POINT of VIEW

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Investigative Contacts

Street encounters between citizens and police officers are incredibly rich in diversity.[1]

There are probably no encounters on the streets (or anywhere else) that are more "rich in diversity" than those daily exchanges between officers and the public. After all, they run the gamut from "wholly friendly exchanges of pleasantries" to "hostile confrontations of armed men involving arrests, or injuries, or loss of life."[2]

Situated between these two extremes—but much closer to the "wholly friendly exchange" end—is a type of encounter known as an investigative contact or "consensual encounter." Simply put, a contact occurs when an officer, lacking grounds to detain a certain suspect, attempts to confirm or dispel his suspicions by asking him questions and maybe seeking consent to search his person or possessions. As the Supreme Court explained:

> Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.[3]

One of the interesting things about contacts is that they usually pose a dilemma for both the suspect and the officer. For the suspect (assuming he's guilty) the last person on earth he wants to chat with is someone who carries handcuffs. But he also knows that his refusal to cooperate, or maybe even a hesitation, might be interpreted as confirmation that he is guilty. So he will ordinarily play along for a while and see how things go, maybe try to outwit the officer or at least make up a story that is not an obvious crock.

Meanwhile, the officer knows that, while his badge might provide some "psychological inducement,"[4] he cannot "throw his weight around."[5] Thus he must employ restraint and resourcefulness, all the while keeping in mind that the encounter will instantly become a de facto detention if it crosses the line between voluntariness and compulsion.[6] So it often happens that both the suspect and the officer are role-playing—and they both know that the other knows it.

For officers, however, acting skills and resourcefulness are not enough. As one court put it, they must also have been "carefully schooled" in certain legal rules—the "do's and don'ts" of police contacts[7]—so as to prevent these encounters from inadvertently becoming de facto detentions, at least until they develop grounds to detain or arrest. What are these "do's and don'ts"? That is the subject of this article.

To set the stage, it should be noted that, whenever an officer interacts with anyone in his official capacity, the law will classify the interaction as an arrest, detention, or contact. Arrests and detentions differ "markedly"[8] from contacts because they constitute Fourth Amendment "seizures" which require some level of suspicion; i.e., probable cause or reasonable suspicion.[9] So, as long as the encounter remains merely a contact, the Fourth Amendment and its various restrictions simply do not apply.

One other thing. Officers will sometimes contact a suspect at his home. Known as "knock and talks," these encounters are subject to the same rules as contacts that occur in public places. But because they are viewed as more of an intrusion, there are some additional restrictions that we will cover in the article "Knock and Talks" that begins on page 15.

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[1] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[2] *Terry v. Ohio* (1968) 392 U.S. 1, 13.
[3] *United States v. Drayton* (2002) 536 U.S. 194, 200. ALSO SEE *People v. Rivera* (2007) 41 Cal.4th 304, 309.
[4] *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133.
[5] See *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425.
[6] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 215.
[7] *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
[8] See *People v. Profit* (1986) 183 Cal.App.3d 849, 866.
[9] See *People v. Hughes* (2002) 27 Cal.4th 287, 327.

The Test: "Free to Terminate"

A police-suspect encounter will be deemed a contact if a reasonable person in the suspect's position would have "felt free to decline the officers' requests or otherwise terminate the encounter."[10] In other words, "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required."[11] Later we will discuss the many circumstances that are relevant in making this determination. But first it will be helpful to discuss some important general principles.

REASONABLE "INNOCENT" PERSON: We begin with a principle that might seem peculiar at first: The fictitious "reasonable person" is "innocent" of the crime under investigation. What this means is that the circumstances are viewed through the eyes of a person who, although not necessarily a pillar of the community, is not currently worried about being arrested.[12] Said the Third Circuit, "[W]hat a guilty [suspect] would feel and how he would react are irrelevant to our analysis because the reasonable person test presupposes an *innocent* person."[13]

The reason this is significant is that a person who was guilty of the crime under investigation would necessarily view the officers' words and actions much differently—much more ominously—than an innocent person, and might therefore erroneously conclude that any perceived restriction on his freedom was an indication that he had been detained. For example, in *In re Kemonte H.* the court ruled that a reasonable innocent person who saw two officers approaching him on the street "would not have felt restrained" but would instead "only conclude that the officers wanted to talk to him."[14]

FREE TO DO WHAT? In the past, the test was whether a reasonable person would have believed he was "free to leave" or "free to walk away" from the officers.[15] This test made sense—and it still does—if the encounter occurs on the streets or other place that the suspect could easily leave if he wanted to. But contacts also occur in places that the suspect has no desire to leave (e.g., his home, his car) and in places he cannot leave easily (e.g., a bus, the shoulder of a freeway, his workplace. For that reason, the Supreme Court in *Florida v. Bostick* simplified things by ruling that freedom to terminate—not freedom to leave—is the correct test because it can be applied "equally to police encounters that take place on trains, planes, and city streets."[16] (In this article, we will use the terms "free to terminate," "free to go" and "free to leave" interchangeably.)

OBJECTIVE VS. SUBJECTIVE CIRCUMSTANCES: In applying the "free to terminate" test the only circumstances that matter are those that the suspect could have seen or heard. Thus, the officer's thoughts, beliefs, suspicions, and plans are irrelevant unless they were somehow communicated to the suspect.[17] As the California Supreme Court explained:

> [A]n officer's beliefs concerning the potential culpability of the individual being questioned are relevant to determining whether a seizure occurred only if those beliefs were somehow manifested to the individual being interviewed—by word or deed—and would have affected how a reasonable person in that position would perceive his or her freedom to leave.[18]

For the same reason, the suspect's subjective belief that he could not freely terminate the encounter is also immaterial.[19] For example, an encounter will not be deemed a seizure merely because the suspect testified that, based on his prior experiences with officers, he thought he would be arrested if he did not comply with all of the officer's requests.[20]

SHOULD VS. MUST: The test is whether a reasonable person would have believed he *must* stay or was otherwise *required* to cooperate with officers. This means a detention will not result merely because a reasonable person would have believed he *should*

[10] *Florida v. Bostick* (1991) 501 U.S. 429, 438. ALSO SEE *Brendlin v. California* (2007) 551 U.S. 249, 256-57.
[11] *Florida v. Bostick* (1991) 501 U.S. 429, 434.
[12] See *United States v. Drayton* (2002) 536 U.S. 194, 202 ["The reasonable person test is objective and presupposes an *innocent* person."].
[13] *U.S. v. Kim* (3d Cir. 1994) 27 F.3d 947, 953.
[14] (1990) 223 Cal.App.3d 1507, 1512.
[15] See, for example, *Michigan v. Chesternut* (1988) 486 U.S. 567, 573.
[16] See *Florida v. Bostick* (1991) 501 U.S. 429, 438.
[17] See *Brendlin v. California* (2007) 551 U.S. 249, 260-61; *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[18] *People v. Zamudio* (2008) 43 Cal.4th 327, 345.
[19] See *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1371; *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.
[20] See *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124.

stay and cooperate, or because the officer's request made him "uncomfortable."[21] As the Court of Appeal noted, "Cooperative citizens may ordinarily feel they should respond when approached by an officer on the street but this does not, by itself, mean that they do not have a right to leave if they so desire."[22]

REFUSAL TO COOPERATE: Because contacts are, by definition, consensual, a suspect may refuse to talk with officers, refuse to ID himself, or otherwise not cooperate.[23] "Implicit in the notion of a consensual encounter," said the Court of Appeal, "is a choice on the part of the citizen not to consent but to decline to listen to the questions at all and go on his way."[24] Or, as the Ninth Circuit put it, "When a citizen expresses his or her desire *not* to cooperate, continued questioning cannot be deemed consensual."[25]

COMPARE MIRANDA: It is important not to confuse the "free to terminate" test with *Miranda's* test for determining whether a suspect was "in custody." While both tests attempt to gauge the coercive pressures that existed during a police encounter, a suspect will be deemed "in custody" for *Miranda* purposes only if he reasonably believed he was effectively under arrest.[26] But, as noted, a contact will become a de facto detention if the suspect reasonably believed that he was not free to terminate the encounter.

IF THE SUSPECT RUNS: There is one exception to the "free to terminate" rule: If the suspect ran from the officers when they attempted to contact him, and if they gave chase, the encounter will not be deemed a seizure until they apprehend him.[27] Thus, if the suspect discarded drugs, weapons or other evidence while running, the evidence will not be suppressed on grounds that the officers lacked grounds to detain or arrest him.

TOTALITY OF CIRCUMSTANCES: In applying the "free to terminate" test, the courts will consider the totality of circumstances.[28] Although there are some actions that will, in and of themselves, result in a seizure (e.g., pulling a gun), in most cases it takes a "collective show of authority."[29] As the California Supreme Court explained, "This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation."[30]

FREE TO TERMINATE VS. STREET REALITY: Before going further, it must be acknowledged that many of the things that officers may say and do without converting a contact into a detention would plainly cause some innocent people to believe they were not free to terminate the encounter. But this does not mean, as some have suggested, that the test is a sham or, at best, naive.[31]

Instead, like many other Fourth Amendment "tests" (such as determining whether there are grounds to arrest or pat search a suspect) it is simply a practical—albeit imperfect—compromise between competing interests. As the Fourth Circuit put it, if a suspect decided to walk off, it "may have created an awkward situation," but "awkwardness alone does not invoke the protections of the Fourth Amendment."[32] Similarly, the Ninth Circuit observed that "we must recognize that there is an element of psychological inducement when a representative of the police initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop."[33]

Having covered the basic principles, we will now examine the various circumstances that are especially relevant in determining whether an encounter with an officer was a contact or a seizure.

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[21] See *U.S. v. McCoy* (4th Cir. 2008) 513 F.3d 405, 411 ["uncomfortable does not equal unconstitutional"].
[22] *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1512.
[23] See *Florida v. Bostick* (1991) 501 U.S. 429, 437; *Illinois v. Wardlow* (2000) 528 U.S. 119, 125; *People v. Franklin* (1987) 192 Cal.App.3d 935.
[24] *People v. Spicer* (1984) 157 Cal.App.3d 213, 220.
[25] *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1253.
[26] See *Howes v. Fields* (2012) __ U.S. __ [132 S.Ct. 1181, 1184; *People v. Lopez* (1985) 163 Cal.App.3d 602, 607; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403, fn.1.
[27] See *California v. Hodari D.* (1991) 499 U.S. 621, 627-28; *Brendlin v. California* (2007) 551 U.S. 249, 254.
[28] See *Florida v. Bostick* (1991) 501 U.S. 429, 439; *Ohio v. Robinette* (1996) 519 U.S. 33, 39.
[29] *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.
[30] *In re Manuel G.* (1997) 16 Cal.4th 805, 821.
[31] See, for example, *People v. Spicer* (1984) 157 Cal.App.3d 213, 218 [the notion that a contacted suspect would ever feel perfectly free to disregard an officer's requests may be "the greatest legal fiction of the late 20th century"].
[32] See *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 302, 311.
[33] *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133. Also see *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.

