POINT of VIEW

A publication of the Alameda County District Attorney's Office

Nancy E. O'Malley, District Attorney

In this issue

WINTER 2017

Point of View
Since 1970

Executive Editor
Nancy E. O'Malley
District Attorney

Writer and Editor
Mark Hutchins

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

• Volume 45 Number 1•
Point of View is published in January, May, and September. Articles and case reports may be reprinted by any law enforcement or prosecuting agency or for any educational or public service purpose if attributed to the Alameda County District Attorney's Office. Send correspondence to Point of View, District Attorney's Office, 1225 Fallon St., 9th Floor, Oakland, CA 94612. Email: pov@acgov.org.

This edition of Point of View is dedicated to the memory of the 36 people who were killed in the fire on December 2, 2016.

Contents

ARTICLES

RECENT CASES

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

Interrogation

When a person under questioning would prefer not to answer, almost all interrogation involves some degree of pressure.[1]

A good interrogator needs to know a lot of things, such as what questions to ask, when and how to ask follow-up questions, how to read body language, when to lie, how much factual information to provide and, of course, when to say nothing and just listen. In this article, we will cover none of those things. That's because they are subjects that can best be taught by experienced interrogators who have learned by trial and error, in the confines of dingy interrogation rooms, how to obtain the truth from a person on the other side of the table whose freedom, and maybe his life, depends on keeping the truth at bay. Instead, we will focus on a related subject that is just as important: the rules and principles that regulate the amount and type of pressure that officers may utilize.

It should be understood that, in the context of interrogations, the courts do not view "pressure" as a bad thing. In fact, they are quite aware that to obtain the truth from most perpetrators, interrogators will need to turn up the heat or, in the words of the Supreme Court, "unbend their reluctance."[2] The problem, of course, is knowing how much "unbending" is too much. And this can be difficult because the line between permissible and impermissible pressure is a "fine" one.[3] Moreover, it can be difficult to stay on the safe side of this line because the decision on how to interrogate a suspect—what to say and do—must be made under circumstances that seldom allow for calm and deliberate judgment. Instead, interrogators must respond quickly to the suspect's words, his changing moods, his various ploys, and many other things. To make matters worse, they must frequently deal with their own anger and frustration that may result from an "excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence."[4]

The question arises: If the suspect waived his *Miranda* rights, why is pressure a problem? After all, if he knows he can stop the interview whenever he wants, it seems likely he would do so if he felt overwhelmed. That's true to some extent. As the Supreme Court noted, "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."[5]

Still, the courts do not hesitate to suppress coerced confessions and admissions since they are inherently unreliable;[6] and also because the use of coercion by officers "brutalizes the police, hardens the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public."[7] As the Supreme Court explained in the case of *Spano v. New York*, "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law."[8]

---

[1] *People v. Anderson* (1980) 101 Cal.App.3d 563, 575.
[2] *Culombe v. Connecticut* (1961) 367 U.S. 568, 571.
[3] See *People v. Anderson* (1980) 101 Cal.App.3d 563, 576.
[4] *Culombe v. Connecticut* (1961) 367 U.S. 568, 574.
[5] *Berkemer v. McCarty* (1984) 468 U.S. 420, 433, fn. 20.
[6] See *Michigan v. Tucker* (1974) 417 U.S. 433, 448 [the voluntariness requirement protects "the courts from reliance on untrustworthy evidence"]; *Dickerson v. United States* (2000) 530 U.S. 428, 433 ["[C]oerced confessions are inherently untrustworthy."]; *People v. Boyer* (2006) 38 Cal.4th 412, 444 [coerced testimony is excluded "in particular, to ensure the reliability of testimony offered against him."].
[7] *Miranda v. Arizona* (1966) 384 U.S. 436, 448. Also see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225.
[8] (1959) 360 U.S. 315, 320-21.

Before we go further, a distinction must be made between the terms "coercion" and "voluntariness." A statement is "coerced" if a court concludes that interrogators utilized too much pressure. In contrast, a statement is "involuntary" only if, in addition to coercion, (1) the suspect's mental or physical state was such that he lacked the power to resist it, and (2) the coercion was the motivating cause of the suspect's decision to make the statement. It should also be noted that starting January 1, 2017 officers must record most interrogations of adult and juvenile murder suspects. This subject is covered on page 14 of the article "Significant New Legislation."

When Pressure Becomes Coercion

Over the years, the courts have tried to provide officers with useful ways of determining the point at which pressure becomes coercive. For instance, they have said that it happens if the pressure deprived the suspect of a "rational intellect and free will,"[9] or if it resulted in a confession that was not the product of an "essentially free and unconstrained choice."[10] Such language is not only unhelpful, it is misleading because, if criminals could give admissible confessions only if their minds were unburdened, officers would be lucky to obtain one or two admissible confessions in their entire careers.[11]

It is also misleading because, by focusing on the suspect's mental state, it diverts attention from where it belongs: the interrogating officers' words and actions.[12] As the Court of Appeal explained, "Involuntariness cases invariably involve misconduct directed, in one way or another, at compelling a defendant to confess. . . . Thus, cases talk, for example, of 'extracting' or 'wringing' confessions from a suspect."[13]

It might be argued that all police interrogation is coercive because, if the suspect is guilty, his mind will be in turmoil. For example, he must invent a plausible "innocent" story, then constantly revise it as he becomes aware of contrary physical evidence or statements from victims, witnesses, or accomplices. Furthermore, when each question is asked, he must mentally review his previous answers to make sure they correspond with what he is about to say. And because his story is composed of assorted lies, he must be able to quickly invent new ones when they are exposed. That is *real* pressure. But it's not the kind of pressure that concerns the courts. Instead, their only interest is whether the officers' actions, crossed the line between pressure and coercion.[14]

As we will now discuss, to make this determination it is necessary to examine, not only the officers' words and actions, but also the atmosphere in which the interrogation was conducted.

The surrounding circumstances

The general mood or atmosphere of the interview is significant because it will almost always give meaning and context to whatever is said or done. Consequently, the courts will frequently take note of the following.

LOCATION OF THE INTERROGATION: Most interrogations occur in police stations, usually in small, stark, and windowless interview rooms.[15] As the result, defense attorneys often argue that interviews in such places are necessarily coercive. These argument are almost always rejected because, as

[9] *Blackburn v. Alabama* (1960) 361 U.S. 199, 208.
[10] *Culombe v. Connecticut* (1961) 367 U.S. 568, 571, 602.
[11] See *Colorado v. Connelly* (1986) 479 U.S. 157 166; *Watts v. Indiana* (1949) 338 U.S. 49, 53.
[12] See *Colorado v. Connelly* (1986) 479 U.S. 157, 167, 169.
[13] *People v. Hall* (2000) 78 Cal.App.4th 232, 240.
[14] **NOTE**: In the past, the courts would rule that the "slightest pressure" would automatically result in coercion. But the "slightest pressure" test has been abrogated because the courts now consider the totality of circumstances, which means the existence of some pressure may be offset by other factors, including the suspect's ability to resist it. See *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.10 ["slightest pressure" standard is contrary to *Arizona v. Fulminante* (1991) 499 U.S. 279, 285].
[15] See *Blackburn v. Alabama* (1960) 361 U.S. 199, 204.

the Supreme Court observed, "Often the place of questioning will *have* to be a police interrogation room because it is important to assure the proper atmosphere of privacy and non-distraction if questioning is to be made productive."[16]

In contrast, the least intimidating place in which to question a suspect is ordinarily his home because he is on his own turf. "An interrogation at a suspect's home," said the Court of Appeal, "is usually, but not always, deemed noncoercive."[17] What about questioning people who have been detained on the street? While detainees are aware that they are not free to leave or move about, this is seldom a significant circumstance because detentions, unlike arrests, are typically "transitory" and "comparatively nonthreatening."[18]

NUMBER OF OFFICERS: The number of officers who were present during the interview, and especially the number of officers who questioned the suspect are frequently noted by the courts.[19] For example, in *Blackburn v. Alabama* the Supreme Court noted that the defendant was interrogated in an interview room that was "literally filled with police officers."[20] Nowadays, however, this is seldom an issue because the number of officers who participate in interrogations is usually limited to two or so because, thanks to covert video technology, there is little need to have multiple witnesses in the room. Furthermore, having a group of officers asking questions is almost always counterproductive.

LENGTH OF THE INTERROGATION: This subject is discussed later in the section "Suspect's Power of Resistance."

BREAKS: Offering the suspect an opportunity to take a break—to have something to eat or drink, or to use the bathroom—is a circumstance that substantially reduces the level of pressure in an interview room. This is especially important if the interrogation was lengthy. For example, in discussing the circumstances surrounding an interview, the courts have noted such things as the following: the officers "provided [the suspect] with food and coffee, allowed her a cigarette, and brought her socks and other clothing after she complained of feeling cold,"[21] "the initial interview was spread over a four-hour period with the detectives offering defendant both food and drink,"[22] during an eight hour interview, "the police repeatedly offered defendant food and beverages, provided her with four separate breaks."[23]

THE OFFICERS' ATTITUDE: A very strong indication of the mood or atmosphere of an interrogation is the manner in which the officers posed their questions to the suspect and otherwise interacted with, him. For example, in rejecting claims of coercion, the courts have noted the following:

- "Their questioning was restrained and free from the abuses that so concerned the Court in *Miranda*."[24]
- "[The officers] posed their questions in a calm, deliberate manner," their voices were "very quiet and subdued."[25]
- "Everything totally aboveboard with the officers. No coercion, no harassment. No heavy-handedness. [They] were patient and even-handed."[26]

---

[16] *Culombe v. Connecticut* (1961) 367 U.S. 568, 579. Edited. Emphasis added.
[17] *People v. Herdan* (1974) 42 Cal.App.3d 300, 307, fn.9. Also see *Michigan v. Summers* (1981) 452 U.S. 692, 702, fn.15.
[18] *Berkemer v. McCarty* (1984) 468 U.S. 420, 439-40 ["nonthreatening"]; *People v. Manis* (1969) 268 Cal.App.2d 653, 668 ["transitory"]. Also see *People v. Tully* (2012) 54 Cal.4th 952, 983.
[19] See *Spano v. New York* (1959) 360 U.S. 315, 322; *Haley v. Ohio* 1947) 332 U.S. 596, 598; *Reck v. Pate* (1961) 367 U.S. 433, 441 ["The questioning was conducted by groups of officers."].
[20] (1960) 361 U.S. 199, 207.
[21] See *People v. Coffman* (2004) 34 Cal.4th 1, 54.
[22] *People v. Cunningham* (2015) 61 Cal.4th 609, 644.
[23] *People v. Carrington* (2009) 47 Cal.4th 145, 175. Also see *People v. Peoples* (2016) 62 Cal.4th 718, 741 [Ten hour interview but defendant "was given numerous breaks, drinks, and food"]; *People v. Linton* (2013) 56 Cal.4th 1146, 1178 [two hour and 15 minute interview, "multiple breaks were taken"].
[24] *Fare v. Michael C.* (1979) 442 U.S. 707, 727.
[25] *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618.
[26] *People v. Benson* (1990) 52 Cal.3d 754, 780 [edited quote from trial judge].