Engaging the Suspect

Regardless of why the officers wanted to contact the suspect—whether he was acting suspiciously, or he resembled a wanted fugitive, or he was just hanging out in a high-crime area—the manner in which they get him to stop and talk to them is critical. This is because the usual methods of stopping a suspect constitute such an assertion of police authority that they automatically result in a seizure. As the Supreme Court put it, a seizure is likely to occur if an officer's "use of language or tone of voice indicat[ed] that compliance with the officer's request might be compelled."[34]

COMMANDS TO STOP: Commanding a suspect to "stop," "hold it," "come over here," or otherwise make himself immediately available to the officer is such an overt display of police authority that it will automatically render the encounter a de facto detention.[35] "[W]hen an officer 'commands' a citizen to stop," said the Court of Appeal, "this constitutes a detention because the citizen is no longer free to leave."[36]

REQUESTS TO STOP: Unlike a command to stop, a request to do so demonstrates to the suspect that he has a choice and that the officer is not asserting his authority. For example, the courts have ruled that none of the following requests resulted in a detention: "Can I talk to you for a moment?"[37] "Hey, how you doing? You mind if we talk?"[38] "Gentlemen, may I speak with you just a minute?"[39]

The courts are aware, however, that an officer's manner and tone of voice in making such a request may send an implicit message that the suspect has no choice. As the court explained in *People v. Franklin*:

> [I]f the manner in which the request was made constituted a show of authority such that [the suspect] reasonably might believe he had to comply, then the encounter was transformed into a detention[40]

For example, in *U.S. v. Buchanon* a state trooper who had stopped to assist the occupants of a disabled vehicle started thinking they might be transporting drugs, at which point he said, "Gentlemen, why don't you all come over here on the grass a second if you would please." Although the trooper's words were phrased as a request, the court listened to a recording of the incident and concluded that his tone of voice was "one of command."[41]

DEMONSTRATING URGENT INTEREST: A request to stop might be deemed a detention if it was accompanied by one or more circumstances that demonstrated an unusual or urgent interest in the suspect.[42] This occurred in *People v. Jones* when an Oakland police officer engaged three suspects by pulling his patrol car to the wrong side of the road, parking diagonally against traffic, then asking them to stop. Said the court, "A reasonable man does not believe he is free to leave when directed to stop by a police officer who has arrived suddenly and parked his car in such a way as to obstruct traffic."[43]

APPROACH AND ASK QUESTIONS: A detention will not result if an officer merely walks up to a suspect, flashes a badge or otherwise identifies himself and—without saying or doing anything to indicate the suspect was not free to leave—begins to ask him some questions.[44] As the court observed in *People v. Derello*, "[T]he officers were doing exactly what they were lawfully entitled to do, which is to approach and talk if the subject is willing."[45]

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[34] *United States v. Mendenhall* (1980) 446 U.S. 544, 554.
[35] See *People v. Brown* (1990) 216 Cal.App.3d 1442, 1448; *People v. Verin* (1990) 220 Cal.App.3d 551, 555; *People v. Roth* (1990) 219 Cal.App.3d 211; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238; *People v. Foranyic* (1998) 64 Cal.App.4th 186, 188.
[36] *People v. Verin* (1990) 220 Cal.App.3d 551, 556. ALSO SEE *U.S. v. Winsor* (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3.
[37] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[38] *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1282.
[39] *U.S. v. McFarley* (4th Cir. 1993) 991 F.2d 1188, 1191. ALSO SEE *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 128.
[40] (1987) 192 CA3 935, 941. ALSO SEE *In re Manuel G.* (1997) 16 Cal4th 805, 821 [we consider "the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled"]; *U.S. v. Jones* (4th Cir. 2012) 678 F.3d 293, 303 ["A request certainly is not an order [but it may convey] the requisite show of authority"].
[41] (6th Cir. 1995) 72 F.3d 1217, 1220, fn.2.
[42] See *People v. Boyer* (1989) 48 Cal.3d 247, 268 ["The manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."].
[43] (1991) 228 Cal.App.3d 519, 523.
[44] See *Florida v. Bostick* (1991) 501 U.S. 429, 434; *Florida v. Royer* (1983) 460 U.S. 491, 497; *U.S. v. Drayton* (2002) 536 U.S. 194, 204
[45] (1989) 211 Cal.App.3d 414, 427.

RED LIGHTS: Shining a red light at a moving or parked vehicle is essentially a command directed at the driver to stop or stay put and thus necessarily results in a seizure of the driver if he complies.[46] As the Court of Appeal noted, "A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer."[47]

Although a red light constitutes a command to only those people to whom it reasonably appeared to have been directed (usually the driver),[48] when an officer lights up a vehicle *all* passengers are also deemed detained. This is because they know that, for officer-safety purposes, the officer may prevent them from leaving the vehicle and may otherwise restrict their movements while he is dealing with the driver. As the Supreme Court explained in *Brendlin v. California*, "An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely."[49] Such a detention of the passengers is, however, legal so long as the officer had grounds to detain the driver or other occupant.

SPOTLIGHTS, HIGH BEAMS, AMBER LIGHTS: Using a white spotlight or high beams to get the suspect's attention is a relevant but usually insignificant circumstance. (This subject is covered below in the section "Officer-Safety Measures.") Also note that because an amber warning light is a safety measure that is directed at approaching motorists, it has no bearing on whether the suspect was detained.[50]

BLOCKING THE SUSPECT'S PATH: A detention will ordinarily result if officers stop the suspect by blocking his vehicle or path so as to prevent him from leaving.[51] For example, in *People v. Wilkins*[52] a San Jose police officer was driving through the parking lot of a convenience store when he noticed that two men in a parked station wagon had ducked down as if to conceal themselves. Having decided to contact them, the officer "parked diagonally" behind the vehicle, effectively blocking it in. He soon learned that one of the men, Wilkins, was on searchable probation, so he searched him and found drugs. The court, however, ruled that the search was unlawful because "the occupants of the station wagon were seized 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."

A detention will not result, however, merely because officers stopped a patrol car behind a pedestrian or to the side of a vehicle. As the court explained in *People v. Franklin*, "Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention. No attempt was made to block the way."[53] Similarly, the courts have ruled that a seizure does not result when an officer only partially blocked the suspect.[54] For example, in *U.S. v. Basher* the Ninth Circuit ruled that, although an officer testified that he "parked his vehicle nose to nose with Basher's truck," this did not constitute a detention because the officer also testified that "there was room to drive way."[55] And in a forfeiture

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[46] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so."]; *Brower v. County of Inyo* (1989) 489 U.S. 593, 597 ["flashing lights" constituted a "show of authority"]; *People v. Ellis* (1993) 14 Cal.App.4th 1198, 1202, fn.3 [a detention results when "an officer activated the overhead red light of his police car"].

[47] *People v. Bailey* (1985) 176 Cal.App.3d 402, 405-6.

[48] See *Brendlin v. California* (2007) 551 U.S. 249, 254; *Brower v. County of Inyo* (1989) 489 U.S. 593, 596-97; *U.S. v. Al Nasser* (9th Cir. 2009) 555 F.3d 722, 731.

[49] (2007) 551 U.S. 249, 257. Edited. ALSO SEE *Arizona v. Johnson* (2009) 555 U.S. 323, 332; *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 774.

[50] See *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287.

[51] See *U.S. v. Kerr* (9th Cir. 1987) 817 F.2d 1384, 1387; *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 772 ["Here, by blocking in the Nissan, the officers had communicated to a reasonable person occupying the Nissan that he or she was not free to drive away."]; *U.S. v. Packer* (7th Cir. 1994) 15 F.3d 654, 657 ["the officers' vehicles were parked both in front and behind the Defendant's car"]. COMPARE *Michigan v. Chesternut* (1988) 486 U.S. 567, 575 [the officers did not drive their car "in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement"].

[52] (1986) 186 Cal.App.3d 804.

[53] (1987) 192 Cal.App.3d 935, 940. ALSO SEE *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362 [officer stopped "behind defendant's car"]; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505 [officer parked "next to" suspect's car]; *People v. Juarez* (1973) 35 Cal.App.3d 631 [officer pulled patrol car alongside suspect]; *U.S. v. Pajari* (8th Cir. 1983) 715 F.2d 1378, 1380 [the officers "simply parked behind his car"].

[54] See *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362; *People v. Perez* (1989) 211 Cal.App.3d 1492, 1946; *U.S. v. Summers* (9th Cir. 2001) 268 F.3d 683, 687.

[55] (9th Cir. 2011) 629 F.3d 1161, 1167.

case, *U.S. v. $25,000,* the court ruled that two DEA agents had not inadvertently detained a person they spoke with at LAX because, among other things, one of the agents stood "about two feet" in front of the suspect, and the other stood "behind and to the side" of him.[56]

"YOU'RE FREE TO GO": The easiest and most direct method of communicating to a suspect that he is free to go is to say so.[57] Although such a notification is not required,[58] it is recommended, especially in close cases. As the Court of Appeal put it, "[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent."[59]

When giving a "free to go" advisory, however, officers must not place any conditions or restrictions on the suspect's freedom to leave. This is because a suspect is either free to go or he's not; there's no middle ground. For example, despite such an advisory, the courts have ruled that encounters became detentions when an officer told the suspect that he would have to wait for a K9 to arrive,[60] or "wait a minute,"[61] or remain in the patrol car while the officer talked to another person.[62] Similarly, informing a suspect that he is free to go will have little impact if officers conducted themselves in a manner that reasonably indicated he was not; e.g., the officer used a "commanding tone of voice,"[63] the officer kept "leaning over and resting his arms on the driver's door."[64]

LOCATION OF THE ENCOUNTER: The courts frequently mention whether the encounter occurred in a place that was visible to others, the theory being that the presence of potential witnesses might provide the suspect with a greater sense of security.[65] For example, the courts have noted in passing that "many fellow passengers [were] present to witness the officers' conduct,"[66] "the incident occurred on a public street,"[67] "the encounter here occurred in a public place—the parking lot of a [7-Eleven] store—in view of other patrons."[68] Nevertheless, the fact that a contact occurred in a more isolated setting is seldom a significant circumstance. As the Third Circuit observed, "The location in itself does not deprive an individual of his ability to terminate an encounter; he can reject an invitation to talk in a private, as well as a public place."[69]

Officer-Safety Measures

A suspect who is being contacted may, of course, pose a threat to officers. This can present a problem because many basic officer-safety precautions are strongly suggestive of a detention. To help resolve this dilemma, the courts have ruled that some inquiries and requests pertaining to officer safety will not convert the encounter into a seizure.