- "[The officers'] manner of presentation of evidence compared favorably with the presentation of evidence by well-behaved lawyers in court. Neither in tone nor tempo nor decibel does coercive pressure appear."[27]

This does not mean that officers must be friendly or dispassionate. On the contrary, the courts have consistently rejected arguments that coercion resulted merely because the officers were persistent, or because the suspect was subjected to "intellectual persuasion," "searching questions," "confrontation with contradictory facts," "loud, aggressive accusations of lying," "loud and forceful speech," "harsh questioning," or "tough talk."[28] As the Fourth Circuit observed, "Numerous cases reiterate that statements by law enforcement officers that are merely 'uncomfortable' or create a 'predicament' for a defendant are not ipso facto coercive."[29]

Threats and promises

Regardless of the general atmosphere of an interrogation, officers will almost always be deemed to have utilized coercion if they threatened to take some punitive action against the suspect if he did not make a statement, or if they promised him something he wanted if he did. But before we discuss specific threats and promises, it is necessary to take note of the following general principles pertaining to the subject:

THREATS VS. PROMISES: There is no significant difference between a threat and a promise. For example, a promise that a suspect will receive a lenient sentence if he gave a statement is an implied threat that he would get a harsh one if he refused.[30]

EXPLICIT VS. IMPLIED: A threat or promise may be explicit or implied.[31]

FALSE PROMISES: Although the courts sometimes speak of "false" or "broken" promises as being objectionable, it is the promise itself—not the failure to honor it—that generates coercion.[32]

DISCLAIMERS: Telling a suspect that officers do not have the authority to promise him anything with regard to charging, sentencing, or anything else is a circumstance that would tend to make it unreasonable for the suspect to believe he had been given a promise.[33] Nevertheless, such a disclaimer will have little, if any, effect if a promise can be reasonably implied.[34] For example, in ruling that a confession was involuntary, the court in *In re Roger C.* said, "While the interrogating officers used bare language informing Roger that they could not promise probation or parole, they made it crystal clear to him that he had no hope of anything other than incarceration if he did not confess."[35]

DISCUSSING POSSIBLE SENTENCES: This is where most of the problems arise because, regardless of whether sentencing was openly discussed, it is always lurking in the minds of perpetrators. It's also on the minds of the interrogators because, as one academic report described the problem, a "baffled questioner" who is getting nothing but "obstinate silence or evasive and impudent replies, is easily tempted to eke out his unsuccessful questions by threats."[36] Consequently, the subject of sentencing frequently arises, whether it was introduced by the perpetrator (who is looking for a deal) or by the officers (who are looking for a confession).

---

[27] *People v. Andersen* (1980) 101 Cal.App.3d 563, 578.
[28] See *Haynes v. Washington* (1963) 373 U.S. 503, 515; *People v. Carrington* (2009) 47 Cal.4th 145, 175; *People v. Ditson* (1962) 57 Cal.2d 415, 433; *People v. Boyde* (1988) 46 Cal.3d 212, 242; *People v. Anderson* (1980) 101 Cal.App.3d 563, 576]; *In re Shawn D.* (1993) 20 CalApp.4th 200, 213; *In re Joe R.* (1980) 27 Cal.3d 496, 515.
[29] *U.S. v. Holmes* (4th Cir. 2012) 670 F.3d 586, 592-93.
[30] *People v. Cahill* (1994) 22 Cal.App.4th 296, 311.
[31] See *People v. Hill* (1967) 66 Cal.2d 536, 549; *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.
[32] See *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192; *People v. Vasila* (1995) 38 Cal.App.4th 865, 875.
[33] See *People v. Groody* (1983) 140 Cal.App.3d 355, 359; *People v. Boyde* (1988) 46 Cal.3d 212, 239.
[34] See *People v. Anderson* (1980) 101 Cal.App.3d 563, 579.
[35] (1975) 53 Cal.App.3d 198, 203.
[36] IV National Commission on Law Observance and Enforcement, Report No. 11, Lawlessness in Law Enforcement, quoted in *Culombe v. Connecticut* (1961) 367 U.S. 574, fn. 7.

This does not mean that the subjects of charging and sentencing are off limits. It just means that officers must make sure that their comments about charging and sentencing are factual, which usually means noncommittal. That is because charging and sentencing decisions can be made only by prosecutors and judges respectively. For example, in ruling that an officer's comments pertaining to charging or sentencing were coercive, the courts have pointed out the following:

- "The clear implication of the officer's remarks was that unless defendant changed her story and confessed her true involvement in the crime, she would be tried for murder."[37]
- "They told him his only way out was to say [the shooting] was an accident. They implied by so saying he would not have to go to prison and would be out with his children."[38]
- "[D]efendant was given bald promises that, if he provided the necessary information, he would not be prosecuted federally and would be released from custody."[39]

In contrast, the courts ruled in the following two cases that the officer's remarks were noncommittal and were therefore not objectionable. In the first case, the officer said, "Well, it can go anywhere from, and this is just my opinion, I'm not telling you what's going to happen, it can go anywhere from 2nd degree murder to 1st degree murder. . . . If there's a trail of girls laying [sic] from here to Colorado, then it doesn't look too good for you."[40] In the second case, the court pointed out that the officer "merely offered his opinion that the person who committed a crime like the one for which defendant was under arrest would serve substantial time in prison, but probably less than 30 years. There was no mention of the effect of cooperation upon the time to be served."[41]

DISCUSSING THE DEATH PENALTY: While officers may inform a murder suspect that the crime under investigation may carry the death penalty,[42] they may not do so in a threatening manner or imply that he might avoid the death penalty by confessing.[43] Accordingly, the following remarks were deemed coercive:

- "[W]e can talk to the DA and you assist us in this investigation, you won't get the death penalty."[44]
- "Death penalty went back in today. Did you know that?"[45]
- "Right now the way it looks, it looks like robbery and murder. You know what robbery and murder is? Robbery and murder is a capital offense in California. An offense that you could go to the gas chamber."[46]

PROMISE TO RELEASE FROM CUSTODY: A statement motivated by a promise to immediately release the suspect from custody will ordinarily be deemed coerced.[47] For example, in *In re J. Clyde K.* the court concluded that the confession of a minor who had been detained for auto burglary was coerced because the officer promised him that if he told the truth he would be released with only a citation.[48]

THREATS AND PROMISES PERTAINING TO FRIENDS AND RELATIVES: A threat to take some punitive action against the suspect's friends or relatives is considered highly coercive, and so is a promise that a friend or relative would receive a benefit if the

---

[37] *People v. McClary* (1977) 20 Cal.3d 218, 223.
[38] *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1486.
[39] *People v. Vasila* (1995) 38 Cal.App.4th 865, 875.
[40] *People v. Bradford* (1997) 14 Cal.4th 1005, 1044.
[41] *People v. Clark* (1993) 5 Cal.4th 950, 989.
[42] See *People v. Holloway* (2004) 33 Cal.4th 96, 115; *People v. Ray* (1996) 13 Cal.4th 313, 340.
[43] See *People v. Williams* (2010) 49 Cal.4th 405, 443.
[44] *People v. Williams* (1997) 16 Cal.4th 635, 659.
[45] *People v. Nicholas* (1980) 112 Cal.App.3d 249, 265.
[46] *People v. Flores* (1983) 144 Cal.App.3d 459, 466
[47] See *People v. Vasila* (1995) 38 Cal.App.4th 865, 874; *People v. Flores* (1983) 144 Cal.App.3d 459, 471-72; *People v. Azure* (1986) 178 Cal.App.3d 591, 602.
[48] (1987) 192 Cal.App.3d 710, 722.

suspect was cooperative.[49] On the other hand, officers may inform the suspect that he might be able to reduce or eliminate his friend's legal problems by giving a statement if (1) the officers reasonably believed that the friend was implicated in the crime under investigation; and (2), by making a statement, the suspect might have been able to reduce or eliminate his friend's difficulties. In the words of the First Circuit, "[A]n officer's truthful description of the family member's predicament is permissible since it merely constitutes an attempt to both accurately depict the situation to the suspect and to elicit more information about the family member's culpability."[50] For example, in rejecting arguments that such remarks were coercive, the courts have noted the following:

- "Defendant's comments about his wife, mother, and brother made them legitimate subjects of conversation."[51]
- "The officers believed that Nichols, and he alone, could implicate [his girlfriend] or exonerate her. In justice to her it was their duty to learn, if they could, whether her further detention was warranted and this required the interrogation of Nichols."[52]
- The officer's remark that "defendant's mother and wife might be subject to prosecution if it appeared that they had concealed defendant's presence" was "far short of a threat."[53]
- Officer: "[I]nformation hasn't come forward at this time which would cause me to release [Lisa]. See what I'm saying?" Court: These comments "seem clearly proper" because the officer had reason to believe that Lisa was implicated."[54]
- Officer: "[A]fter I get through talking to her and comparing what you told me with what she says, if I have reason to feel she's not involved in it, I'm sure as hell not going to book her."

DISCUSSING MITIGATING CIRCUMSTANCES: Officers may point out to the suspect that the punishment for the crime under investigation may depend on the role he played in its commission and his state of mind. Although there is an implication that he might be better off if he explained any mitigating circumstances, such an appeal is not objectionable if nothing specific was promised or threatened. For example, in ruling that such comments were not coercive, the courts have noted the following:

- "[The detective's] suggestions that the Gleason homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible."[55]
- "The comments explain the possible consequences, depending upon his motivation and involvement in the shooting, and as such do not constitute threats or false promises of leniency."[56]
- The officer's statement that "a showing of remorse is a factor which mitigates punishment" was "no more than a truthful legal commonplace with which all persons familiar with criminal law would agree."[57]

"WE'LL TELL THE JUDGE, DA": Interrogators frequently promise the suspect that they would notify prosecutors or the judge that he was cooperative and had given a truthful statement. Although there might be an implication that such cooperation will result in some benefit, it is not considered an implied promise of leniency so long as the officers did not indicate that the prosecutor or judge would

[49] See *People v. Steger* (1976) 16 Cal.3d 539, 550; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1403.
[50] *U.S. v. Hufstetler* (1st Cir. 2015) 782 F.3d 19, 24.
[51] *People v. McWhorter* (2009) 47 Cal.4th 318, 350.
[52] *People v. Abbott* (1958) 156 Cal.App.2d 601, 605.
[53] *People v. Kendrick* (1961) 56 Cal.2d 71, 86.
[54] *People v. Thompson* (1990) 50 Cal.3d 134, 169.
[55] *People v. Carrington* (2009) 47 Cal.4th 145, 170. Also see *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1485.
[56] *People v. Maestas* (1987) 194 Cal.App.3d 1499, 1507.
[57] *People v. Andersen* (1980) 101 Cal.App.3d 563, 579.

do something specific in return.[58] For example, in rejecting arguments that such a remark constituted an implied promise, the courts have noted the following:

- "The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant that full cooperation might be beneficial in an unspecified way."[59]
- "Because none of the detectives' statements indicated that the district attorney would act favorably in specific ways if appellant cooperated, they did not constitute impermissible promises of favorable action."[60]
- [The detective's] promise to talk to the district attorney about 'special consideration' for appellant, and his statement that one such consideration might be for the district attorney to charge only one burglary, was no more than the pointing out of benefits which might result naturally from a truthful and honest course of conduct."[61]
- "[The detective] told defendant the district attorney would make no deals unless all of the information defendant claimed to have was first on the table. We conclude no implied promise of a 'deal' or leniency resulted from these conversations."[62]

In contrast, an implied threat may be found if officers told the suspect that they would notify the DA or judge if he *refused* to give a statement or *failed* to demonstrate remorse.[63]

Interrogation tactics

In the course of an interview, officers will often employ standard or improvised interrogation tactics. While this might give them a psychological advantage, it is seldom deemed coercive because, as the California Supreme Court observed, "Although adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never been the norm that dictates the rules of investigation and the gathering of proof."[64] To put it another way, "There is no constitutional right to a clumsy or inexperienced questioner."[65] Some examples:

GOOD COP-BAD COP: The "good cop-bad cop" routine is not considered coercive,[66] unless the bad cop gets carried away and makes threats or utilizes some other form of coercion.[67]

SYMPATHY: An officer's expression of sympathy for a suspect will not render a statement involuntary because an understanding attitude, even when feigned, is not coercive.[68] As the Fifth Circuit noted, "[T]here is nothing inherently wrong with efforts to create a favorable climate for confession."[69]

ACCUSE OF LYING: It is not inherently coercive to accuse the suspect of lying.[70] "Loud, accusations of lying," said the California Supreme Court, "do not, in and of themselves, constitute coercive threats."[71]

LIES AND DECEPTION: With one exception (which we will discuss later), an officer's act of lying to the suspect will not render a subsequent statement involuntary even if the lie motivated him to talk.[72] Although certain kinds of lies—such as "We found

[58] See *People v. Ramos* (2004) 121 Cal.App.4th 1194; *People v. Jones* (1998) 17 Cal.4th 279, 298.
[59] *People v. Carrington* (2009) 47 Cal.4th 145, 174.
[60] *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1091.
[61] *People v. Groody* (1993) 140 Cal.App.3d 355, 359.
[62] *People v. Seaton* (1983) 146 Cal.App.3d 67, 74.
[63] *U.S. v. Tingle* (9th Cir. 1981) 658 F.2d 1332, 1336, fn.5.
[64] *People v. Jones* (1998) 17 Cal.4th 279, 297.
[65] *People v. Jones* (1998) 17 Cal.4th 279, 297.
[66] See *Miller v. Fenton* (3d Cir. 1986) 796 F.2d 598, 607.
[67] See *Martin v. Wainwright* (11th Cir. 1995) 770 F.2d 918, 925 ["bad" cop "discussed the death penalty"].
[68] See *People v. Jablonski* (2006) 37 Cal.4th 774, 815; *People v. Bradford* (1997) 14 Cal.4th 1005, 1043.
[69] *Hawkins v. Lynaugh* (5th Cir. 1988) 844 F.2d 1132, 1140.
[70] See *People v. Enraca* (2012) 53 Cal.4th 735, 755; *People v. Johns* (1983) 145 Cal.App.3d 281, 292.
[71] *In re Joe R.* (1980) 27 Cal.3d 496, 515.
[72] See *Illinois v. Perkins* (1990) 496 U.S. 292, 297; *People v. Maury* (2003) 30 Cal.4th 342, 411; *People v. Lee* (2002) 95 Cal.App.4th 772, 785 ["it is sometimes necessary to use deception to get at the truth."].

your fingerprints on the gun"—will probably increase the amount of pressure on the suspect, the courts do not view these types of lies as inherently coercive. The following are examples of lies that were not deemed coercive:

- You've been ID'd by a witness.[73]
- We saw your car on a surveillance video that was taken near the murder scene near the time of the murder.[74]
- Your semen was found on the body of the victim.[75]
- Your fingerprints were found on the victim's neck.[76]
- Your accomplice confessed.[77]

EXPLOITING A PSYCHOLOGICAL VULNERABILITY: As noted, there is one exception to the permissible use of lies and deception. It is this: A statement motivated by an officer's lies will be deemed involuntary if (1) the officer employed a type of deception that was reasonably likely to "procure an untrue statement," and (2) the suspect's mind was so disordered that he was unusually susceptible to the influences of others.[78] Consequently, a court might rule that, under these circumstances, the suspect's lack of confidence in his mind's ability to apprehend reality might cause him to accept the officer's repeated lies as the truth.

In one of the rare cases in which this happened, *People v. Hogan*,[79] the confession of a rape-murder suspect was ruled involuntary mainly because, (1) he was "sobbing uncontrollably," and was so emotionally distraught that he had vomited; (2) the officers repeatedly suggested to him that he was unquestionably guilty and mentally ill; and (3) the certainty of his guilt "was suggested by deceptive references to nonexistent eyewitnesses."

RELIGIOUS APPEALS: Although the courts have sometimes expressed displeasure with an officer's use of a religious appeal, it is not apt to be deemed coercive unless officers were aware that the suspect was particularly vulnerable to a religious appeal and they exploited that vulnerability.[80]

PLAYING ACCOMPLICES AGAINST ONE ANOTHER: When two or more suspects have been arrested for a crime, officers are often able to make good use of a perpetrator's natural distrust of his accomplices.[81] For example, officers may be able to motivate a suspect into giving a statement by notifying him that his accomplice had already confessed and had implicated the suspect. As the court stated in *People v. Long*, "Good faith confrontation with the confessions of other accomplices is an interrogation technique possessing no apparent constitutional vice."[82]

Another option is to point out the relative legal difficulties between the suspect and his accomplice. In situations where an accomplice might have committed a more serious crime than the suspect, officers may sometimes tell the suspect that he would be better off if he admitted his "lesser" involvement.

For example, in *People v. Garcia*[83] the defendant drove the getaway car used in a robbery-murder that was committed by a friend named Orlando. After Garcia was arrested, an officer told him, "If you guys were doing a robbery, he shot the guy, he panicked or whatever, that's the price he's going to have to pay. We're going to focus our thing on him—Orlando. But there's no sense you going down the way he is, that far down with him as the trigger man." In ruling that the officer's remarks did not render Garcia's subsequent confession involuntary, the California Supreme Court pointed

[73] *People v. Williams* (2010) 49 Cal.4th 405, 442-43. Also see *People v. Richardson* (2008) 43 Cal.4th 959, 993.
[74] *People v. Johnson* (2010) 183 Cal.App.4th 253, 295.
[75] *People v. Davis* (2009) 46 Cal.4th 539, 601, fn.5.
[76] *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1241.
[77] *Frazier v. Cupp* (1969) 394 U.S. 731, 739; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 213.
[78] See *People v. Felix* (1977) 72 Cal.App.3d 879, 886.
[79] (1982) 31 Cal.3d 815.
[80] See *Brewer v. Williams* (1977) 430 U.S. 387, 403; *People v. Montano* (1991) 226 Cal.App.3d 914, 935.
[81] See *People v. Ditson* (1962) 57 Cal.2d 415, 433.
[82] (1970) 6 Cal.App.3d 741, 748. Also see *People v. Robinson* (1969) 274 Cal.App.2d 514, 520-1.
[83] (1984) 36 Cal.3d 539.

out that the officer's comment "does not constitute an offer of leniency on the part of the police or the prosecution in return for a confession; it advised defendant that an accomplice is generally better off than a triggerman. That was sound advice."

CONFRONTING WITH EVIDENCE: Officers are, of course free to confront suspects with evidence that proves or tends to prove they are guilty. "[G]ood faith confrontation," said the Court of Appeal, "is an interrogation technique possessing no apparent constitutional vices."[84]

WITHHOLDING INFORMATION: A statement is not involuntary merely because officers withheld information from the suspect that might have made him less apt to confess or otherwise talk with them; e.g., that witnesses were unable to ID him at a lineup.[85] Similarly, it is not inherently coercive to warn a suspect that he might be charged as an accessory if he withheld information about the crime or the perpetrator.[86]

LEADING QUESTIONS: A question is "leading" if it suggested a certain answer, usually an incriminating one; e.g., "You were the one who planned the holdup, weren't you?" (leading); "Who planned the holdup?" (not leading). While it is relevant that the suspect made the statement in response to an officer's leading questions, it is not a significant circumstance.[87]

The Suspect's Power of Resistance

If a court finds that an officer's words or actions constituted coercion, it will then determine whether there were any circumstances that would have increased the suspect's ability to resist it.[88] If so, the statement might be deemed voluntary. Similarly, if the court determines that the officer's words or actions were on the borderline, the suspect's ability or inability to resist may determine whether the suspect was coerced. As the Supreme Court observed, "As interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus."[89] In making these determinations, the courts will consider the following:

Reduced ability to resist

YOUNG SUSPECTS: The suspect's young age may be a factor because interrogation methods and surrounding circumstances "are all likely to have a more coercive effect on a child than an adult."[90] The courts understand, however, that chronological age is not always a reliable indicator of how the suspect was able to deal with pressure, as some minors are quite hardened and are not the least bit intimidated by officers or other authority figures.

It should be noted that, as we reported in the Fall 2015 edition, a certain California court, in a highly irregular case, attempted to establish a *per se* rule that all statements by minors were involuntary or at least presumptively unreliable.[91] The court's analysis of the facts was, however, so distorted that it has so far had no persuasive power on any other court. Consequently, we think California courts will continue to apply the principle announced in *In re Jessie L*, that "[a] minor has the capacity to make a voluntary confession. The admissibility of such a statement depends not upon his age alone but a combination of that factor with other circumstances such as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statements."[92]

LOW INTELLIGENCE, MENTAL DISABILITY: A suspect's low IQ or mental disorder are relevant to the issues

---

[84] *People v. Andersen* (1980) 101 Cal.App.3d 563, 576. Also see *People v. Thomas (2011)* Cal.App.4th 987, 1011-12.
[85] See *Colorado v. Spring* (1987) 479 U.S. 564, 577; *People v. Boyette* (2002) 29 Cal.4th 381, 411.
[86] See *People v. Hernandez* (2009) 178 Cal.App.4th 1510, 1539.
[87] See *People v. Cox* (1990) 221 Cal.App.3d 980, 986.
[88] See *Yarbrough v. Alvarado* (2004) 541 U.S. 652, 667-688; *People v. Rundle* (2008) 43 Cal.4th 76, 114.
[89] *Colorado v. Connelly* (1986) 479 U.S. 157, 164.
[90] *In re Aven S.* (1991) 1 Cal.App.4th 69, 75.
[91] See *In re Elias V.* (2015) 237 Cal.App.4th 568.
[92] (1982) 131 Cal.App.3d 202, 215.

of whether he could understand his rights, whether his mental state would have caused him to view the surrounding circumstances as more threatening or coercive, and also whether officers exploited the suspect's mental state to obtain a statement.[93] As the Eighth Circuit observed, "Although lack of education and lower-than-average intelligence are factors in the voluntariness analysis, they do not dictate a finding of involuntariness, particularly when the suspect is clearly intelligent enough to understand his constitutional rights."[94]

For example, in rejecting claims that a mental deficiency rendered a statement involuntary, the courts have noted the following:

- Although the suspect "suffers from ADHD and other mental disabilities," there is "no evidence that [he] was, in fact, suggestible or confused."[95]
- Suspect was 16-years old "functioning as an 11-year old, thinking in concrete, not abstract terms," had a "borderline normal IQ," and "could not simultaneously handle several variables, such as the *Miranda* warnings"; but his statement was voluntary mainly because "there were no promises of lenient treatment, nor an unduly long interrogation."[96]
- Even though the suspect had an IQ of 80 and the understanding of a 10-year old, "[t]here was no atmosphere of coercion, no prolonged questioning or coercive tactics, no threats or promises of leniency. He was not threatened, tricked or cajoled into a waiver by any promise of the police."[97]
- "Here although defendant's intelligence was very low, there is no showing whatever that he truly did not want to talk, or that his desire was in any way overcome by reason of the police or anyone else taking unfair or unlawful advantage of his ignorance, mental condition, or vulnerability to persuasion."[98]

DRUGS AND ALCOHOL: While a suspect's consumption of drugs, alcohol, or both will affect his mental alertness, it is not a significant circumstance unless he was severely impaired.[99] Thus, in *U.S. v. Coleman* the Ninth Circuit noted that "[a]lthough Defendant's heroin withdrawal caused lethargy and physical discomfort, such symptoms alone are insufficient to establish involuntariness."

ILLNESS, INJURIES: Illness or injuries may make the suspect more vulnerable, especially if he was also under the influence of medication that would have caused a significant impairment in his mental faculties; e.g., the suspect had been shot and had arrived at the hospital depressed almost to the point of coma" and he "complained to [the officer] that the pain in his leg was 'unbearable.'"[100]

DISTRAUGHT, DEPRESSED: It is relevant, but seldom significant, that the suspect was distraught or depressed because he had committed a heinous crime or was upset because he had been apprehended.[101]

FATIGUE: Just as a suspect's intelligence or mental disorder might make the surrounding circumstances appear more coercive, so might physical and mental fatigue.[102] Like the other relevant circumstances, however, some circumstances may

[93] See *United States v. Mendenhall* (1980) 446 U.S. 544, 558 ["respondent, who was 22 years old and had an 11th-grade education, was plainly capable of a knowing consent"]; *Yarborough v. Alvarado* (2004) 541 U.S. 652, 668 [relevant circumstances include the suspect's education].
[94] *U.S. v. Vinton* (8th Cir. 2011) 631 F.3d 476, 482.
[95] *In re Joseph H.* (2015) 237 Cal.App.4th 517, 535. Also see *People v. Thomas* (2012) 211 Cal.App.4th 987, 1013.
[96] *People v. Anthony J.* (1980) 107 Cal.App.3d 962.
[97] *In re Brian W.* (1981) 125 Cal.App.3d 590.
[98] *In re Norman H.*,(1976) 64 Cal.App.3d 997, 1003.
[99] See *People v. Perdomo* (2007) 147 Cal.App.4th 605, 617; *People v. Cox* (1990) 221 Cal.App.3d 980; *People v. Garcia* (1964) 227 Cal.App.2d 345, 350-51 *People v. Brewer* (2000) 81 Cal.App.4th 442, 456.
[100] *Mincey v. Arizona* (1978) 437 U.S. 385, 398. Also see *Reck v. Pate* (1961) 367 U.S. 433, 441-42; *People v. Adams* (1983) 143 Cal.App.3d 970, 985. Compare *People v. Barker* (1986) 182 Cal.App.3d 921, 934.
[101] See *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28; *People v. Richardson* (2008) 43 Cal.4th 959, 993.
[102] See *Spano v. New York* (1959) 360 U.S. 315, 322; *People v. Hensley* (2014) 59 Cal.4th 788, 814.

reduce the significance of fatigue. As the California Supreme Court said in *People v. Anderson,* "Although [defendant] testified that he had been awake for 30 hours prior to confessing, other facts support a finding of voluntariness, including his age at the time of the offense (27), his high IQ (136), and his reflective actions during the course of the offenses charged, including the careful and methodical way in which he obtained entry into [the victim's] house only a few hours prior to his confession."[103]

LENGTHY INTERROGATIONS: While the length of the interview is related to physical and mental fatigue, it is seldom a significant factor if the suspect was not particularly vulnerable, and if he was given periodic breaks. This subject of breaks is covered under "Increased ability to resist," below.