REMOVE HANDS FROM POCKETS: A detention will not result if officers simply *requested* that the suspect remove his hands from his pockets or keep them in

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[56] (9th Cir. 1988) 853 F.2d 1501, 1503, 1504.
[57] See *Florida v. Royer* (1983) 460 U.S. 491, 504 ["[B]y informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 856 ["You're not under arrest, I'm not detaining you, you're free to leave and not speak to me if you don't want to."]; *Morgan v. Woessner* (9th Cir. 1993) 997 F.2d 1244, 1254 ["Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."].
[58] See *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *People v. Daugherty* (1996) 50 Cal.App.4th 275, 283-84; *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["the officers were not required to inform Mr. Jones that he was free to leave"].
[59] *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
[60] See *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281; *U.S. v. Beck* (8th Cir. 1998) 140 F.3d 1129, 1136-37.
[61] *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537. ALSO SEE *U.S. v. Ramos* (8th Cir. 1994) 42 F.3d 1160, 1162-64 [although the driver's license was returned to him, he was asked to remain in the patrol car while the officer spoke with the passenger].
[62] *U.S. v. Ramos*, (8th Cir. 1994) 42 F.3d 1160, 1162-64.
[63] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.
[64] *U.S. v. McSwain* (10th Cir. 1994) 29 F.3d 558, 563.
[65] See *I.N.S. v. Delgado* (1994) 466 U.S. 210, 217, fn.5 ["other people were in the area"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["the encounter was in a busy, public area of the airport"]; *U.S. v. Sanchez* (10th Cir. 1996) 89 F.3d 715, 718 [the encounter occurred "in an open and well illuminated parking lot"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1172 [the encounter occurred "in the public space outside the service station, in full view of other patrons"]; *U.S. v. Spence* (10th Cir. 2005) 397 F.3d 1280, 1283 ["This court does consider interaction in a nonpublic place and the absence of other members of the public as factors pointing toward a nonconsensual encounter."].
[66] *United States v. Drayton* (2002) 536 U.S. 194, 204.
[67] *People v. Sanchez* (1987) 195 Cal.App.3d 42, 45.
[68] *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.
[69] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 952.

sight.[70] Thus in such a case, *U.S. v. Basher,* the Ninth Circuit explained that "[p]olice officers routinely ask individuals to keep their hands in sight for officer protection," and here the request "does not appear to have been made in a threatening manner."[71] Once again, note the importance of the officers' choice of words and their attitude. As the Court of Appeal explained, "[I]f the manner in which the request was made constituted a show of authority such that appellant reasonably might believe he had to comply, then the encounter was transformed into a detention."[72]

EXIT THE VEHICLE: For officer-safety purposes, officers may also request that the occupants of a parked vehicle step outside. But a detention will likely result if they expressly or impliedly commanded them to do so. Thus, in *People v. Rico* the court said, "While the appellants' initial stop did not constitute a detention, the officer's subsequent ordering the appellants to alight from their vehicle and remain by the patrol car constituted a detention."[73]

SPOTLIGHTS, HIGH BEAMS: A seizure does not result merely because officers utilized a white spotlight or high beams to illuminate the suspect, whether for officer safety or to get the suspect's attention.[74] For example, in *People v. Perez*[75] a San Jose police officer on patrol at night noticed two men in a car parked in an unlit section of a motel parking lot known for drug sales. As the officer pulled up to the car, he turned on his high beams and white spotlight to "get a better look at the occupants." He eventually arrested the driver for being under the influence of PCP, and one of the issues on appeal was whether his use of the lights converted the encounter into a detention. In ruling it did not, the court said, "While use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention."

Similarly, in *People v. Franklin*[76] a Ridgecrest officer on patrol in a high crime area spotlighted Franklin who was walking on the sidewalk. He did this because, although it was a warm night, Franklin was wearing a full-length camouflage jacket. When the officer stopped behind him, Franklin turned and walked toward the officer and repeatedly asked, "What's going on?" Because Franklin was sweating and appeared "real jittery," the officer asked him to remove his hands from his pockets. As he did so, the officer saw blood on his hands, which ultimately led to Franklin's arrest for a murder that had just occurred in a nearby motel room. Again, the court rejected the argument that the spotlighting rendered the encounter a seizure, saying, "the spotlighting of appellant alone fairly can be said not to represent a sufficient show of authority so that appellant did not feel free to leave."

PAT SEARCHES: A nonconsensual pat search is both a search and a seizure and will therefore automatically result in a detention.[77] As the court explained in *In re Frank V.*, "Since Frank was physically restrained by the patdown, it constituted a detention."[78]

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[70] *People v. Ross* (1990) 217 Cal.App.3d 879, 885 [the officer "'asked' but did not demand that appellant remove her hands from her pockets"]; *People v. Epperson* (1986) 187 Cal.App.3d 115, 118, 120 [officer asked the suspect to identify an object in his pocket].

[71] (9th Cir. 2011) 629 F.3d 1161, 1167.

[72] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941. ALSO SEE *U.S. v. Jones* (4th Cir. 2012) 678 F.3d 293, 305 [officers "quickly approached Jones . . . and nearly immediately asked first that he lift his shirt and then that he consent to a pat down"]. **NOTE**: While one California court ruled that such a command did not automatically result in a detention (*In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239), to our knowledge no other court has adopted this reasoning.

[73] (1979) 97 Cal.App.3d 124, 130-31. ALSO SEE *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456.

[74] See *People v. Rico* (1979) 97 Cal.App.3d 124, 130 ["momentarily" spotlighting of a vehicle "was ambiguous"]; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505 ["The fact he shined his spotlight on the vehicle as he parked in the unlit area would not, by itself, lead a reasonable person to conclude he or she was not free to leave."]; *U.S. v. Mabery* (8th Cir. 2012) 686 F.3d 591, 597 ["the act of shining a spotlight on Mabery's vehicle from the street was certainly no more intrusive (and arguably less so) than knocking on the vehicle's window"]. **NOTE**: In *People v. Gary* (2007) 156 Cal.App.4th 1100, 1111 the court melodramatically described the spotlighting of the defendant as "bath[ing] him in light." Still, the dip did not appear to be a significant circumstance.

[75] (1989) 211 Cal.App.3d 1492, 1496.

[76] (1987) 192 Cal.App.3d 935.

[77] See *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456 [pat search is both a search and seizure]; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238 [suspect was patted down and told to sit on the curb]; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538. BUT ALSO SEE *People v. Singer* (1990) 226 Cal.App.3d 23, 46-67 [routine pat searching of unarrested suspect before he voluntarily got into a police car for a ride to the station did not convert the encounter into an arrest].

[78] (1991) 233 Cal.App.3d 1232, 1240, fn.3.

HANDCUFFS, OTHER RESTRAINT: Not surprisingly, a detention will also automatically result if officers handcuffed or otherwise restrained the suspect. This is because such measures are classic indications of a detention or arrest.[79]

DRAWN WEAPON: Even more obviously, a detention will result if an officer drew a handgun or other weapon as a safety precaution.[80] It is even significant that the officer "had his hand on his revolver."[81] However, the fact that an officer was visibly armed has "little weight in the analysis."[82] As the Supreme Court observed, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[83]

NUMBER OF OFFICERS: Finally, the presence of backup officers, the number of them, their proximity to the suspect, and the manner in which they arrived and conducted themselves are all highly relevant.[84] For example, in *U.S. v. Washington* the court ruled the defendant was seized mainly because he was "confronted" by six officers who had gathered "around him."[85] And in *U.S. v. Buchanon* the court ruled the defendant was detained largely because of "[t]he number of officers that arrived [three], the swiftness with which they arrived, and the manner in which they arrived (all with pursuit lights flashing)." These circumstances, said the court, "would cause a reasonable person to feel intimidated or threatened."[86] In contrast, the presence of backup officers has been deemed less significant when they were "posted in the background,"[87] were "out of sight,"[88] were "four to five feet away,"[89] or were "little more than passive observers."[90]

Conducting the Investigation

After engaging the suspect and taking appropriate safety measures, officers will ordinarily begin their investigation by asking questions. As the court observed in *People v. Manis*, "When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning."[91]

In addition to such questioning, there are some other investigative procedures that officers may ordinarily utilize without converting the encounter into a detention. But first, we will discuss—actually, reiterate—the all-important subject of the officers' general attitude.

Respectfulness

Lacking grounds to detain or arrest the suspect, officers must be courteous and demonstrate a respectful attitude. Even if he is a notorious sleaze with a bloated criminal record and a bad attitude, they must be careful not to impose their authority on him, at least until they develop grounds to do so. It

[79] See *People v. Zamudio* (2008) 43 Cal.4th 327, 342 ["no one was handcuffed or patted down"]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240, fn.3; *People v. Gallant* (1990) 225 Cal.App.3d 200, 207; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 128 ["[he] was never handcuffed" and he "was left in the unlocked backseat of the police car"].

[80] See *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the display of a weapon by an officer" is a circumstance "that might indicate a seizure"]; *People v. McKelvy* (1972) 23 Cal.App.3d 1027, 1034 [one of the officers carried a shotgun]; *People v. Gallant* (1990) 225 Cal.App.3d 200, 204 ["One of the police officers answered defendant's knock at the door by drawing his gun, opening the door, and confronting defendant."].

[81] See *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.

[82] See *People v. Zamudio* (2008) 43 Cal.4th 327, 346; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.

[83] *United States v. Drayton* (2002) 536 U.S. 194, 205.

[84] See *United States v. Mendenhall* (1980) 446 U.S. 544, 554 ["the threatening presence of several officers" is relevant]; *In re Manuel G.* (1997) 16 Cal.4th 805, 821; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538 ["Four uniformed officers approached the men, a number that quickly increased to six uniformed officers, and then seven."]; *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670.

[85] (9th Cir. 2004) 387 F.3d 1060, 1068.

[86] (6th Cir. 1995) 72 F.3d 1217, 1224.

[87] *U.S. v. Kim* (9th Cir. 1994) 25 F.3d 1426, 1431, fn.3. ALSO SEE *People v. Profit* (1986) 183 Cal.App.3d 849, 877 ["Here initially there were three defendants and only two officers. Only later did the third officer even the numbers. This does not constitute a show of force"]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["Although there were four officers present, most of the time only two talked to Defendant, while two talked to Twilligear"]; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227 ["while four officers were on the premises, only one . . . approached Mr. Thompson"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["the officers stood several feet away from Yusuff"].

[88] *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 954.

[89] U.S. v. $25,000 (9th Cir. 1988) 853 F.2d 1501, 1504-1505.

[90] *U.S. v. White* (8th Cir. 1996) 81 F.3d 774, 779; *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["while there were three officers on the scene . . . the officers' presence was nonthreatening"].

[91] (1969) 268 CA2 653, 665.

doesn't matter whether they choose to adopt a friendly tone or one that is more businesslike. What counts is that they create—and maintain—a noncoercive environment. As the Court of Appeal explained, "It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not."[92]

For example, in *U.S. v. Jones*[93] an encounter quickly became a detention when, upon approaching the suspect, the officers immediately requested that he lift his shirt and consent to a search. Said the court, "A request certainly is not an order, but a request—two back-to-back requests in this case—that conveys the requisite show of authority may be enough to make a reasonable person feel that he would not be free to leave." And in *Orhorhaghe v. I.N.S*. the Ninth Circuit ruled that an encounter was converted into a de facto detention mainly because the officer "acted in an officious and authoritative manner that indicated that [the suspect] was not free to decline his requests."[94]

In contrast, in *Ford v. Superior Court* the court ruled that, "[a]lthough petitioner was never told in so many words that he was not under arrest or that he was free to leave, that advice was implicit in the sergeant's apology for the time it was taking to interview other witnesses."[95] Similarly, the courts have noted the following in ruling that a contact had not degenerated into a de facto detention:

- The officer "spoke in a polite, conversational tone."[96]
- The officer "seemed to act cordially."[97]
- His tone "was calm and casual."[98]
- The conversation was "nonaccusatory."[99]
- "[A]t no time did [the officers] raise their voices."[100]
- Their "tone of voice was inquisitive rather than coercive."[101]

To say that officers must be respectful does not mean they may not demonstrate some degree of suspicion. After all, most people are aware that officers do not go around questioning people at random in hopes that they had just committed a crime. Thus, in *People v. Lopez* the court noted that, while the officer's questions "did indicate [he] suspected defendant of something," and that his questions were "not the stuff of usual conversation among adult strangers," his tone was apparently "no different from those presumably gentlemanly qualities he displayed in the witness box."[102]

Officers may also demonstrate respectfulness if they take a moment to explain to the suspect why

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[92] *People v. Franklin* (1987) 192 Cal.App.3d 935, 941. ALSO SEE *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85 ["It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary."]; *People v. Lopez* (1989) 212 Cal.App.3d 289, 293, fn.2 ["both form and content are important."]; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239 ["Both the nature and the manner must be examined."]; *U.S. v. Ledesma* (10th Cir. 2006) 447 F.3d 1307, 1314 [relevant circumstance is the "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory" as opposed to "an officer's pleasant manner and tone of voice that is not insisting"].