LENGTHY PRE-INTERVIEW DETENTION: It is sometimes necessary or desirable to keep a suspect waiting in an interview room before questioning him. Like the length of the interview itself, this is seldom a significant circumstance unless the wait was excessive, or if officers neglected to check with him occasionally to see if he needed anything, or if the suspect was especially vulnerable to being left alone.[104]

Increased ability to resist

In contrast to the circumstances that tend to increase a suspect's vulnerability, the following tend to indicate that the suspect had an increased ability to resist the pressures of interrogation.

RATIONAL ANSWERS: The suspect's answers to the officers' questions were responsive and coherent. For example, in rejecting claims of coercion, the courts have noted that "his answers were intelligible,"[105] "[e]ach of appellant's answers is appropriate to the question asked,"[106] and that the suspect's answers to the officers' questions were "clear" and "responsive."[107]

COMPOSURE: The suspect seemed composed during questioning. Thus, the courts have noted that the suspect "spoke with confidence,"[108] he appeared to be "calm, prepared, and intent on presenting a coherent and sympathetic version of his [defense],[109] he "did not become confused, break down of lose his general composure."[110]

HARDENED, "STREET WISE": The suspect was "a street kid, street man, in his 'early 20's, big, strong, bright, not intimidated by anybody. [111] It is also relevant that the suspect had been arrested on numerous occasions and had therefore become accustomed to interacting with officers.[112]

---

[103] (1990) 52 Cal.3d 453, 470.
[104] See *People v. Dykes* (2009) 46 Cal.4th 731, 753; *In re Aven. S.* (1991) 1 Cal.App.4th 69, 77.
[105] *Colorado v. Connelly* (1986) 479 U.S. 157 160-62.
[106] *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618.
[107] *U.S. v. Dehghani* (8th Cir. 2008) 550 F.3d 716, 721.
[108] *People v. Carrington* (2009) 47 Cal.4th 145, 175. Also see *People v. McWhorter* (2009) 47 Cal.4th 318, 360 defendant's "maturity and ability to again handle himself in a fashion that reflects maturity and sophistication and articulation served to cleanse any taint"]; *People v. Higareda* (1994) 24 Cal.App.4th 1399, 1409 ["appellant appeared calm, not frightened or scared"]; *In re Aven S.* (1991) 1 Cal.App.4th 69, 77 [minor "remained calm and in control of himself throughout the interview process"]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [the trial judge said, "There isn't any excitement in the voice. There isn't any nervousness particularly. There isn't any outward sign of stress. It is just a straight account of what happened"].
[109] *People v. Storm* (2002) 28 Cal.4th 1007, 1036.
[110] *People v. Johns* (1983) 145 Cal.App.3d 281, 293.
[111] *People v. Williams* (1997) 16 Cal.4th 635. 659. Also see *Stein v. New York* (1953) 346 U.S. 156, 185-86 ["These men were not young, soft, ignorant or timid."]; *In re Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1273 ["Juan H. stood his ground. The minor remained in control of his responses during the interrogation"].
[112] See *United States v. Watson* (1976) 423 U.S. 411, 424 ["There is no indication in this record that [the suspect] was a newcomer to the law"]; *Stein v. New York* (1953) 346 U.S. 156, 185 ["What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."]; *People v. Cunningham* (2015) 61 Cal.4th 609, 644 [defendant had "served two prior prisoner terms and one prior county jail term"]; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1404 ["Because of his sophistication and experience with the criminal justice system, Lincoln knew the officers' implicit promises were hollow."]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1211 ["defendant was hardly a terrified novice"].

LYING, CRAFTY SUSPECT: The suspect lied to officers or was crafty in his responses to their questions. Some examples:

- "Satterwhite effectively parried the [detectives'] accusations and questions."[113]
- "[D]efendant was deceptive throughout the five-hour session and admitted to wrongdoing only when confronted with evidence or caught in a lie."[114]
- "Defendant admittedly lied to the detectives throughout the interview. This is not the behavior of one whose free will have been overborne."[115]
- Defendant "was keen enough to change his story" to fit the facts.[116]

SUSPECT LATER INVOKED: That the suspect subsequently invoked his *Miranda* rights tends to indicate that he was aware that he could stop the interview at any time, in which case it might be inferred that he did not feel unduly pressured when he spoke with the officers.[117]

The Motivating Cause

Even if the court rules that officers utilized coercion, a statement will not be suppressed if it reasonably appeared that it was not made in response to the coercion.[118] As the California Supreme Court explained, "Although coercive police activity is a necessary predicate to establish an involuntary confession, it does not itself compel a finding that a resulting confession is involuntary. The statement and the inducement must be causally linked."[119] To be more specific, a statement will not be suppressed unless the coercion played a "dominant role" in the suspect's decision to speak.[120] How do the court's determine the motivating cause of a statement? The following circumstances are especially relevant.

THE SUSPECT'S WORDS: In some cases, the suspect's own words will prove that he was not motivated by coercion; e.g., the suspect said he confessed because of his "desire to justify, excuse, or at least explain his problematic conduct,"[121] or because of "compunction arising from his own conscience,"[122] or because he wanted to "unburden himself."[123]

TIME LAPSE: It is significant that the suspect did not immediately respond to the coercive tactics but instead gave a statement after the passage of a significant amount of time and under circumstances that were not coercive.[124]

NO EXPLOITATION: The existence of coercive circumstances or a reduced ability to resist might be less apt to motivate the suspect to make a statement if officers did not exploit these circumstances.[125]

SUSPECT ACKNOWLEDGES VOLUNTARINESS: When a suspect gives a statement, officers will often ask him to acknowledge in writing or on a recording that he was not pressured or coerced. This is a good practice.[126] But such an acknowledgement will have little or no weight if it appeared the acknowledgement, itself, was coerced; or if there were other circumstances that cast doubt on the voluntariness of the statement.[127] POV

[113] *People v. Thomas* (2012) 211 Cal.App.4th 987, 1013.
[114] *People v. Nelson* (2012) 53 Cal.4th 367, 380. Also see *People v. Perdomo* (2007) 147 Cal.App.4th 605, 618.
[115] *People v. Johns* (1983) 145 Cal.App.3d 281, 293. Edited.
[116] *People v. Lewis* (2001) 26 Cal.4th 334, 383-84.
[117] See *People v. Richardson* (2008) 43 Cal.4th 959, 993; *U.S. v. Boskic* (1st Cir. 2008) 545 F.3d 69, 81.
[118] See *Colorado v. Connelly* (1986) 479 U.S. 157, 164; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1088.
[119] *People v. Maury* (2003) 30 Cal.4th 342, 404-405.
[120] See *People v. Neal* (2003) 31 Cal.4th 63, 84.
[121] *People v. Mickey* (1991) 54 Cal.3d 612, 650. Also see *People v. Cunningham* (2015) 61 Cal.4th 609, 644.
[122] *People v. Benson* (1990) 52 Cal.3d 754, 782. Also see *People v. Ray* (1996) 13 Cal.4th 313, 341.
[123] See *People v. Rundle* (2008) 43 Cal.4th 76, 117. Also see *People v. Linton* (2013) 56 Cal.4th 1146, 1177.
[124] See *People v. Linton* (2013) 56 Cal.4th 1146, 1177; *People v. Scott* (2011) 52 Cal.4th 452, 480.
[125] See *People v. McWhorter* (2009) 47 Cal.4th 318, 360; *People v. Dykes* (2009) 46 Cal.4th 731, 753.
[126] See *People v. Belmontes* (1988) 45 Cal.3d 744, 772.
[127] See *Haynes v. Washington* (1963) 373 U.S. 503, 513; *People v. Andersen* (1980) 101 Cal.App.3d 563, 579.

Significant New Legislation

There are several new and amended Penal Code sections that became effective on or before January 1, 2017. Particularly noteworthy are statutes pertaining to searches of electronic communications and the interrogation of murder suspects.

Electronic Communications Searches

Pursuant to the California Electronic Communication Privacy Act (CalECPA) which went into effect on January 1, 2016, officers were generally required to obtain a warrant to search for a suspect's electronic communications and communications records that were possessed by an electronic communications provider or were stored in a communications device. During its 2015-16 session, the Legislature addressed three of the problems caused by the initial version of CalECPA.

Probation and parole searches: A major problem with CalECPA was that it did not authorize officers to conduct probation and parole searches of electronic devices that were owned or under the control of probationers and parolees. This seemed to be an oversight because these devices would ordinarily be subject to search conditions that authorized searches of things under the parolee's or probationer's control. In addition, this information is often essential in determining whether probationers and parolees are complying with the terms of release.

In any event, the Legislature corrected the problem by adding Penal Code sections 1546.1(c)(9) and 1546.1(c)(10) which specifically authorize warrantless probation and parole searches of electronic communications devices if the "authorized possessor" was on parole or searchable probation. A person is an "authorized possessor" if he is owns or is authorized to use the device.[1]

There is, however, an additional requirement for probation searches: the terms of probation must expressly authorize a search of electronic communications devices. Thus, a search will not be authorized merely because the terms of probation authorized searches of property under the probationer's "control." As the result, prosecutors must ask the court to include language in the probation order that expressly authorizes searches of cell phones and other such devices for content and records.

Search warrants: Initially, CalECPA required that officers who were seeking a search warrant for electronic communications information specify the exact time span within which the sought-after communications or records were stored or disseminated; e.g., communications between November 30, 2016 and January 12, 2017. This created problems because officers frequently do not know exactly when the target of an investigation began and ended using an electronic communications device in the course of his criminal activities. This problem was corrected with an amendment that requires officers to provide time-span information only to the extent it is "appropriate and reasonable" to do so under the circumstances.[2]

Pen registers and phone traps: When CalECPA became law on January 1, 2016, officers could generally obtain pen register and phone trap information only by means of a search warrant. This changed on September 23, 2016 when Penal Code section 1546.1(c) added subsection (12) which authorized the release of such information by means of a simplified court order.

Such a court order requires only an application under oath in which the applicant (1) states his name and agency; (2) states that the information to be obtained via pen register or phone trap is relevant to an ongoing criminal investigation, and (3) establishes probable cause to believe that the sought-after information will lead to information pertaining to various crimes, including information that tends to show that a felony has been committed, information that tends to show that a particular

[1] Pen. Code § 1546(b).
[2] Pen. Code § 1546.1(d)(1).

person has committed a felony, and information pertaining to the location of a person who is reasonably believed to be a witness in a criminal investigation or for whom probable cause to arrest exists.[3] A court may order the application sealed.

The application must also specify (1) the identity, if known, of the subscriber to the target phone; (2) the nature of the crime under investigation and the identity, if known, of the person who is the subject of the criminal investigation; (3) the number and, if known, the physical location of the target telephone and, in the case of a trap and trace device, the geographic limits of the trap and trace order. If such an order is issued, it must direct the provider to furnish information facilities, and technical assistance as necessary. An application for pen register or phone trap authorization is automatically sealed until the order, or any extensions of the order, expire.

The order may authorize the installation and use of the pen register or phone trap for up to 60 days. Extensions may be granted for up to 60 days if officers file a new application that includes a statement that demonstrates the continued existence of probable cause to believe the pen register and phone trap information continues to be relevant to the investigation.

Interrogation

Beginning January 1, 2017, Penal Code section 859.5 was amended to require the recording of interviews with adult murder suspects, in addition to minors. Specifically, the amended statute requires that officers record all interviews with murder suspects who are being questioned in police stations, jails, prisons, juvenile halls, and any other "fixed place of detention." Furthermore, if the suspect is a minor, the interview must be recorded both visually and aurally. Interviews of adults may be recorded by audio only, but the statute "encourages" visual recording as well.

The amended statute is similar to *Miranda* in that it pertains only to custodial interrogations, meaning that the requirement takes effect when the suspect "should have been advised of his or her constitutional rights." Thus, recording is required if (1) a reasonable person in the suspect's position would have believed he was under arrest, even if he had not been placed under arrest; and (2) the officers' questions were reasonably likely to elicit an incriminating response about a murder. However, if the suspect was being questioned about another crime and the subject of murder "is raised or mentioned," all further questioning must be recorded.

It should be noted that, because many crimes that result in serious injury (such as ADW, felony DUI) may become murders if the victim dies, officers may be required to utilize the new procedure whenever the possibility of a murder charge is reasonably foreseeable. (In fact, whenever possible, it is a good idea to record all interviews.)

The statute also added certain exemptions from recording. One of them permits unrecorded interviews if the suspect waived his rights but said he did not want his interview recorded; or if he indicated that he would not answer any questions unless electronic recording ceases. Because most custodial interrogations today are recorded covertly, officers should probably pretend to grant the suspect's request but record the interview anyway.[4] Also noteworthy: the statute does not apply to routine booking questions, and officers are required to maintain the original recording or an exact copy until the case has been adjudicated and all appeals have been resolved.

There are various sanctions if officers violate the amended statute. Among other things, the violation may be considered by the court in determining whether to suppress the statement on grounds it was involuntary or unreliable. POV

[3] Pen. Code § 638.52(b)(8). See Pen. Code § 638.52(d) for a list of the information that must be included in the court order and other requirements. For notification requirements, see Pen. Code § 638.54.

[4] See *Lopez v. United States* (1963) 373 U.S. 427, 439; *United States v. White* (1971) 401 U.S. 745, 751; *People v. Jackson* (1971) 19 Cal.App.3d 95, 101 ["Admissions and confessions secretly recorded are admissible."].

Identifying Detainees, Passengers, and Witnesses

"And where there is such a right to so detain, there is a companion right to request, and obtain, the detainee's identification."[1]

Do officers have a legal right to demand identification from the people they detain? Do they also have a right to demand identification from people who witness crimes? If so, what are their options if the detainee or witness refuses to identify himself? These are the issues we will discuss in this article.

Obtaining ID From Detainees

Officers clearly have a legal right to identify detainees. As the Supreme Court explained, "[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him."[2] The Court has also ruled that requiring a detainee to identify himself neither intrudes on his Fifth Amendment right not to incriminate himself, nor does it require *Miranda* compliance.[3]

While the right to identify a detainee is settled, there has been some uncertainty over what officers may do if the detainee refused to identify himself. The uncertainty stems mainly from three Ninth Circuit cases in which this issue was arguably addressed but, in reality, was not. In the first case, *Lawson v. Kolender,*[4] the court ruled that California's old vagrancy statute—Penal Code section 647(e)—was unconstitutional. This was not surprising since the statute said that a person was guilty of a misdemeanor—vagrancy—if he loitered "from place to place without apparent reason or business" and, refused to identify himself "when requested by officers."

Unfortunately, at one point in its decision the court said the following: "[S]tatutes like section 647(e), which require the production of identification are in violation of the fourth amendment." This sentence, if taken out of context, could be interpreted to mean that any law that requires a detainee to identify himself is unconstitutional. That was not, however, what the court was ruling and, if it were, it would have been contrary to basic Fourth Amendment principles.[5] Instead, when taken in context the court was simply ruling that a person cannot be detained and required to identify himself for the purpose of conducting a criminal investigation *unless* officers had reasonable suspicion to detain him; i.e., they had reason to believe he had committed a crime or was about to. Thus, because section 647(e) authorized investigative detentions based on nothing more than an officer's observation of a person loitering "from place to place without apparent reason or business," the court's ruling that it was unconstitutional was correct.[6]

---

[1] *People v. Rios* (1983) 140 Cal.App.3d 616, 621.

[2] *Hayes v. Florida* (1985) 470 U.S. 811, 817. Also see *Hiibel v. Nevada* (2004) 542 U.S. 177, 186 ["Obtaining a suspect's name in the course of a [detention] serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."]; *People v. Hart* (1999) 74 Cal.App.4th 479, 488 ["Once detained, the defendant was obligated to identify herself."].

[3] See *Hiibel v. Nevada* (2004) 542 U.S. 177, 191; *People v. Farnam* (2002) 28 Cal.4th 107, 180.

[4] (9th Cir. 1981) 658 F.2d 1362.

[5] See *Terry v. Ohio* (1968) 392 U.S. 1, 21.

[6] See *Brown v. Texas* (1979) 443 U.S. 47, 52 [the officer testified the situation "looked suspicious" but was "unable to point to any facts supporting that conclusion"]. **NOTE**: California appealed the ruling in *Lawson* to the Supreme Court which agreed with the Ninth Circuit's ruling that section 647(e) was unconstitutional, but it did so only on the grounds that the statute was vague because it failed "to clarify what is contemplated by the requirement that a suspect provide a 'credible and reliable' identification." See *Kolender v. Lawson* (1983) 461 U.S. 352, 353-54.

While the unfortunate sentence in *Lawson* was the source of the uncertainty about this issue, the real culprits were two other panels of the Ninth Circuit which subsequently cited *Lawson* as saying that a person cannot be arrested for failing to identify himself even if he *had* been lawfully detained. Not only were these rulings not supported by *Lawson* or any other law, they are contrary to a a more recent ruling by the Supreme Court.

In the first Ninth Circuit case, *Martinelli v. City of Beaumont*,[7] the court blatantly misstated the ruling in *Lawson* by claiming that *Lawson* had ruled "that a California statute requiring persons to provide reliable identification upon request during *Terry* stops [i.e., lawful detentions] violated the fourth amendment's proscription against unlawful searches." As noted, however, the court in *Lawson* said no such thing, having ruled only that requiring detainees to identify themselves violated the Fourth Amendment *if* the officers lacked reasonable suspicion to detain.

In the second case, *Carey v. Nevada Gaming Control Board*,[8] the court mistakenly said that *Lawson* had ruled that, even if officers had grounds to detain a person, they could not demand that he identify himself. Specifically, the court in *Carey* claimed that *Lawson* had held that "arresting the plaintiff for refusing to identify herself during a *Terry* stop [i.e., during a lawful detention] violated the Fourth Amendment." As noted, this was not the ruling in *Lawson*.

Any doubts that *Martinelli* and *Carey* were based on carelessness or gross misinterpretations of the Fourth Amendment were dispelled in 2004 when the Supreme Court said the following in *Hiibel v. Nevada*: "The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop."[9] Thus, the Court in *Hiibel* ruled that a state may criminalize a person's refusal to identify himself to officers if the person had been lawfully detained. Applying this ruling to the facts of the case, the Court said, "The officer's request was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment."

The logic of this ruling and the illogic of *Martinelli* and *Carey* were demonstrated by the California Court of Appeal when it observed, "Unless the officer is given some recourse in the event his request for identification is refused, he will be forced to rely either upon the good will of the person he suspects or upon his own ability to simply bluff that person into thinking that he actually does have some recourse."[10]

THE OFFICER'S OPTIONS: Because a detainee who refuses to identify himself almost always delays or obstructs an officer in the performance of his duties, most detainees who do so can be arrested for violating Penal Code section 148 if the following circumstances existed:

(1) The detention was supported by reasonable suspicion so that the detaining officers were carrying out their *lawful* duties.

(2) The detainee *willfully* refused to provide ID. This seems to mean that the detainee admitted he was carrying ID but refused to produce it, or he was not carrying ID and refused to provide information that would have enabled the officer to confirm his identity with DMV or another law enforcement database.

(3) There was probable cause to believe that the detainee's willful refusal to provide satisfactory ID did, in fact, delay the termination of the detention.[11]

---

[7] (9th Cir. 1987) 820 F.2d 1491.
[8] (9th Cir. 2002) 279 F.3d 873.
[9] (2004) 542 U.S. 177, 187.
[10] *People v. Long* (1987) 189 Cal.App.3d 77, 87. Also see *U.S. v. Jackson* (7th Cir. 2004) 377 F.3d 715, 717 ["Once Jackson failed to produce a driver's license, the police could not put him back in the car and watch him motor off."].
[11] See CALCRIM 2656; *People v. Quiroga* (1993) 16 Cal.App.4th 961, 972 ["A felony suspect's refusal to reveal his identity in the booking interview potentially places on society an added burden of investigation and inquiry."].

There are a few other options besides arresting the detainee. If he was driving a car when he was stopped, officers may search the passenger compartment for identification documents if the following circumstances existed: (1) officers reasonably believed it would have been impossible, impractical, or dangerous for them to permit the driver or other occupant to conduct the search,[12] and (2) the search was limited to places and things in which ID or registration may reasonably be found.[13] This would include such places as the glove box, above the visor, and under the seats.[14] The search need not, however, be limited to places in which such documents are "usually" or "traditionally" found.[15]

Other options include questioning the detainee's companions about his identity,[16] obtaining the detainee's consent to transport him to his home to obtain ID,[17] and searching the detainee's wallet for ID if he was carrying a wallet.[18]

WHAT IS "SATISFACTORY" IDENTIFICATION? Because officers have a legal right to identify detainees, they also have a right to obtain "satisfactory" ID.[19] What does this mean? The Court of Appeal ruled that a current driver's license is presumptively satisfactory unless there was reason to believe it was forged or altered.[20] It also ruled that some other document will be deemed the functional equivalent of a driver's license if it contained all of the following: the detainee's photo, brief physical description, signature, current mailing address, serial numbering, and information establishing that the document is current.[21] While other documents are not presumptively satisfactory ID, officers may exercise discretion in making the determination.[22]

Optaining ID From Vehicle Passengers

There is also a question as to whether officers who have detained the driver of a car have a legal right to obtain ID from the passengers. In other words, can officers demand that the passengers provide satisfactory ID merely because they were in the company of the detainee?

The answer is probably no, but it's a little more complicated than that. In *Brendlin v. California* the Supreme Court ruled that, when officers stop the driver of a car, all of the passengers in the vehicle are also detained.[23] As the Sixth Circuit put it, "*Brendlin* makes it clear that, generally, when a police officer pulls over a vehicle during a traffic stop, the officer seizes everyone in the vehicle, not just the driver."[24] The reason is that a reasonable person in the passengers' situation would know that the officer, for safety reasons, has a right to restrict the passengers' movements.[25] Thus, the passenger is not free to leave.

---

[12] See Veh. Code § 12951(b); *In re Arturo D.* (2002) 27 Cal.4th 60, 78; *People v. Hart* (1999) 74 Cal.App.4th 479, 488; *People v. Faddler* (1982) 132 Cal.App.3d 607, 610 [search for ID by officer justified by "lateness of the hour, the presence of three men in the vehicle, the nature of the suspected violation and the conduct of the defendants"].

[13] See *In re Arturo D.* (2002) 27 Cal.4th 60, 78, fn.19.

[14] See *In re Arturo D.* (2002) 27 Cal.4th 60, 81; *People v. Webster* (1991) 54 Cal.3d 411, 431; *People v. Turner* (1994) 8 Cal.4th 137, 182; *People v. Martin* (1972) 23 Cal.App.3d 444, 447]; *People v. Chavers* (1983) 33 Cal.3d 462, 470.

[15] See *In re Arturo D.* (2002) 27 Cal.4th 60, 78 [search need not be limited to "traditional repositories"].