[93] (4th Cir. 2012) 678 F.3d 293, 303.

[94] (9th Cir. 1994) 38 F.3d 488, 495.

[95] (2001) 91 Cal.App.4th 112, 128.

[96] *People v. Bennett* (1998) 68 Cal.App.4th 396, 402. ALSO SEE *United States v. Drayton* (2002) 536 U.S. 194, 204 [the officer spoke "in a polite, quiet voice"]; *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 953 [the officer's tone was "polite and conversational."]; *U.S. v. Flowers* (4th Cir. 1990) 912 F.2d 707, 711 ["they spoke to him in a casual tone of voice"]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1254 [the officers "acted courteously"]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110 [the officer "never spoke to Cormier in an authoritative tone"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1172 [the officer "was polite and the conversation was friendly in tone"]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986, 986 ["a normal, polite tone of voice"]; *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425 ["conversational tones"]; *U.S. v. Orman* (9th Cir. 2007) 486 F.3d 1170, 1175 [he "politely asked him if he could have a word with him"].

[97] *People v. Singer* (1990) 226 Cal.App.3d 23, 48.

[98] *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314.

[99] *People v. Hughes* (2002) 27 Cal.4th 287, 328.

[100] *U.S. v. $25,000* (9th Cir. 1988) 853 F.2d 1501, 1505.

[101] *U.S. v. Dockter* (8th Cir. 1995) 58 F.3d 1284, 1287. ALSO SEE *People v. Epperson* (1986) 187 Cal.App.3d 115, 120 ["There was nothing in the officer's attitude or the nature of the inquiry which would indicate to a reasonable person that compliance with the officer's request might be compelled or that defendant was not free to leave."]; *People v. Sanchez* (1987) 195 Cal.App.3d 42, 47 ["The record lacks any indication their dialogue was coercive [there was] nothing apparent in [the officer's] attitude or the nature of his inquiry to reflect compulsory compliance"].

[102] (1989) 212 Cal.App.3d 289, 293.

they wanted to speak with him, rather than begin by abruptly asking questions or making requests. For example, in rejecting an argument that a DEA agent's initial encounter with the defendant at an airport terminal had become a de facto detention, the court in *U.S v. Gray* noted that the agent "informed Gray of the DEA's purpose and function."[103] Similarly, in *U.S. v. Crapser* the Ninth Circuit pointed out that the officer began by "explain[ing] to [the suspect] why the police had come to her motel room."[104]

In contrast, in *People v. Spicer*[105] officers pulled over a car driven by Mr. Spicer because it appeared that he was under the influence of something. While one officer administered the FSTs to Mr. Spicer, the other asked his passenger, Ms. Spicer, to produce her driver's license. Although he had good reason for wanting to see the license (to make sure he could release the car to her) he did not explain this. As Ms. Spicer was looking for her license in her purse, the officer saw a gun and arrested her. But the court ruled the gun was seized illegally mainly because the officer's blunt attitude had effectively converted the encounter into a de facto detention. Said the court, "Had the officer made his purpose known to Ms. Spicer, it would have substantially lessened the probability his conduct could reasonably have appeared to her to be coercive."

Requesting ID

Before attempting to confirm or dispel their suspicions, officers will almost always ask the suspect to identify himself, preferably with a driver's license or other official document. Like a request to stop, a request for ID will not convert an encounter into a seizure unless it was reasonably interpreted as a command.[106] As the Supreme Court put it, "[N]o seizure occurs when officers ask . . . to examine the individual's identification—so long as the officers do not convey a message that compliance with their requests is required."[107] Similarly, the Court of Appeal explained:

> It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary.[108]

Even if the suspect freely handed over his license or other identification, a seizure might result if the officer retained it after looking it over. This is mainly because, having examined the suspect's ID, the officer's act of retaining it could reasonably be interpreted as an indication that he was not free to leave.[109] As the Ninth Circuit put it, "When a law enforcement official retains control of a person's identification papers, such as vehicle registration documents or a driver's license, longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart."[110] For example, the courts have ruled that a detention resulted when an officer did the following without the suspect's consent:

- took his ID to a patrol car to run a warrant check[111]
- kept the ID while conducting a consent search[112]
- pinned the ID to his uniform.[113]

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[103] (4th Cir. 1989) 883 F.2d 320, 323.
[104] (9th Cir. 2007) 472 F.3d 1141, 1144. ALSO SEE *United States v. Drayton* (2002) 536 U.S. 194, 198.
[105] (1984) 157 Cal.App.3d 213. ALSO SEE *People v. Garry* (2007) 156 Cal.App.4th 1100, 1111-12 ["rather than engage in a conversation, [the officer] immediately and pointedly inquired about defendant's legal status as he quickly approached"].
[106] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216; *Florida v. Royer* (1983) 460 U.S. 491, 501; *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *United States v. Drayton* (2002) 536 U.S. 194, 201; *People v. Leath* (2013) 217 Cal.App.4th 344, 353.
[107] *Florida v. Bostick* (1991) 501 U.S. 429, 437.
[108] *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85.
[109] See *Florida v. Royer* (1983) 460 U.S. 491, 503 ["Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter . . . As a practical matter, Royer could not leave the airport without them."]; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538 ["We have noted that though not dispositive, the retention of a citizen's identification or other personal property or effects is highly *material* under the totality of the circumstances analysis."]. COMPARE *People v. Profit* (1986) 183 Cal.App.3d 849, 879 [there was "no retention of Profit's briefcase"].
[110] *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
[111] *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1315. BUT ALSO SEE *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, 124 ["[The officer] necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher."]; *U.S. v. Weaver* (4th Cir. 2002) 282 F.3d 303, 309 ["Weaver was in no way impeded physically by holding his identification from him"].
[112] *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
[113] *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.

Asking Questions

Although officers may pose investigative questions to the suspect,[114] questioning can be problematic if, as often happens, the suspect's answers were vague, nonresponsive, inconsistent, or nonsensical as this will necessarily prolong the encounter and may cause the officers to become frustrated which, in turn, may cause them to act in an aggressive or authoritative manner.[115] As the Tenth Circuit noted, "Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one."[116] Although the line between permissible probing and impermissible pressure can be difficult to detect, the following general principles should be helpful.

INVESTIGATIVE VS. ACCUSATORY QUESTIONING: There is a big difference between investigative and accusatory questions. As the name suggests, accusatory questions are those that are phrased in a manner that communicates to the suspect that the officers believe he is guilty of something, and that their objective is merely to confirm their suspicion. While this type of questioning is appropriate in a police interview room, it is strictly prohibited during contacts. As the Court of Appeal observed:

> [Q]uestions of a sufficiently accusatory nature may by themselves be cause to view an encounter as a nonconsensual detention. . . . [T]he degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention.[117]

For example, in *Wilson v. Superior Court*[118] LAPD narcotics officers at LAX received a tip that comedian Flip Wilson would be arriving on a flight from Florida and that he would be transporting drugs. When one of the officers spotted Wilson in the terminal, he approached him and, according to the officer, "I advised Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs." Wilson then consented to a search of his luggage in which the officers found cocaine.

In a unanimous opinion, the California Supreme Court suppressed the drugs because the encounter had become an illegal de facto detention when Wilson gave his consent. Said the court, "[A]n ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."

In contrast to accusatory questioning, investigative inquiries convey the message that officers are merely seeking information or, at most, are exploring the possibility the suspect might have committed a crime. In other words, while such questioning is "potentially incriminating,"[119] it is also potentially exonerating. For example, in *U.S. v. Kim*[120] a DEA agent approached two suspected drug dealers on an Amtrak train and greeted them with, "You guys don't have drugs in your luggage today, do you?" One of the men, Kim, consented to a search of his

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[114] See *Florida v. Bostick* (1991) 501 U.S. 429, 434; *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216; *Florida v. Royer* (1983) 460 U.S. 491, 497.

[115] See *U.S. v. Beck* (1998) 140 F.3d 1129, 1135 [questioning can result in a seizure if "the questioning is so intimidating, threatening or coercive that a reasonable person would not have believed himself free to leave"]. COMPARE *United States v. Drayton* (2002) 536 U.S. 194, 203 ["The officer gave the passengers no reason to believe that they were required to answer the officers' questions."].

[116] *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.

[117] *People v. Lopez* (1989) 212 Cal.App.3d 289, 293. ALSO SEE *Florida v. Royer* (1983) 460 U.S. 491, 502 ["[The officers] informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs."]; *People v. Boyer* (1989) 48 Cal.3d 247, 268 [defendant "was subjected to more than an hour of directly accusatory questioning [at the police station], in which [an officer] repeatedly told him—falsely—that the police knew he was the killer."]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1069 [suspect detained when officers told him he was "arrestable"]; *U.S. v. Gonzales* (5th Cir. 1996) 79 F3 413, 420 ["There is one troubling element: the officers informed Gonzales that the car he was driving was suspected of being used to transport drugs. This may have pushed the encounter, which was initially consensual, to being a [detention]."].

[118] (1983) 34 Cal.3d 777.

[119] See *Florida v. Bostick* (1991) 501 U.S. 429, 439.

[120] (3rd Cir. 1994) 27 F.3d 947, 953. ALSO SEE *People v. Daugherty* (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not directly accuse Daugherty of transporting narcotics, which may have been sufficient to convert the encounter into a detention."]; *People v. Profit* (1986) 183 Cal.App.3d 849, 865 ["[The officer] made no statement that he had information that the defendants were carrying drugs."]; *People v. Hughes* (2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory"]; *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174 [although the questions were "of an incriminating nature," they were "not worded or delivered in such a manner as to indicate that compliance with any officer directives (or even inquiries) was required"]; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1228 ["Most importantly, under the precedents, [the officer] did not use an antagonistic tone in asking questions."].

luggage in which the agent found methamphetamine. In rejecting Kim's argument that the agent's question rendered the encounter a seizure, the court said "[t]he tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry."

PERSISTENCE: If the suspect agreed to answer the officers' questions (and, again, assuming he was guilty), officers will often be unable to obtain the truth unless they are persistent. But persistence, in and of itself, will not render an encounter a detention. For example, in *United States v. Sullivan*[121] a U.S. Parks police officer contacted Sullivan and asked him "if he had anything illegal in [his] vehicle." Sullivan hesitated, then asked "illegal"? The officer repeated the question, at which point Sullivan "turned his head forward and looked straight ahead." The officer persisted, telling Sullivan that "if he had anything illegal in the vehicle, it's better to tell me now." Still no response. Eventually, Sullivan admitted "I have a gun" and, as a result, he was convicted of being a felon in possession of a firearm. In rejecting Sullivan's argument that the officer's persistent questioning had converted the contact into a seizure, the court said, "[T]he repetition of questions, interspersed with coaxing, was prompted solely because Sullivan had not responded. They encouraged an answer, but did not demand one."