[16] See *People v. Grant* (1990) 217 Cal.App.3d 1451, 1459 [OK to attempt "to secure proof of the driver's identity by questioning [the passenger]"]; *People v. Maxwell* (1988) 206 Cal.App.3d 1004, 1010 [OK to ask passenger to exit so that officer could question him about driver's ID where the driver had no ID or registration].

[17] See *U.S. v. Garcia* (7th Cir. 2004) 376 F.3d 648, 651.

[18] See *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002-4; *Ingle v. Superior Court* (1982) 129 Cal.App.3d 188; *People v. Faddler* (1982) 132 Cal.App.3d 607; *People v. Rios* (1983) 140 Cal.App.3d 616, 621.

[19] See *People v. McKay* (2002) 27 Cal.4th 601, 616.

[20] See *People v. McKay* (2002) 27 Cal.4th 601, 620; *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1186.

[21] See *People v. McKay* (2002) 27 Cal.4th 601, 620-22; *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1187.

[22] See *People v. McKay* (2002) 27 Cal.4th 601, 622

[23] (2007) 551 U.S. 249. Also see *Arizona v. Johnson* (2009) 555 U.S. 323.

[24] *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 774.

[25] See *Brendlin v. California* (2007) 551 U.S. 249, 258.

It gets complicated because, if all of the passengers are automatically detained, a passenger who refuses to identify himself is arguably arrestable for violating section 148 just as any other detainee would be arrestable for doing the same.

Although no California court has ruled on this issue, it is arguable that such an arrest would be permitted *if* officers could articulate an objectively reasonable basis for demanding ID from a passenger. On the other hand, if the purpose of the demand was just to run warrant checks on the passengers or otherwise obtain general intelligence about the people who associate with the detainee, it is likely that the courts would rule that there is insufficient reason to require the passenger to identify himself, and therefore an arrest for violating section 148 would be unlawful.

Obtaining ID From Witnesses

In addition to obtaining ID from detainees and their companions, officers may need to identify people at or near the scene of a crime who were reasonaby believed to have been witnesses. The question is whether officers can detain these people for the purpose of identifying them if they will not stop voluntarily. We think so, but only if the following two circumstances existed. First, the primary purpose of the detention must have been to further a public interest *other than* determining whether the witness had committed a crime. Second, the public interest in obtaining the witness's ID must have outweighed the intrusiveness of the detention.[26] In making this determination, the courts ordinarily look at the seriousness of the crime under investigation and the likelihood that the detainee could provide important information; i.e., that the detention would be "a sufficiently productive mechanism" to justify the intrusion.[27]

Thus, in a shooting case, *Walker v. City of Orem,* the Tenth Circuit said, "At a minimum, officers had a right to identify witnesses to the shooting, to obtain the names and addresses of such witnesses, and to ascertain whether they were willing to speak voluntarily with the officers."[28] Similarly, in *Michigan State Police v. Sitz* the Supreme Court upheld a DUI checkpoint because of, among other things, the "magnitude of the drunken driving problem," and the "State's interest in preventing drunken driving."[29]

Against this public interest, the courts will weigh the intrusiveness of the detention which generally means (1) the detention must have been brief, and (2) the officers must have done only those things that were reasonably necessary to accomplish their objective.[30] For example, in approving a checkpoint stop of a vehicle to try to locate witnesses to a felony hit-and-run that had occurred about a week earlier, the Supreme Court pointed out that the officers "used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred."[31]

Finally, although officers may briefly detain potential witnesses to serious crimes, these detainees are not required to identify themselves.[32] POV

---

[26] See *Illinois v. Lidster* (2004) 540 U.S. 419, 427 ["[I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."]; *Indianapolis v. Edmond* (2000) 531 US 32, 47 ["The constitutionality of such checkpoint programs still depends on a balancing of the competing interests at stake and the effectiveness of the program."]; *In re Randy G.* (2001) 26 C4 556, 566 ["there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails"].

[27] *Delaware v. Prouse* (1979) 440 U.S. 648, 659. Also see *Illinois v. Lidster* (2004) 540 U.S. 419 [felony hit-and-run].

[28] (10th Cir. 2006) 451 F.3d 1139, 1148.

[29] (1990) 496 U.S. 444, 451.

[30] See *Illinois v. Lidster* (2004) 540 U.S. 419, 427 [the detention was "minimally" intrusive as it lasted "a very few minutes at most"]; *Illinois v. McArthur* (2001) 531 U.S. 326, 331 [the detention was "limited in time and scope"]; *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1333 ["Such a stop entailed only a brief detention"].

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

[32] See *Ganwich v. Knapp* (9th Cir. 2003) 319 F.3d 1115, 1120 [unreasonable "to condition the plaintiffs' release on their submission to interrogation"].

Gems From Judges

Over the years, we have jotted down some comments in published opinions that say something interesting or, better yet, something that needs to be said. Here are a few we especially like. (Some editing.)

≈

"Judicial opinions are littered with stale, opaque, confusing jargon. There is no need for jargon, stale or fresh. Everything judges do can be explained in straightforward language—and should be." *U.S. v. Dessart* (7th Cir. 2016) 823 F.3d 395, 407, 408.

≈

"I—very respectfully—do not join in Judge Carnes's erudite opinion. I stress that it is not because the opinion says something that I am sure is wrong. I agree with much of the opinion, at least. But the opinion says a lot and says more than I think is absolutely needed. Moreover, long opinions, even if correct in every detail, generally make it harder for readers to separate a holding from dicta." *Holsey v. Warden* (11th Cir. 2012) 694 F.3d 1230, 1274.

≈

"I feel, however that at times this court tends to be overly concerned with theory and pronounced principles for their own sake, and to disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one." *Lee v. Illinois* (1986) 476 U.S. 530, 547-48 (dis. opn. of Blackmun, J.).

≈

"For the public interest is not served by a police force intent on escaping [civil] liability to the cumulative detriment of those duties which communities depend upon officers to perform." *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 225.

≈

"Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search." *Atwater v. City of Lago Vista* (2001) 532 U.S. __ [149 L.Ed 2d 549, 572-3].

≈

In the average day, police officers perform a broad range of duties, from typical law enforcement activities—investigating crimes, pursuing suspected felons, issuing traffic citations—to 'community caretaking functions'—helping stranded motorists, returning lost children to anxious parents, assisting and protecting citizens in need—totally divorced from the detection, investigation, or acquisition of evidence." *People v. Ray* (1999) 21 Cal.4th 464, 467.

≈

"The Sixth Amendment does not require counsel to waste the court's time with futile or frivolous motions." *People v. Memro* (1995) 11 Cal.4th 786, 834.

≈

"It would perhaps reduce the danger inherent in [law enforcement] if we allowed the police to do whatever they felt necessary, whenever they needed to do it. However, there is a Fourth Amendment to the Constitution which necessarily forecloses this possibility. As long as it is in existence, police must carry out their often dangerous duties according to certain prescribed procedures." *U.S. v. Colbert* (6th Cir. 1996) 76 F.3d 773, 778.

≈

"To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem." *Watts v. Indiana* (1949) 338 U.S. 49, 59.

≈

"The protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." *New York v. Belton* (1981) 453 US 454, 457.

≈

"But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater v. City of Lago Vista* (2001) 532 US 318, 347.

≈

"[T]he history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness." *People v. Rosales* (1968) 68 Cal.2d 299, 304.

≈

"As information is accumulated in the process of an investigation, the police must make not a single evaluation but a series of judgments. Inevitably this is something of a balance sheet process. Some of the information, and some of the factors which they observe, will add up in support of probable cause; some, on the other hand, may undermine that support. Finally, at some point the officer must make a decision, culled from a balance of these negatives and positives, and then act on his decision." *Jackson v. U.S.* (D.C. Cir. 1962) 302 F.2d 194, 197.

≈

"The policeman plays a rather special role in our society; in addition to being an enforcer of the criminal law, he is a 'jack-of-all-emergencies,' expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety." *US v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 784.

≈

"There is no right to escape detection. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. . . . It is consonant with good morals, and the Constitution, to exploit a criminal's ignorance or stupidity in the detectional process." *State v. McKnight* (1968) 52 N.J. 35 [quoted in *People v. Bennett* (1998) 68 Cal.App.4th 396, 403, fn.7].

≈

"A court is not a place to play hide-and-go-seek with relevant evidence and information." *U.S. v. $42,500* (9th Cir. 2002) 283 F.3d 977, 983.

≈

When the reason for a rule of law ceases, so should the rule itself. *Kortmeyer v. California Insurance Association.* (1992) 9 Cal.App.4th 1285, 1297.

≈

"In the last analysis the people's freedom will be no better than the policemen and magistrates they select." *People v. Linke* (1968) 265 Cal.App.2d 297, 307. POV

Recent Cases

People v. Macabeo

(2016) __ Cal.4th __ [2016 WL 7048010]

Issue

May officers conduct a search incident to the arrest of a suspect if officers had not yet decided to take him into custody?

Facts

At about 1:40 A.M., two Torrance police officers stopped Paul Macabeo for riding his bicycle through an intersection without stopping. In response to questioning, Macabeo initially told the officers that he was on probation for possession of drugs. Later, however, he said his case had been dismissed and he was not on probation. Apparently uncertain about Macabeo's probation status, and also because he was "fidgety," an officer pat searched him but found no weapons. An officer then asked if he could remove "stuff" from his pockets. Macabeo said OK. Among the items removed was a cell phone which one of the officers activated and searched, finding images of underage girls engaging in sexual conduct. Macabeo was arrested for violating Penal Code section 311.11. After the phone was searched, an officer confirmed that Macabeo was not on probation. In the trial court, Macabeo's motion to suppress the images was denied and the Court of Appeal affirmed. Macabeo appealed to the California Supreme Court.

Discussion

Pursuant to the "search incident to arrest" exception to the warrant requirement, officers may ordinarily search an arrestee in order to make sure he is not armed and also to secure any evidence in his possession.[1] Although this exception has been the law since 1973,[2] there has been some uncertainty as to whether such a search is legal if the arresting officers had not made a pre-search decision to take the suspect into actual physical custody, as opposed to citing and releasing him. This uncertainty resulted from three Supreme Court decisions.

In the first one, *United States v. Robinson*, the Court ruled that searches incident to arrest were permitted because the danger to officers "is far greater in the case of the *extended exposure* which follows the taking of a suspect into custody."[3] This tended to indicate that the officers must have already decided to take the suspect into actual physical custody; i.e., that there would, in fact, be "extended exposure."

Later in *Rawlings v. Kentucky* the Court ruled that if officers had probable cause to arrest a suspect, they could search him incident to the arrest even if they had not yet formally placed him under arrest.[4] This tended to indicate that a search was permitted if the officers *could have* transported the suspect (i.e., if they had probable cause), even though they had not yet decided to do so. Finally, in *Riley v. California* the Court ruled that a search of a cell phone incident to an arrest was unlawful because a search of a cell phone is ordinarily unnecessary for officer safety or to prevent the destruction of evidence stored inside.[5] This indicated that a search is not permitted unless officers had decided to transport the suspect.

In *Macabeo*, the California Supreme Court resolved this issue (at least in California), ruling that searches incident to arrest may only be conducted if officers had already decided to take the suspect into custody. Thus, the court essentially adopted the reasoning of *Riley* and concluded there is simply no justification for a routine search of the arrestee unless the decision had been made to take him somewhere, usually to jail, a police station, or a hospital.

---

[1] See *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473, 2485]; *Knowles v. Iowa* (1998) 525 U.S. 113, 116.
[2] See *United States v. Robinson* (1973) 414 U.S, 218, 234.
[3] (1973) 414 U.S, 218, 234-35. Emphasis added.
[4] (1980) 448 U.S. 98, 111 Also see *People v. Limon* (1993) 17 Cal.App.4th 524, 538.
[5] (2014) 573 U.S. __ [134 S.Ct. 247].

Applying this rule to the facts in *Macabeo*, it was apparent to the court that the officers had no intention of taking Macabeo to jail for riding a bicycle through an intersection at 1:40 A.M. In other words, the fact that they *could have* transported him to jail without violating the Fourth Amendment was irrelevant. Consequently, the court ruled that the images in Macabeo's cell phone should have been suppressed.

Comment

At hearings on motions to suppress, it will be safer for prosecutors to expressly ask the arresting officers whether they had made a pre-search decision to transport the arrestee. In most cases, however, we think a court may infer that such a decision had been made based on the seriousness of the crime; e.g., all felony arrests, DUI arrests. Consequently, we would hope that motions to suppress in such cases will not be granted due to a technical failure to elicit such testimony.

One other thing. At one point in its decision, the court said, "Even the search-incident exception may be limited when attendant circumstances show the arrestee had no potential to put an officer in jeopardy, to escape, or to destroy evidence." This might be interpreted to mean that officers cannot conduct searches incident to arrest unless they can articulate a reason to believe the search was necessary for their safety or for the integrity of the evidence. Such an interpretation would, however, be contrary to the settled rule that officers are not required to make such case-by-case determinations. As the Supreme Court explained in *Robinson*

> [O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.

The Court added that there is "an adequate basis for treating all custodial arrests alike for purposes of search justification."[6]

People v. Lopez

(2016) 4 Cal.App.5th 815

Issues

(1) Did an officer detain the driver of a car when he approached her and asked to see her identification? (2) If not, did the officer have sufficient grounds to search her car for identification when she said she was not carrying ID, but that there might be some inside the vehicle?

Facts

Woodland police received a call from an apparently anonymous caller that the driver of a certain car was driving erratically at a specified intersection. The caller also said that the driver had been "drinking all day" and he provided the operator with a description of the car, including its license plate number. The officer was unable to locate the car in the immediate vicinity, so he ran the plate number and found that the registered owner lived in the vicinity. So he drove there and parked nearby. Within a few minutes, a car matching that description arrived and parked in front of the house. The officer observed no Vehicle Code violations or other indication that the driver was impaired.

When the driver stepped out of the car, the officer walked up to her and asked if she had a driver's license. He asked the question because it appeared she was walking away from him and also because she had a "panicked" look on her face. She said she was not carrying any identification, but that there might be some in the car. The officer then handcuffed her, and another officer entered her car to search for ID. He saw a purse on the front passenger seat and handed it to the first officer who, while searching through it for ID, found a small amount methamphetamine. The driver, who was subsequently identified as Maria Lopez, was arrested. Before trial, Lopez filed a motion to suppress the drugs on grounds the search was unlawful. The judge ruled that, while there was no detention, the search was illegal. The People appealed.

[6] (1973) 414 U.S, 218, 234.

Discussion

WAS LOPEZ DETTAINED? The first issue on appeal was whether the officer had unlawfully detained Lopez when he asked to see her driver's license after she exited the car and started walking away. It is settled that a detention occurs if (1) an officer's words or actions would have indicated to a reasonable person that she was not free to decline the officer's request, and (2) the person submitted to the officer's show of authority or otherwise complied with his commands.[7] Although Lopez submitted to the officer's implied request to stop, the court ruled the request did not convert the encounter into a detention because it is also settled that an officer's mere *request* to see a person's ID would not cause a reasonable person to believe that she was *required* to do so. As the Court of Appeal explained in *People v. Cartwright*, "It is now well established that a mere request for identification does not transmogrify a contact into a Fourth Amendment seizure."[8]

A detention may, however, result if there were additional circumstances indicating that the person was not free to leave. For example the court had ruled that a detention resulted when an officer stopped his patrol car about 35 feet from the defendant and quickly approached him after illuminating him with a white spotlight.[9] In *Lopez*, however, the record indicated that the officer did nothing more than request to see Lopez's driver's license and, accordingly, the court ruled that she was not initially detained. Said the court, "[C]onsidering all of the circumstances surrounding [the officer's] approach and the words he directed towards defendant, we cannot conclude his verbal and non-verbal conduct constituted a show of authority so intimidating as to communicate to any reasonable person he or she was not free to decline his requests or otherwise terminate the encounter."

Although Lopez was not detained initially, it was undisputed that she was detained when the officer handcuffed her. But, by that time, the officer had grounds to detain her for driving without a license.[10] Furthermore, the court ruled that the officer's act of handcuffing her did not render the detention an illegal de facto arrest because, at that point, the officer had not yet decided to take her into actual physical custody and there was no California statute that required him to do so, nor was there any reason why he would not simply release her with a warning or, at most, issue a citation.

WARRANTLESS VEHICLE SEARCH: Lopez argued that, even if she wasn't initially detained, the search of her car was unlawful because the officer lacked probable cause to believe there was evidence of a crime located inside it. That was certainly true. But it didn't matter because the officer was not conducting a probable cause search for evidence.[11] Instead, he was conducting an entirely different type of vehicle search: a search for the driver's ID.

The California Supreme Court has ruled that such a search is permissible if an officer, having made a lawful traffic stop, learned from the driver that she did not have any ID or was unable to find it. Thus, officers are not required to take the driver's word for it that there is no ID in the vehicle.[12] The search must, however, be limited to places and things in

---

[7] See *Brendlin v. California* (2007) 551 U.S. 249, 256-57; *California v. Hodari D.* (1991) 499 U.S. 621, 626; *People v. Brown* (2015) 61 Cal.4th 968, 977.

[8] (1999) 72 Cal.App.4th 1362, 1370. Also see *Florida v. Bostick* (1991) 501 U.S. 429, 437 ["[N]o seizure occurs when police ask … to examine the individual's identification—so long as the officers do not convey a message that compliance with their requests is required."]; *INS v. Delgado* (1984) 466 U.S. 210, 216 ["[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."].

[9] *People v. Garry* (2007) 156 Cal.App.4th 1100.

[10] See Veh. Code §§ 12500, 12951(b).

[11] See *United States v. Ross* (1982) 456 U.S. 798, 809; *People v. Carpenter* (1997) 15 Cal.4th 312, 365 ["The police had probable cause to search the vehicle. Under the 'automobile exception' to the warrant requirement, they did not need a warrant at all."].

[12] *In re Arturo D.* (2002) 27 Cal.4th 60, 78 ["When the officer prepared to cite Arturo for a Vehicle Code violation, he had both a right and an obligation to ascertain the driver's true identity"]. Also see Veh. Code § 12951(b) ["The driver of a motor vehicle shall present the registration or identification card or other evidence of registration of any or all vehicles under his or her immediate control for examination upon demand of any peace officer" who has been lawfully stopped for a traffic violation."].

which ID or registration may reasonably be found.[13] This would include such places as the glove box, above the visor, and under the seats.[14] The search need not be limited to places in which such documents are "usually" or "traditionally" found.[15]

Consequently, the court ruled that the vehicle search was lawful because (1) the officer had probable cause to believe that Lopez had committed a violation of the Vehicle Code, (2) Lopez claimed she was not carrying any ID, and (3) the search was limited to a place in which ID might reasonably be found; i.e., her purse.

Comment

Over the years, some courts have suggested that many of the things that officers may do without converting a contact into a detention—such as requesting to see some identification—would clearly indicate to a reasonable person that he was not free to decline the officer's request. That argument could certainly have been made in this case. But it should be kept in mind that the analysis of these circumstances simply represents a practical—albeit imperfect—compromise between competing interests.

People v. Quick

(2016) __ Cal.App.4th __ [2016 WL 6875925]

Issue

Did a car search qualify as a vehicle inventory search, a search incident to arrest, or both?

Facts

A police officer in Atascadero made a traffic stop on a car driven by a man who, according to narcotics investigators, was "involved in narcotics activity" and possessed multiple firearms. When the officer spoke with the driver, Daniel Quick, he noticed symptoms that he was under the influence of drugs. Quick also said he had used Percocet and marijuana earlier in the day. When the officer asked him to step outside for a field sobriety test, Quick refused. The officer called for backup and, in the meantime, Quick exited the car. But as he did so, he removed his jacket, tossed it on the driver's seat, rolled up the car window, tossed his keys inside the car, and locked the door shut. The officer then conducted the field sobriety test and determined that Quick was, in fact, under the influence of drugs. He was then arrested.

A sergeant at the scene decided to impound Quick's car because it was parked 24 inches from the roadway, thus creating a traffic hazard. Officers then conducted a search of Quick's jacket and found 25.9 grams of methamphetamine (259 to 518 single doses), two methamphetamine pipes, and a Taser. Quick filed a motion to suppress the evidence on grounds the search of his car was illegal.[16] The motion was denied, Quick was convicted and sentenced to four years in prison. He appealed.

Discussion

Vehicle inventory searches are permitted if (1) it was reasonably necessary to tow the vehicle under the circumstances, and (2) the search was conducted in accordance with standard procedures.[17] As the court explained, "When a vehicle is lawfully impounded, an inventory search pursuant to an established, standardized procedure does not violate the Fourth Amendment." Per the Vehicle Code,[18] towing is permitted if, among other things, the vehicle was blocking a roadway or when the driver

---

[13] See *In re Arturo D.* (2002) 27 Cal.4th 60, 78, fn.19.
[14] See *In re Arturo D.* (2002) 27 Cal.4th 60, 81; *People v. Webster* (1991) 54 Cal.3d 411, 431.
[15] See *In re Arturo D.* (2002) 27 Cal.4th 60, 78 [search need not be limited to "traditional repositories"].
[16] NOTE: Quick initially argued that the search was unlawful because the traffic stop was merely a pretext to search for evidence of drug trafficking. It appears, however, that Quick did not pursue this claim, probably because pretext traffic stops are lawful when, as here, there were legitimate reasons for making the stop. See *Colorado v. Bertine* (1987) 479 US 367, 372.
[17] *Halajian v. D&B Towing* (2012) 209 Cal.App.4th 1, 15 [community caretaking exception applied to towing of unregistered vehicle in convenience store parking lot]; *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1247 ["[T]he ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances."].
[18] See Veh. Code §§ 22651(b); Veh. Code § 22651(h).

was arrested and taken into custody. Both of these circumstances existed and, therefore, the court ruled that the decision to tow the vehicle was lawful.

The court also observed that there were two other potential grounds for the search. First, officers may, as a matter of routine, search a vehicle if the driver was arrested and had ready access to the passenger compartment when the search occurred.[19] But the search of Quick's car would not qualify as this type of search because it apparently occurred after Quick had been taken into custody.

Second, a search incident to arrest is permissible when the driver lacked access but officers had reasonable suspicion—probable cause is not required—to believe that the vehicle contains evidence that is relevant to the crime for which the driver was arrested. Here, Quick was arrested for possession with intent to distribute and, therefore, the officers reasonably believed that more drugs would found in the vehicle. Consequently, the court ruled the search also qualified under this exception to the warrant requirement.

What about Quick's act of locking his methamphetamine-laden jacket in his car? Although it really didn't matter (because the search would have been lawful even if he had not done so), the court addressed the issue, saying it might permit a search incident to arrest under these circumstances because, said the court, "The interaction between a peace officer and a person suspected of committing a crime is not a game. It is serious business. . . . A person detained for investigation has no constitutional right to dispose of evidence."

U.S. v. Williams

(9th Cir. 2016) 837 F.3d 1016

Issues

(1) Did officers have grounds to detain the defendant? (2) As an incident to arrest, could they search the defendant's pockets and his car?

Facts

At 4:40 A.M. a man phoned the Las Vegas Metropolitan Police Department's "hotline" and reported there was a car parked in the parking lot of an adjacent apartment building. The caller, who identified himself and provided his address and phone number, said that a man was sleeping in the car, which he described as a grey Ford Five Hundred. The caller explained that the man did not live in the apartment building, and was "known to sell drugs in the area." He requested that officers remove the man from the parking lot. When the officers arrived, they found a Ford Five Hundred parked there, so they stopped directly behind it, turned on their overhead lights and lit up the inside of the car with a spotlight.

Just then a man, later identified as Tony Williams, sat up in the driver's seat, looked to his left and right, started the car, and shifted into reverse. The officers ordered him to turn off the engine and he complied. Williams then stepped out of the car but then ran. He was apprehended about a minute later and pat searched. During the search, an officer found individually-wrapped packets of crack cocaine and $1,165 in cash. The officers then returned to the Ford, searched it, and found a gun inside.