On the other hand, a seizure will certainly result if officers persisted in asking questions after the suspect made it clear that he wanted to discontinue the interview. For example, in *Morgan v. Woessner* the court ruled that baseball star Joe Morgan was unlawfully seized at Los Angeles International Airport when an LAPD narcotics officer continued to question him after Morgan had "indicated in no uncertain terms that he did not want to be bothered." Said the court, "We find that Morgan's unequivocal expression of his desire to be left alone demonstrates that the exchange between Morgan and [the officer] was not consensual."[122]

LENGTHY QUESTIONING: Because contacts are usually brief, the length of the encounter is seldom a significant issue.[123] But lengthy questioning will not ordinarily convert a contact into a seizure so long as the suspect continued to express—explicitly or implicitly—his willingness to assist officers in their investigation. An example is found in an Oakland murder case, *Ford v. Superior Court.*[124] Here, a contact with a "witness" to a murder (who was actually the murderer) began at the crime scene and ended with his arrest twelve hours later in a police interview room. Despite the length, the court ruled the encounter had remained consensual throughout because the suspect "deliberately chose a stance of eager cooperation in the hopes of persuading the police of his innocence," and the officers merely played along until they had probable cause.

***MIRANDA* WARNINGS**: If an encounter is merely a contact, officers should never *Mirandize* the suspect before asking questions.[125] This is mainly because *Miranda* warnings are commonly associated with arrests and, furthermore, they are likely to be interpreted as an indication that the officers have evidence of the suspect's guilt.

"YOU'RE FREE TO DECLINE": Just as officers are not required to inform suspects that they are free to leave (discussed earlier), they need not inform them that they can refuse to answer their questions.[126] Still, it is a highly relevant circumstance.[127]

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[121] (4th Cir. 1998) 138 F.3d 126, 133-34.

[122] (9th Cir. 1993) 997 F.2d 1244, 1253. ALSO SEE *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216-17 [a seizure results "if the person refuses to answer and the police [persist]"]; *U.S. v. Wilson* (4th Cir. 1991) 953 F.2d 116, 122 ["but the persistence of [the officers] would clearly convey to a reasonable person that he was not free to leave the questioning by the police"].

[123] See *I.N.S. v. Delgado* (1984) 466 U.S. 210, 219 ["The questioning by INS agents seems to have been nothing more than a brief encounter.]; *People v. Hughes* (2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory, routine, and brief"]; *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1283 ["The whole incident took around 10 minutes from the initial contact to Bouser's arrest."]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["The entire event . . . lasted about five minutes."]; *U.S. v. McFarley* (4th Cir. 1993) 991 F.2d 1188, 1192 [20 minutes was not too long under the circumstances]; *U.S. v. Cruz-Mendez* (10th Cir. 2006) 467 F.3d 1260, 1267 [30 minutes was not unreasonable under the circumstances].

[124] (2001) 91 Cal.App.4th 112, 128. ALSO SEE *People v. Hughes* (2002) 27 Cal.4th 287, 328-29; *Green v. Superior Court* (1985) 40 Cal.3d 126.

[125] See *People v. Boyer* (1989) 48 Cal.3d 247, 268.

[126] See *United States v. Mendenhall* (1980) 446 U.S. 544, 555.

[127] See *Florida v. Bostick* (1991) 501 U.S. 429, 436; *United States v. Mendenhall* (1980) 446 U.S. 544, 559. Also see *United States v. Washington* (1977) 431 U.S. 181, 188 ["Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."

Warrant checks

Running a warrant check without the suspect's consent will not automatically result in a detention.[128] But it can be problematic, especially if the officer walks off with his ID to run the warrant check on his radio or in-car computer. For example, in *U.S. v. Jones* the court said that "[w]ithin thirty seconds" after initiating a contact with Jones, the officer asked for some identification. At that point, "Mr. Jones handed his identification to [the officer], who relayed it to [another officer who] then walked back to his patrol vehicle to run Mr. Jones's license." "Mr. Jones was seized," said the court, "once the officers took [his] license and proceeded to conduct a records check based upon it."[129]

In contrast, the court in *U.S. v. Analla* ruled that a detention did not result because, instead of taking the suspect's license to his patrol car, the officer "stood beside the car, near where Analla was standing."[130] Note that this issue can usually be avoided if officers obtain the suspect's consent to temporarily carry his ID a short distance for the purpose of running a warrant check.[131]

Seeking consent to search

Officers who have contacted a suspect will frequently seek his consent to search his person, possessions, or vehicle. Like any other request, this will not convert the encounter into a seizure if the officers neither pressured the suspect nor asserted their authority.[132] But if the suspect declines the request, they must, of course, not persist or otherwise encourage him to change his mind.

For example, in *United States v. Wilson*[133] a DEA agent approached Albert Wilson at the National Airport terminal in Washington, D.C. and asked to speak with him. At first, Wilson was cooperative. But when the agent asked if he would consent to a search of his coat he angrily refused and began walking away. Undeterred, the agent trailed behind him, repeatedly asking Wilson why he would not consent to a search. As they stepped outside the terminal, Wilson bolted but was quickly apprehended. The agents then searched his coat and found cocaine. On appeal, however, the court ordered it suppressed because the agent's "persistence" had converted the encounter into a seizure.

It should also be noted that, although officers are not required to notify the suspect that he has a right to refuse consent,[134] such a warning is a relevant circumstance.[135]

Seeking consent to transport

In some cases, officers will seek the suspect's consent to accompany them to some location such as a police station (e.g., for questioning, fingerprinting, a lineup) or to the crime scene (e.g., for a showup). Again, such a request will not convert the encounter into a detention so long as officers made it clear to the suspect that he was free to decline.[136]

For example, in *In re Gilbert R.*[137] LAPD detectives went to Gilbert's home to see if he would voluntarily accompany them to the police station to answer some questions about an ADW. Both Gilbert and his mother consented. At the station, Gilbert confessed but later argued that his confession should have been suppressed because the officers had effectively arrested him by driving him to the station. In rejecting the argument, the court said that a reasonable person in Gilbert's position "would have believed that he or she did not have to accompany the detectives."

In contrast, in *People v. Boyer*[138] several Fullerton police officers went to Boyer's home to question him about a murder. Two of them covered the back yard

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[128] See *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1286; *People v. Terrell* (1999) 69 Cal.App.4th 1246.
[129] (10th Cir. 2012) 701 F.3d 1300, 1306, 1315.
[130] (4th Cir. 1992) 975 F.2d 119, 124.
[131] See *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
[132] See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548; *Florida v. Royer* (1983) 460 U.S. 491, 497.
[133] (4th Cir. 1991) 953 F.2d 116.
[134] See *United States v. Drayton* (2002) 536 U.S. 194, 206; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40.
[135] See *United States v. Mendenhall* (1980) 446 U.S. 544, 559; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 249.
[136] See *United States v. Mendenhall* (1980) 446 U.S. 544, 557-58; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125; *People v. Zamudio* (2008) 43 Cal.4th 327, 344-45; *People v. Hughes* (2002) 27 Cal.4th 287, 329.
[137] (1994) 25 Cal.App.4th 1121.
[138] (1989) 48 Cal.3d 247.

while the others went to the front door and knocked. Boyer responded by running out the back door, where the officers ordered him to "freeze." He complied and later agreed to be interviewed at the police station where he made an incriminating statement. But the court suppressed it on grounds the consent was involuntary. Said the court, "[The] manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."

One other thing. Before transporting a suspect to a police station or anywhere else, officers may be required by departmental policy or officer-safety considerations to pat search him even though he is not being detained. As discussed earlier, this will not ordinarily convert the encounter into a detention provided that the suspect freely consented to the intrusion.

Converting Detentions Into Contacts

In the course of detaining a suspect, officers may conclude that, although they still have their suspicions, they no longer have grounds to hold him. At that point, the detention must, of course, be terminated. Nevertheless, they may be able to continue to question him if they can effectively convert the detention into a contact. As the Tenth Circuit said, "[I]f the encounter between the officer and the [suspect] ceases to be a detention but becomes consensual, and the [suspect] voluntarily consents to additional questioning, no further detention occurs."[139]

What must officers do to convert a detention into a contact? The cases indicate there are three requirements:

(1) **Return documents**: If officers obtained the suspect's ID or any other property from him, they must return it.[140] Again quoting the Tenth Circuit, "[W]e have consistently concluded that an officer must return a driver's documentation before a detention can end."[141] Also see "Investigative requests" (Requests for ID), above.

(2) **"You're free to go"**: While not technically a requirement,[142] officers should inform the suspect that he is now free to leave.[143] As the court explained in *Morgan v. Woessner*, "Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."[144]

(3) **No contrary circumstances**: There must not have been other circumstances that, despite the "free to go" advisory, would have reasonably indicated to the suspect that he was, in fact, not free to leave. For example, in *U.S. v. Beck*[145] the court ruled that a suspect was detained because, although he was told he was free to go, he was also told he could not leave unless he consented to a search or waited for a canine unit to arrive. Similarly, in *U.S. v. Ramos*[146] the court ruled that an attempt to convert a traffic stop into a contact had failed mainly because the driver and passenger remained separated.

In addition to these three requirements, it would be significant that the officers explained to the suspect *why* they wanted to continue speaking with him. As discussed earlier in the section entitled "Respectfulness," a brief explanation of this sort is significant because such openness is more consistent with a contact than a detention, and it tends to communicate the idea that the officers are seeking the suspect's voluntary cooperation.[147] POV

[139] *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
[140] See *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537, 540 ["no reasonable person would feel free to leave without such documentation"]; *U.S. v. White* (8th Cir. 1996) 81 F.3d 775, 779.
[141] *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.
[142] See *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *U.S. v. Sullivan* (4th Cir. 1998) 138 F.3d 126, 133; *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
[143] See *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.
[144] (9th Cir. 1993) 997 F.2d 1244, 1254.
[145] (8th Cir. 1998) 140 F.3d 1129, 1136-37. ALSO SEE *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281.
[146] (8th Cir. 1994) 42 F.3d 1160, 1162-64.
[147] See *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798 [the officer "justified his desire to ask Thompson more questions by explaining that part of his job was to prevent the transport of illegal guns and drugs"].

"Knock and Talks"

Consensual encounters may also take place at the doorway of a home.[1]

While most consensual encounters or "contacts" occur on the streets as a spontaneous response to a situation or circumstance, they may also take place at the suspect's home. Commonly known as "knock and talks," these types of contacts are usually employed when officers have reason to believe that a resident is involved in some sort of criminal activity but they lack any other effective means of confirming or dispelling their suspicion. So they visit him at home for the purpose of asking some questions and oftentimes seeking consent to search the premises.[2] As the Supreme Court observed, "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."[3]

The main thing to remember about knock and talks is that, like all contacts, they must be voluntary, meaning that officers can neither expressly nor impliedly assert their authority. As the Fifth Circuit put it:

> The purpose of a "knock and talk" is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose of a "knock and talk" approach is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupants' consent to search.[4]

Although knock and talks have been described as a "reasonable investigative tool"[5] and a measure that is "firmly rooted" in Fourth Amendment jurisprudence,[6] the courts are somewhat leery of them because they take place inside a residence—the most private of all structures protected by the Fourth Amendment. "[W]hen it comes to the Fourth Amendment," said the Supreme Court, "the home is first among equals."[7]

Just as important, the courts are concerned that knock and talks may take on the character of the "dreaded knock on the door" that is prevalent in totaliltarian and police states. Addressing this subject, the Sixth Circuit observed that the "right of officers to thrust themselves into a home is a grave concern, not only to the individual but to society which chooses to dwell in reasonable security and freedom from surveillance."[8]

Thus, officers who conduct knock and talks must not only understand the rules that cover all types of contacts (which we covered in the lead article), they must also be aware of the additional restrictions that are unique to these sensitive operations.

Making Contact

The manner in which officers make contact with the suspect at the front door is often crucial as it may reasonably be interpreted to mean that he was being detained; i.e., that he "was not at liberty to ignore the police presence and go about his business."[9] Accordingly, the courts are especially alert to the following:

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[1] *People v. Rivera* (2007) 41 Cal.4th 304, 309.
[2] See *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1860].
[3] *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227.
[4] *U.S. v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355.
[5] *U.S. v. Jones* (5th Cir. 2001) 239 F.3d 716, 720. ALSO SEE *People v. Michael* (1955) 45 Cal.2d 751, 754 ["it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes"]; *U.S. v. Lucas* (6th Cir. 2011) 640 F.3d 168, 174 [knock and talks are a "legitimate investigative technique"]; *U.S. v. Roberts* (5th Cir. 2010) 612 F.3d 306, 310 ["knock and talk" is "an accepted investigatory tactic"].
[6] *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146. ALSO SEE *People v. Jenkins* (2004) 119 Cal.App.4th 368, 372 ["However offensive the [trial] court may have found the 'knock and talk' procedure, we can find no basis in law to support its conclusion that the practice is unconstitutional."].
[7] *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1414].
[8] *U.S. v. Morgan* (6th Cir. 1984) 743 F.2d 1158, 1161.
[9] See *Florida v. Bostick* (1991) 501 U.S. 429, 436.

POLITE VS. PERSISTENT KNOCKING: When officers knock on the door or ring the doorbell they must do so in a manner consistent with an ordinary visitor—not as someone who is asserting a legal right to speak with the occupants. This means that continuous or repeated knocking may be deemed a command to open the door which will render the resulting encounter a seizure.[10] Thus, in *U.S. v. Reeves* (admittedly an extreme example) the court ruled that a "reasonable person faced with several police officers consistently knocking and yelling at their door for twenty minutes in the early morning hours would not feel free to ignore the officers' implicit command to open the door."[11]

Similarly, in *U.S. v. Jerez*[12] sheriff's deputies in Wisconsin decided to conduct a knock and talk at a motel room occupied by Jerez, a suspected drug trafficker. But no one answered the door, so they "took turns knocking" for about five minutes. Still no response. So while one deputy began knocking loudly on the window, another "shone his flashlight through the small opening in the window's drapes, illuminating Mr. Jerez as he lay in the bed." Eventually, Jerez opened the door and consented to a search which netted cocaine. But the court ruled the entry was not consensual because "[t]his escalation of the encounter renders totally without foundation any characterization that the prolonged confrontation was a consensual encounter."

Note, however, that the Supreme Court has ruled that neither loud knocking nor a loud announcement will *automatically* convert the encounter into a seizure. This is mainly because, said the Court, a "forceful knock may be necessary to alert the occupants that someone is at the door" and, unless the officers make a loud announcement, the occupants "may not know who is at their doorstep."[13]

COMMAND TO OPEN DOOR: An encounter at the doorway is plainly not consensual if officers *ordered* the residents to open the door. As the California Supreme Court put it, "The right to seek interviews with suspects at their homes does not include the right to demand that a suspect open his door."[14] Similarly, the Fifth Circuit observed, "When officers demand entry into a home without a warrant, they have gone beyond the reasonable 'knock and talk' strategy of investigation."[15]

For example, in ruling that a knock and talk was involuntary, the Ninth Circuit said in *U.S. v. Winsor*, "[T]he police knocked on the door, identified themselves as police, and demanded that the occupants open the door, and [Winsor] opened the door on command. On these facts, there can be no consent as a matter of law."[16]

TIME OF ARRIVAL: The time of the officers' arrival is significant if it occurred late at night, especially if the lights were out and it appeared the residents were asleep. That is because of the "special vulnerability" of people "awakened in the night by a police intrusion at their dwelling place,"[17] and the "peculiar abrasiveness" of such intrusions.[18] For this reason, the courts "have recognized that nocturnal

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[10] See *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 [the officers "knocked on the door longer and more vigorously than would an ordinary member of the public. The knocking was loud enough to awaken a guest in a nearby room and to cause another to open her door."]. COMPARE *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["a single, polite knock on the door"]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109 [the officer "knocked on the door for only a short period spanning seconds"]; *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 951 [the encounter "began with a polite knock on the door"].

[11] (10th Cir. 2008) 524 F.3d 1161, 1169.

[12] (7th Cir. 1997) 108 F.3d 684, 690.

[13] *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1861].

[14] *People v. Shelton* (1964) 60 Cal.2d 740, 746. ALSO SEE *U.S. v. Reeves* (10th Cir. 2008) 524 F.3d 1161, 1167 ["Opening the door to one's home is not voluntary if ordered to do so under the color of authority."]; *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 ["Open up"]; *U.S. v. Edmondson* (11th Cir. 1986) 791 F.2d 1512, 1515, ["FBI. Open up."].

[15] *U.S. v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355-56.

[16] (9th Cir. 1988) 846 F.2d 1569, 1573, fn.3.

[17] *U.S. v. Jerez* (7th Cir. 1997) 108 F.3d 684, 690. COMPARE *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425 ["The time was not unusual (about 5:30 P.M.)]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["The encounter occurred in the middle of the day"]; *U.S. v. Abdenbi* (10th Cir. 2004) 361 F.3d 1282, 1288 [officers arrived at about 6:15 A.M. "because they hoped to speak to [the suspect] before he left for work."].

[18] *U.S. v. Ravich* (2nd Cir. 1970) 421 F.2d 1196, 1202. BUT ALSO SEE *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1026 [although the time was 2:15 A.M., "the lights were on in the room"].

encounters with the police in a residence (or a hotel or motel room) should be examined with the greatest of caution."[19] For example, in *U.S. v. Jerez* (discussed earlier) another reason the knock and talk was deemed unlawful was that the officers had arrived at about 11 P.M. and it appeared the residents had gone to bed; i.e., "the room was quiet; no sounds were heard coming from the room."[20]

LOITERING ON THE PROPERTY: Like any other visitor, officers may walk to the front door via normal access routes, then knock or otherwise announce their presence. But if no one answers the door within a reasonable time, they cannot loiter on the property or explore the grounds because such conduct is outside the scope of any implied consent. As the Supreme Court explained, officers are impliedly authorized "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[21]

NUMBER OF OFFICERS: There is no rule that a maximum of two officers may attempt a knock and talk. But it's a good rule of thumb. That's because the more officers at the front door, the more the situation might appear to be a display of police authority.[22] As the California Supreme Court observed in *People v. Michael*, "[T]he appearance of four officers at the door may be a disturbing experience."[23] For example, in *U.S. v. Gomez-Moreno* the court ruled that officers did not engage in a "proper" knock and talk but instead "created a show of force when ten to twelve armed officers met at the park, drove to the residence, and formed two groups—one for each of the two houses" with a helicopter overhead."[24]

To avoid such problems but still address officer-safety concerns, some officers may stay hidden. But if a resident happens to see them, the coercion level may increase substantially.[25]

The Greeting

The manner in which officers greeted the suspect or other person who answered the door is crucial because a cordial and respectful attitude may communicate to him that the officers are merely seeking his cooperation. In contrast, an overbearing or officious attitude will likely be interpreted to mean the officers have a legal right to obtain answers to their questions or conduct a search. For example, in *People v. Boyer* the court said that "[t]he manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' . . . suggested that they did not intend to take 'no' for an answer."[26]

Conducting the Investigation

For a discussion of how officers must conduct themselves while questioning the suspect or seeking his consent to search, see "Conducting the Investigation" which begins on page eight in the lead article.

Warrantless Entry to Seize Evidence

There are two situations in which officers who are conducting a knock and talk may enter the premises without a warrant for the limited purpose of seizing or securing evidence.

EVIDENCE IN PLAIN VIEW FROM OPEN DOOR: While speaking with a resident at the front door, officers will sometimes see drugs or other evidence in plain view. Can they enter and seize it without a warrant? The answer is yes if both of the following circumstances existed: (1) they had probable cause to believe the item was evidence of a crime; and (2) an occupant had opened the door voluntarily, not in response to a show of authority. In other words, the officers must not have discovered the evidence—i.e., they must not have obtained "visual access" to it—by means of coercion. Said the Fourth Circuit:

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[19] *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110.

[20] (7th Cir. 1997) 108 F.3d 684, 687. ALSO SEE *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670 [officers "roust[ed] the Quinteros from sleep"].

[21] *Florida v. Jardines* (2013) __ U.S. __ [133 S.Ct. 1409, 1415].

[22] See *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068; *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 494; *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2. BUT ALSO SEE *People v. Munoz* (1972) 24 Cal.App.3d 900, 905 ["The fact there were four officers does not in itself carry an implied assertion of authority."].

[23] (1955) 45 Cal.2d 751, 754.

[24] (5th Cir. 2007) 479 F.3d 350, 355.

[25] See *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068.

[26] (1989) 48 Cal.3d 247, 268. COMPARE *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110 [the officer "never spoke to Cormier in an authoritative tone or led him to believe that he had no choice other than to answer her questions"].

> [A] a search occurs for Fourth Amendment purposes when officers gain visual or physical access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority.[27]

On the other hand, if the door was opened voluntarily, a warrantless entry to seize the evidence would be permitted for at least two reasons: (1) an occupant cannot reasonably expect privacy as to something that is obviously evidence of a crime and that he knowingly and voluntarily exposed to the view of officers,[28] and (2) the officers might reasonably believe that the suspect would realize they had seen the evidence and that he would immediately attempt to dispose of it if given a chance.[29]

For example, in *U.S. v. Scroger*[30] officers in Kansas City, having received reports of drug activity at a certain house, went there at 11 A.M. to conduct a knock and talk. As they were walking up to the front door, they heard someone say "go out the back," followed by the sounds of someone running. While two officers went to the back, two others went to the front door and knocked. Scroger answered the door, and it was apparent he had been cooking methamphetamine. Among other things, the officers saw "glassware" and detected a "strong odor"—both of which they associated with methamphetamine production. Just then, Scroger tried to slam the door shut, but the officers pushed their way in and took him into custody. After securing the house, they obtained a warrant and ultimately found "a large number of items commonly associated with the clandestine manufacturing of methamphetamine."

Scroger argued that the evidence should have been suppressed because the officers had no right to enter without a warrant or consent. Citing exigent circumstances, however, the court said "[i]t is highly likely that the evidence would have been destroyed or moved if the officers had waited to apprehend Scroger until they had obtained a warrant."

EXIGENCY BASED ON REASONABLE INFERENCE: Before knocking on the door, officers will sometimes see or hear something that provides them with probable cause to believe the suspect had been alerted to their presence and had started—or would immediately start—to destroy any evidence on the premises. If this happens, the "destruction of evidence" exception to the warrant requirement would apply, in which case the officers could forcibly enter the premises for the limited purpose of securing it pending issuance of a search warrant.[31]

There is, however, an exception to this rule. Specifically, a warrantless entry will not be permitted if a court finds that the threat to the evidence was fabricated by the officers themselves. How can the courts make this determination? In the past, it was often difficult because the courts would try to determine the officers' subjective intent. But in 2011 the United States Supreme Court ruled in *Kentucky v. King* that a threat will be deemed fabricated only if, upon arrival, the officers said or did something that would have caused an occupant of the premises to reasonably believe that the officers were about to enter or search the premises in violation of the Fourth Amendment.[32]

This means, among other things, that a threat will not be deemed fabricated merely because the officers had somehow alerted the occupants to their presence, even though that might have caused the occupants to attempt to destroy any evidence on the premises. As the Supreme Court observed in *King*:

> [W]henever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them.

But the Court added that such a possibility will not constitute a fabricated exigency unless the officers had expressly or impliedly threatened to enter the premises without a warrant. POV

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[27] *U.S. v. Mowatt* (4th Cir. 2008) 513 F.3d 395, 400. ALSO SEE *People v. Shelton* (1964) 60 Cal.2d 740, 747; *U.S. v. Winsor* (9th Cir. 1988) 846 F.2d 1569.
[28] See *Illinois v. Andreas* (1983) 463 US 765, 771; *People v. Haugland* (1981) 115 Cal.App.3d 248, 257; *U.S. v. Huffhines* (9th Cir. 1992) 967 F2 314, 319.
[29] See *Kentucky v. King* (2011) __ U.S. __ [[131 S.Ct. 1849, 1862].
[30] (10th Cir. 1997) 98 F.3d 1256.
[31] See *Kentucky v. King* (2011) __ U.S. __ [131 S.Ct. 1849, 1856].
[32] (2011) __ U.S. __ [131 S.Ct. 1849, 1862].

Recent Cases

Stanton v. Sims

(2013) __ U.S. __ [2013 WL 5878007]

Issue

Was an officer "plainly incompetent" for making a warrantless entry into a residence to apprehend a suspect wanted for only a misdemeanor?

Facts[1]

At about one o'clock in the morning, La Mesa police officer Mike Stanton and his partner were dispatched to a report of an "unknown disturbance" in a neighborhood known for gang violence. When they arrived, the only people in the area were three men who were walking in the street. Upon seeing the patrol car, two of the men went into an apartment complex and the third man "ran or quickly walked" toward a house that was completely enclosed by a tall fence.

The officer decided to go after the third man and arrest him for delaying or obstructing an officer in the performance of his duties, a misdemeanor.[2] Consequently, Stanton yelled "police" and ordered the man to stop but, after looking "directly" at the officer, the man opened the gate and entered the front yard of the house. The gate immediately closed behind him so, when Stanton arrived, he kicked it open. It so happened that the owner of the home, Drendolyn Sims, was standing behind the gate talking with friends. And when the gate flew open, it hit Ms. Sims and caused "serious injuries."

Ms. Sims sued the officer in federal court alleging that his entry into her front yard constituted a "search" under the Fourth Amendment, and that the search was not justified by exigent circumstances. The district court dismissed the suit, ruling that the officer was entitled to qualified immunity. Ms. Sims appealed to the Ninth Circuit which reversed the decision. (Our report on the Ninth Circuit's decision was published in the Spring-Summer 2013 edition.) Officer Stanton appealed to the United States Supreme Court.

Discussion

In its decision, a panel of the Ninth Circuit ruled that Stanton was not entitled to qualified immunity from liability because he was "plainly incompetent"[3] for making a warrantless entry into Ms. Sims' yard. Although the panel was aware of the "hot pursuit" exception to the warrant requirement, it ruled that the exception did not apply when, as here, an officer is chasing a person who was wanted for only a misdemeanor. "The possible escape of a fleeing misdemeanant," said the panel, "is not generally a serious enough consequence to justify a warrantless entry." Moreover, the panel concluded that this "rule" is so well known—so "clearly established"—that Officer Stanton's failure to apply it made him ineligible for qualified immunity.

But in a strongly-worded and unanimous rebuke, the U.S. Supreme Court reversed the panel's decision. And it did so in a short *per curiam* opinion which essentially meant that all nine members of the Court agreed that the panel's decision was so obviously wrong—so plainly incompetent—that an extended discussion of its errors would be futile. Not surprisingly, the Ninth Circuit's opinion was written by Judge Stephen Reinhardt who has a long history of writing opinions that are, to say the least, defective.

The reasons for the Supreme Court's ruling can be summarized as follows. First, Judge Reinhardt's opinion was based on sloppy research and inept reasoning. Among other things, the Supreme Court pointed out, "In its one-paragraph analysis on the hot pursuit point, the panel relied on two cases . . . . Neither case clearly establishes that Stanton violated Sims' Fourth Amendment rights."

Second, not only did Judge Reinhardt distort these rulings, his other research on the subject was so careless or superficial that it failed to disclose that there is, in fact, no "clearly established" rule on the subject. As the Supreme Court observed, "[F]ederal

[1] **NOTE**: Some of these facts are taken from the Ninth Circuit's decision. See *Sims v. Stanton* (9th Cir. 2013) 706 F.3d 954.
[2] See Pen. Code § 148.
[3] See *Ashcroft v. al-Kidd* (2011) __ U.S. __ [131 S.Ct. 2074, 2085] ["Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law."].

and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect." Even worse, the Court noted that in 2008 and 2010 two federal district courts—*both in the Ninth Circuit*—"granted qualified immunity precisely because the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established."

Third, there are two published California cases—*People v. Lloyd*[4] and *In re Lavoyne M.*[5]—in which the Court of Appeal ruled that the "hot pursuit" exception does, in fact, apply to misdemeanor chases. Taking note of those cases, the Supreme Court said:

> It is especially troubling that the Ninth Circuit would conclude that Stanton was plainly incompetent—and subject to personal liability for damages—based on actions that were lawful according to the courts in the jurisdiction where he acted.

Although it was disappointing that the Supreme Court did not take the opportunity to clear up the confusion that exists in some states as to whether the hot pursuit exception applies in misdemeanor chases, it said nothing to undermine the California rule which it set forth as follows: "Where the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant."[6]

People v. Burton

(2013) 219 Cal.App.4th Supp. 9

Issue

Under California's "in the presence" rule, if an officer makes an arrest for a misdemeanor that was not committed in his presence, will the evidence obtained as a result of the arrest be suppressed?

Facts

A caller notified a police department in Ventura County that he saw a man "acting erratically" and that the man was now driving a red truck on the freeway. The witness also provided the truck's license number. About twenty minutes later, an officer saw the truck parked at the side of a road. A man, later identified as David Burton, was standing nearby. The officer contacted Burton, detected an odor of alcohol and determined that Burton was "unsteady on his feet and swayed as he walked." After Burton admitted that he had driven the truck recently, the officer arrested him for DUI.

Although the court did not discuss the matter, it appears that Burton took a blood or breath test because he filed a motion to suppress evidence (presumably the test results) on grounds that he was arrested in violation of the rule that an officer may not ordinarily arrest a person for a misdemeanor unless the crime had been committed in his presence. The trial court denied the motion and Burton was convicted. He appealed the ruling to the Superior Court's Appellate Division.

Discussion

At the outset it should be noted that, while we do not ordinarily report on superior court appellate division rulings, this one is different because the California Supreme Court ordered that the ruling be published. It seems likely, then, that the Supreme Court is in full agreement with the Appellate Division's ruling and analysis and, as a result, the courts throughout the state are apt to give the ruling considerable weight. For that reason, and also because the legal issue is an important one, we decided to report on it.

Pursuant to California's "in the presence" rule, officers are prohibited from arresting a suspect for a misdemeanor or infraction unless they had probable cause to arrest and probable cause to believe the crime had been committed in their presence.[7] (In situations

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[4] (1989) 216 Cal.App.3d 1425.

[5] (1990) 221 Cal.App.3d 154.

[6] Quoting from *People v. Lloyd* (1989) 216 Cal.App.3d 1425, 1430. **NOTE**: Although we signaled out Judge Reinhardt in our report (for good reason), the two other members of the panel—Judge Barry Silverman and Judge Kim Wardlaw—are equally to blame for this embarrassing opinion.

[7] Pen. Code § 836(a)(1). ALSO SEE *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 ["[T]he correct test for misdemeanors is whether the circumstances exist that would cause a reasonable person to believe a crime has been committed in his presence."] *Green v. D.M.V.* (1977) 68 Cal.App.3d 536, 540 ["[A] warrantless arrest for an offense other than a felony must be based on *reasonable cause* to believe that the arrestee has committed the offense in the officer's presence." Emphasis added].

where a misdemeanor was not committed in an officer's presence, the usual procedure is to submit the matter to the District Attorney or City Attorney for a charging decision and then, if the case is charged, seek an arrest warrant.)

There are, however, exceptions to the "presence" rule. In fact, in DUI cases there are five of them, one of which is as follows: officers may arrest an intoxicated driver if they reasonably believed he may injure himself or damage property unless he was arrested immediately.[8] While the Appellate Division might have relied on this exception in rejecting Burton's argument that he was arrested illegally, it decided to address Burton's more significant argument which he stated as follows: The Fourth Amendment—not just the California Penal Code—prohibits officers from arresting a person for a misdemeanor that was not committed in the officer's presence. Thus, any evidence obtained as the result of such an arrest must be suppressed.

The United States Supreme Court has, in fact, occasionally mentioned the "in the presence" requirement in its cases.[9] But, as the Appellate Division pointed out, the Court has never ruled it was constitutionally mandated. On the contrary, the Court's decisions clearly indicate it is merely a statutory rule that states may or may not impose upon themselves as they see fit.

Consequently, there is essentially only one constitutional requirement for an arrest—be it a felony, misdemeanor or infraction: officers must have probable cause to arrest. Said the Appellate Division, "[T]he Fourth Amendment supports arrests for misdemeanors when there is objective and reasonable probable cause to justify the arrest, regardless of the 'in the presence' requirement outlined [in the Penal Code]." Accordingly, it ruled that, because the officer who arrested Burton had probable cause to arrest him for DUI, the arrest was lawful under the Fourth Amendment, and therefore the trial court had properly denied Burton's motion to suppress.

People v. Turner

(2013) 219 Cal.App.4th 151

Issues

(1) Did officers have grounds to detain a parent at a high school football game? (2) If so, did the manner in which they detained him result in a de facto arrest?

Facts

During an evening football game at Everett Alvarez High School in Salinas, assistant coach Anthony Stewart notified head coach Rafael Ward that Turner had threatened him. Turner was the father of an Everett Alvarez player and, according to Stewart, Turner was "upset about something that [Stewart] had said or done" and had called him a "bitch-ass [racial slur]" and added, "I'll see you after the game." When this happened, according to Ward, the game had become "intense" after an Alvarez player suffered a broken leg, and the crowd had a "negative vibe." When the school principal was informed of the threat, he instructed two county probation officers (who were providing security) to go to the parking lot after the game "because one or more people in the crowd had threatened one of the coaches."

After the game ended, Ward was heading out to the parking lot when his aunt walked up to him and said "you need to be careful" because she had been told by a friend, Jeannette Smith, that Turner "has a gun." Smith was "an acquaintance" of Turner's. Ward conveyed this information to one of the probation officers who notified Salinas PD and requested assistance.

At about this time, one of the probation officers noticed six or seven people standing near a dumpster in the parking lot; they were apparently drinking beer and looking "a little intimidating." One of the men was Turner and, shortly after the first patrol car arrived in the parking lot, he broke away from the group and started walking away. It appears that Turner matched the description of the suspect because one of the

[8] Veh. Code § 40300.5(d).

[9] See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354 ["If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."]; *Virginia v. Moore* (2008) 553 U.S. 164, 171 ["In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt."]; *Carroll v. United States* (1925) 267 U.S. 132, 156-57 ["The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."]. ALSO SEE *People v. Trapane* (1991) 1 Cal.App.4th Supp 10, 13 ["There is no federal constitutional requirement that a misdemeanor be committed in an officer's presence to justify a warrantless arrest."].

probation officers identified himself, drew his service weapon and told Turner to raise his hands. At least one of the responding police officers also drew a gun and ordered Turner to get on the ground. Turner complied and was handcuffed. An officer then asked him if he was carrying any weapons and he said he had a gun in his front pocket. The officer removed the weapon (a loaded revolver) and arrested Turner for, among other things, carrying a firearm on school grounds.

Discussion

Turner filed a motion to suppress the gun, claiming the officers lacked grounds to detain him and, even if they had grounds, their act of drawing their weapons converted the detention into an illegal de facto arrest. The court denied the motion and Turner pled no contest. He then appealed the court's ruling.

GROUNDS TO DETAIN: It is settled that officers may detain a suspect only if they have reasonable suspicion, and that reasonable suspicion requires information that has some indicia of reliability. Thus, in the case of *Florida v. J.L.* the Supreme Court ruled that the detention of the defendant was unlawful because it was based solely on an anonymous tip that he was currently standing at a particular bus stop and was carrying a concealed firearm.[10]

Based on the similarities between his detention and the one in *J.L.,* Turner argued that he, too, was detained unlawfully. But the court disagreed, pointing out that, unlike *J.L.,* the source of the information about Turner was not an anonymous caller. On the contrary, (1) her identity was known, (2) she knew Turner, (3) she apparently had first-hand knowledge about the gun, and (4) she had personally conveyed the information about the gun to Ward's aunt. In addition, the court noted that Turner's act of walking away when he saw the first patrol car arrive was a circumstance that increased the level of suspicion.

It should be noted that the California Supreme Court has ruled that, even if the source of a tip was anonymous, it might be reasonable for officers to detain a suspect if they had sufficient reason to believe he presented an imminent threat to the public, such as driving while intoxicated.[11] Although it was unnecessary for the court in *Turner* to invoke this rule, it said "we cannot ignore that the reported crime here of carrying a concealed, loaded firearm serves as a grim reminder of the numerous mass shootings that have occurred in schools in the past decade or so."

DE FACTO ARREST? As noted, Turner argued that even if there were sufficient grounds to detain him, the officers' act of ordering him to the ground at gunpoint had converted the detention into a de facto arrest. It is true that a detention will be deemed a de facto arrest if the officers employed safety precautions that were unnecessary or excessive.[12] And, like any arrest, a de facto arrest is illegal if officers lacked probable cause. But even if the officers in *Turner* lacked probable cause, it was apparent that the precautions they took were reasonable. After all, Turner was reportedly carrying a firearm and had indicated he was about to shoot someone in the parking lot.[13] Thus, the court ruled the officers' actions were "reasonable and appropriate in order to safely determine whether defendant was armed." Turner's conviction was affirmed

U.S. v. Tosti

(9th Cir. 2013) 733 F.3d 816

Issues

(1) Did the defendant have a reasonable expectation of privacy in child pornography images on a computer he left at a CompUSA store for repair? (2) Did the defendant's wife have apparent authority to consent to a search of digital storage devices located in the family home?

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[10] (2000) 529 U.S. 266.

[11] See *People v. Wells* (2006) 38 Cal.4th 1078; *People v. Dolly* (2007) 40 Cal.4th 458. ALSO SEE *Florida v. J.L.* (2000) 529 U.S. 266, 273.

[12] See *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 83 ["When the detention exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause."]; *U.S. v. Shabazz* (5th Cir. 1993) 993 F.2d 431, 436.

[13] See *People v. Glaser* (1995) 11 Cal.4th 354, 366 [the issue is whether "detention at gunpoint [was] justified by the need of a reasonably prudent officer"]; *People v. Celis* (2004) 33 Cal.4th 667, 676; *People v. McHugh* (2004) 119 Cal.App.4th 202, 211 ["A police officer may use force, including. . . displaying his or her weapon, to accomplish an otherwise lawful stop or detention as long as the force used is reasonable under the circumstances to protect the officer or members of the public or to maintain the status quo."]; *Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991 ["Our cases have made clear that an investigative detention does not automatically become an arrest when officers draw their guns."].

Facts

A computer technician at CompUSA in San Rafael notified police that he had been repairing a computer when he discovered that it contained images of child pornography. When officers arrived, the computer was running and they could see "numerous images [of child pornography] appearing on the computer monitor in a very small 'thumbnail' format." The officers directed the technician to "open the images in a 'slide show' format so that they would appear as larger images viewable one by one." One of the officers testified that, even in a thumbnail format, it was apparent that the images were of child pornography. The detectives seized the computer, obtained a warrant to search it, and thereafter copied the relevant images. The computer belonged to Donald Tosti, a Marin County psychologist.

Dr. Tosti's wife thereafter notified the FBI that she had found photos of child pornography in Dr. Tosti's home-office while looking for some financial records at his request. Ms. Tosti explained that, although she and Dr. Tosti were estranged, she lived with him in the house and had "full access throughout the residence." In addition to the photos, Ms. Tosti gave the agents a Dell computer, several hard drives, and numerous DVDs, saying she did not want them in the house. None of these devices were password protected. She also gave them written consent to search these items which, as it turned out, contained more child pornography. Tosti was arrested and filed a motion to suppress all of the pornographic images. With one exception, the motion was denied and Tosti was convicted of possessing child pornography. Tosti appealed to the Ninth Circuit.

Discussion

Dr. Tosti contended that the images that were seized from his computer at the CompUSA store should have been suppressed because the detective's act of directing the technician to open the thumbnail images (thereby enlarging them) constituted an illegal warrantless search. The court disagreed.

Under the Fourth Amendment, a "search" results if an officer intruded into a place or thing in which a person had a reasonable expectation of privacy.[14] But once that expectation of privacy is lost through no fault of law enforcement, an officer's examination of the place or thing does not constitute a search. Thus, in *United States v. Jacobsen*, the U.S. Supreme Court ruled that "[t]he agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment."[15] Accordingly, the Ninth Circuit ruled that the officers' act of viewing the images on the monitor did not constitute a search because the CompUSA technician had already seen them, and the detectives examined only those images that the technician had already viewed. In other words, said the court, "[The technician's] prior viewing of the images had extinguished Tosti's reasonable expectation of privacy in them."

Nonetheless, Tosti argued that the detective's acts of directing the technician to enlarge the images and then viewing them in a slide-show format constituted a search because the technician had not yet viewed the enlarged images. In rejecting the argument, the court pointed out that the details in the enlarged photos were also visible in the thumbnails and, therefore, the officers "learned nothing new" by viewing the enlarged images.

Finally, Tosti argued that his wife did not have the authority to consent to a search of the digital storage devices that she had given to the FBI agents. As a general rule, it is reasonable for officers to believe that a spouse has the authority to consent to a search of every room and container in the family home unless there was reason to believe otherwise.[16] In applying this rule, the court in *Tosti* pointed out "there were no objective indications that Ms. Tosti's access to the office was limited. There were no locks or other signs that Tosti tried to keep his wife out of the office." And, more to the point, the computer and electronic media were neither password protected nor encrypted."

Consequently, the court ruled that the evidence in the case was seized legally.

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[14] See *Katz v. United States* (1967) 389 U.S. 347, 252. **NOTE**: Even if a person did not have a reasonable expectation of privacy in a place or thing, a "search" of it results if officers intruded upon it for the purpose of obtaining incriminating evidence against a person who owned, controlled, or lawfully possessed it. See *United States v. Jones* (2012) __ U.S. __ [132 S.Ct. 945, 949]. This was not an issue in *Tosti* because neither of the detectives intruded upon anything as all of the images were in plain view when they arrived.

[15] *United States v. Jacobsen* (1984) 466 U.S. 109, 119.

[16] See *People v. Duren* (1973) 9 Cal.3d 218, 241 ["[S]ince a wife normally exercises as much control over the property in the home as the husband, police officers may reasonably assume that she can properly consent to a search thereof."]; *U.S. v. Duran* (7th Cir. 1992) 957 F.2d 499, 505; *U.S. v. Clark* (8th Cir. 2005) 409 F.3d 1039, 1044.

U.S. v. Howard

(7th Cir. 2013) 729 F.3d 655

Issues

(1) Did an officer have grounds to detain the defendant in order to safely arrest his companion? (2) Was the detention unnecessarily intrusive?

Facts

A police detective in Wisconsin had been attempting to locate a man named Marcus Johnson who was wanted for pistol-whipping a man in a bar one week earlier. Johnson was also a suspect in a recent shooting. While staking out a parking lot, the detective saw a van pull up and park; the van was "known to be associated with Johnson." After requesting backup, the detective saw Johnson and another man exit the van and start walking toward an apartment building. The detective drew his gun and started to follow them on foot when he suddenly realized that two other men had just exited the van and were walking behind him. As he later testified, it was "a bad situation because I was in between two groups of individuals and I was outnumbered." The detective then pointed his gun at the men behind him and ordered everyone to the ground while waiting for backup.

The first backup officer was handcuffing Johnson when his companion fled. Rather than chase him (he was captured later), the officer searched Johnson and, in addition to finding crack cocaine, noticed bloodstains on his pants and shoes. The officer then locked Johnson in his patrol car and walked over to the detective who was still detaining the other two men at gunpoint. One of the men was Darius Howard.

Almost immediately, the officer noticed bloodstains on the clothing of Howard and the other man. Both were then handcuffed and the detective searched the van in which he found a baseball bat and a gun wrapped in a bloody shirt. He was then notified that the four men were suspects in an armed robbery that had occurred about one hour earlier. Howard subsequently confessed to the robbery, explaining that "he used the shirt to wipe the robbery victim's blood off the gun at Johnson's request."

The appeal in this case pertains only to the federal charges filed against Howard for being a felon in possession of the firearm in the van and possession of cocaine that was found during a search incident to arrest. Howard filed a motion to suppress the evidence but it was denied. He then pled guilty and appealed the suppression ruling to the Seventh Circuit.

Discussion

According to Howard, the evidence was seized illegally because the detective lacked grounds to detain him. Specifically, Howard pointed out that he was not suspected of having committed any crime, that he was "not acting suspiciously in any way," and that he made no furtive movements.

Although most detentions are based on reasonable suspicion to believe that the detainee had committed or is committing a crime,[17] there is another type of detention—commonly known as a "special needs" detention—which is permitted without reasonable suspicion if the strength of the need for a temporary seizure outweighed its intrusiveness.[18] Thus, the lawfulness of Howard's detention depended on whether the facts satisfied this test.

Starting with the need for the detention, the court pointed out that the detective "was alone and was attempting to arrest Johnson for a violent crime involving a gun. He was surprised when Johnson's associates exited the same van. He reasonably concluded that they presented a potential threat to his ability to arrest Johnson safely." The court then considered the intrusiveness of the detention and noted that Howard was seized "for only a few minutes until Johnson was arrested. Then [the officer] came over and almost immediately noticed facts [the bloody clothing] that gave the police particularized suspicion to continue to keep Howard on the scene." It was therefore apparent that the need for the detention outweighed its intrusiveness and it was therefore lawful. Howard's conviction was affirmed. POV

[17] See *Terry v. Ohio* (1968) 392 U.S. 1.

[18] 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."]; *In re Randy G.* (2001) 26 Cal.4th 556, 566 ["there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails"]; *People v. Profit* (1986) 183 Cal.App3d 849, 883 [the seriousness of the offense under investigation is a "highly determinative factor in any evaluation of police conduct"]