Williams was charged in federal court with being a felon in possession of a gun in the furtherance of drug trafficking, and possession of crack cocaine with intent to distribute. The trial court, however, granted Williams's motion to suppress the cocaine and gun on grounds that the officers did not have sufficient grounds to detain or search him. The government appealed to the Ninth Circuit.

Discussion

GROUNDS TO DETAIN: It was apparent that Williams was detained when the officers stopped their car behind the Ford, thereby blocking him in.[20] So, the question was whether the information provided by the caller was sufficiently reliable to constitute

[19] *Arizona v. Gant* (2009) 556 U.S. 332.

[20] See *People v. Wilkins* (1986) 186 Cal.App.3d 804, 809 [seizure resulted when the officer "stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked station wagon was prevented."]; *U.S. v. Kerr* (9th Cir. 1987) 817 F.2d 1384, 1387.

reasonable suspicion for a detention.[21] Although the caller did not phone 911 (which would have been an indication of reliability[22]), there were several circumstances that made it reasonable for the officers to trust the caller's tip, at least for the purpose of conducting a detention.

First, the caller identified himself and provided his phone number and address. Second, he provided details, saying a certain car was parked at a certain location, that a man was sleeping inside, and that the caller was aware that the man did not live in the apartment building. Third, the incident occurred around 5:00 A.M. in a high-crime area, including gang activity. Fourth, when the officers arrived, they found the situation exactly as the caller had described it.[23] (While Williams's attempt to drive away and subsequent flight constituted strong corroboration of the caller's reliability, it did not technically count because the detention had occurred seconds earlier when the officers blocked his path.)

The court ruled that the information known to the officers (or presumably to the police operator if the details were not transmitted to the officers) was sufficiently reliable to warrant a detention. Said the court, "[T]he tip in this case not only provided an accurate description of the suspect, but it also alleged ongoing, observable criminal activity—trespass. [The caller] identified Williams's location, car, and appearance and also stated that Williams was sleeping in a car in an adjacent apartment building's lot, even though Williams did not live there."

THE SEARCH OF WILLIAMS'S POCKET: The search of Williams's pocket was clearly lawful as a search incident to his arrest for fleeing the officers pursuant to a Nevada statute which, like California Penal Code section 148, makes it unlawful to delay or obstruct an officer in the performance of his duties.[24] Said the court, "[T]he officers had probable cause to arrest Williams and performed a valid search incident to arrest of Williams's person—which lawfully extended to the insides of Williams's pockets."

THE SEARCH OF WILLIAMS'S CAR: Although the officers did not have a warrant to search Williams's car, there is a well-known exception to the warrant requirement that allows officers to search a vehicle located in a public place if they have probable cause to believe it contains evidence of a crime.[25] And such probable cause may be based on an officer's inference that a vehicle occupant who has just been arrested for a crime may have kept evidence of that crime in the vehicle if, based on the officer's training and experience, the people who commit such crimes commonly possess specific types of evidence.[26]

While trespassing and running from officers are not crimes for which there are usually fruits or instrumentalities, drug trafficking is. Consequently, the court ruled that the vehicle search was lawful because, based on the officers' discovery of crack cocaine wrapped in individual packets (plus the cash), they reasonably believed that Williams's vehicle would contain more drugs and things that are commonly used by drug traffickers; e.g., weapons. As the court explained, "The crack cocaine provided the officers with the probable cause necessary to arrest Williams for drug possession and drug dealing, two crimes in which a vehicle could reasonably contain further evidence."

For these reasons, the Ninth Circuit ruled the district court judge should not have granted Williams's motion to suppress the evidence and, accordingly, it sent the case back to the district court for trial.

---

[21] See *Alabama v. White* (1990) 496 U.S. 325; *Navarette v. California* (2014) __ U.S. __ [134 S.Ct. 1683].

[22] **NOTE**: If the caller had phoned 911 instead of the hotline, this circumstance would have added to his credibility because the courts view 911 callers has having some built-in reliability since it is common knowledge that 911 calls may be traced and recorded, and therefore people who phone 911 are (at least to some extent) leaving themselves exposed to identification even if they gave a false name or refused to identify themselves. See *Navarette v. California* (2014) __ U.S. __ [134 S.Ct. 1683, 1689]; *People v. Brown* (2015) 61 Cal.4th 968, 982 [a call to 911 constitutes "[a]nother indicator of veracity"].

[23] See *Massachusetts v. Upton* (1984) 466 U.S. 727, 734; *Navarette v. California* (2014) __ U.S. __ [134 S.Ct. 1683].

[24] See *United States v. Robinson* (1973) 414 U.S. 218, 234; *Knowles v. Iowa* (1998) 525 U.S. 113, 116.

[25] See *United States v. Ross* (1982) 456 U.S. 798, 809 *People v. Carpenter* (1997) 15 Cal.4th 312, 365.

[26] See *People v. Senkir* (1972) 26 Cal.App.3d 411, 421; *People v. Farley* (2009) 46 Cal.4th 1053, 1099.

Thomas v. Dillard

(9th Cir. 2016) 818 F.3d 864

Issue

When responding to a domestic violence call, do officers automatically have a right to pat search the aggressor?

Facts

At Palomar College in Escondido a campus police officer was dispatched to investigate a caller's report that a man had just pushed a woman at or near some storage containers located on the south side of the college's campus. The only other information furnished by the caller was that the man was wearing a purple shirt and he was black.

When the officer arrived, he saw a black man wearing a purple shirt walking with a woman from behind the same storage containers. The officer saw nothing to indicate the woman had been harmed or that she was upset. The man was later identified as Correll Thomas. In response to the officer's questions, Thomas said he was carrying ID, he was not carrying a weapon, and that he would not consent to a weapons search. The officer then explained the reason for his questions, and Thomas's girlfriend responded that she and Thomas were just kissing behind the storage containers, and denied that he had pushed her or "done anything wrong."

Once again, the officer asked Thomas if he would consent to a weapons search, and Thomas again said no. At that point, the officer attempted to grab Thomas in order to search him but Thomas stepped away. The officer then pointed his Taser at Thomas, and ordered him to submit to a frisk. Thomas still would not consent but he was "not aggressive or belligerent." After requesting backup, the officer told Thomas to put his hands in the air and drop to his knees. Thomas raised his hands but refused to get on his knees. The officer then tazed him. Now temporarily immobilized, Thomas was handcuffed and searched. No weapons were found. Thomas was initially charged with delaying or obstructing an officer in the performance of his duties,[27] but the charges were dropped.

Thomas sued the officer in federal court, alleging that the officer had violated his Fourth Amendment right to be free from unlawful seizure and excessive force. After Thomas filed a motion for summary judgment, the court ruled that the officer had, in fact, illegally detained Thomas and had used excessive force. It then denied the officer's motion that he be granted qualified immunity from prosecution on grounds that the law pertaining to pat searches in domestic violence situations was not clearly established. The officer appealed.

Discussion

While Thomas did not challenge the legality of the initial detention, he contended it became unlawful when the officer pointed his Taser at him and ordered him to submit to a pat search. The court agreed.[28]

It is settled that officers may pat search a detainee if they reasonably believed that the detainee was armed or otherwise dangerous,[29] and that such a belief may be based on direct or circumstantial evidence.[30] One of the circumstances that is especially relevant is the nature of the crime for which the suspect was detained.[31] As the Court of Appeal observed, "Courts have consistently recognized that certain crimes carry with them the propensity for violence, and individuals being investigated for those crimes may be pat searched without further justification."[32] For example, a pat search is warranted whenever officers have lawfully detained a person

---

[27] See Pen. Code § 148.

[28] **NOTE**: Because the trial court ruled in favor of Thomas, the court was required to take the facts and inferences in favor of Thomas.

[29] See *Arizona v. Johnson* (2009) 555 U.S. 323, 332; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1082.

[30] See *People v. Thurman* (1989) 209 Cal.App.3d 817, 823 [it would be "utter folly" to require an officer "to await an overt act of hostility before attempting to neutralize the threat of physical harm"]; *People v. Samples* (1992) 11 Cal.App.4th 389, 393 ["Our courts have never held that an officer must wait until a suspect actually reaches for an apparent weapon before he is justified in taking the weapon."].

[31] See *U.S. v. Flatter* (9th Cir. 2006) 456 F.3d 1154, 1158; *U.S. v. $109,179* (9th Cir. 2000) 228 F.3d 1080.

[32] *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1059.

to investigate a crime of violence; e.g., homicide, assault with a deadly weapon, robbery, carjacking, or shots fired.[33]

As noted, the issue in *Thomas* was whether domestic violence is such a crime. While the term "domestic violence" contains the word "violence," the court pointed out that it is a "term of art" that involves "widely varying degrees of dangerousness" and, accordingly, it "encompasses too broad an array of crimes to categorically justify reasonable suspicion" for a pat search. Thus, the court concluded that, while the nature of a domestic violence call "is certainly relevant to an officer's assessment of whether to conduct a search for weapons," grounds for a pat search are "not established merely because an officer perceives a call as falling under the broad rubric of 'domestic violence.'"

While it seems likely that the courts will not require much in the way of additional circumstances to justify a pat search in such cases, there must be *something*. For example, the court pointed out that a pat search might be appropriate if an officer had to enter the home of a domestic violence suspect "and intervene in the middle of a heated fight or vicious attack," or if an angry suspect was "threatening a responding officer to get off his property."

In *Thomas*, however, the court ruled there were no additional circumstances that would have warranted a pat search. Specifically, Thomas was "not aggressive or belligerent;" he "stood still and his hands were empty and plainly visible;" he had "no suspicious bulges suggesting he had a weapon, there had been no report he had a weapon;" and he had been "forthright with [the officer] from the beginning, providing his identity and answering his questions directly." In addition, his girlfriend "was adamant that Thomas had done nothing wrong." Although Thomas did refuse to consent to a search or get on his knees, the court said that this "steadfast, passive resistance to [the officer's] insistence that he offer himself to be searched does not tip the balance in favor of reasonable suspicion to frisk."

Although the court ruled that "the perceived domestic violence nature of the call did not automatically and categorically give [the officer] reason to believe Thomas was armed and dangerous," it also ruled that, because this rule was not "clearly established" when the detention occurred, the officer was entitled to qualified immunity. As for the use of the Taser, the court ruled that, under the circumstances, it was not justified but, again, this rule had not been clearly established at the time and, therefore the officer was entitled to qualified immunity.

Comment

Two things. First, the two rules announced by the court are now "clearly established" (at least in our federal courts) which means that officers cannot expect to be as fortunate as the officer in *Thomas*. Second, the court in *Thomas* and many other courts have routinely said or implied that pat searches are permissible only if officers reasonably believed that the detainee was both armed *and* dangerous. This is *not* the law and we wish the courts would stop parroting this line which, if given a little thought, would be recognized as patently untrue.

As we have noted many times , if officers detain a suspect whose words or actions plainly demonstrated an imminent threat of violence against them, it would be absurd to say that they could not conduct a pat search merely because the officer had not seen a weapon in his possession. This is why the courts routinely uphold pat searches of unarmed detainees who were reasonably believed to present an imminent threat to the officer. Although the court in *Thomas* repeatedly used the term "armed and dangerous," it acknowledged that dangerousness alone would suffice because the purpose of pat searches is to protect officers when they confront "potentially dangerous individuals"—not "potentially armed and dangerous" individuals. For example, the court said that a pat search might be appropriate in a domestic violence case if an officer had to enter a home to break up a heated fight. POV

[33] See *Terry v. Ohio* (1968) 392 U.S. 1, 28; *People v. Campbell* (1981) 118 Cal.App.3d 588, 595; *People v. Atmore* (1970) 13 Cal.App.3d 244, 247, fn.1; *People v. Rico* (1979) 97 Cal.App.3d 124, 132; *People v. Stone* (1981) 117 Cal.App.3d 15, 19; *People v. Orozco* (1981) 114 Cal.App.3d 435, 445 [shots fired]; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1401 [shots fired].

California Criminal Investigation 2017 Edition

We are now shipping the 2017 edition of *California Criminal Investigation.* This is the 21st annual edition, and it contains over 700 pages with over 3,400 endnotes including about 14,000 case citations. The price is $70. To order, visit le.alcoda.org and click on "Publications." Here is the Table of Contents: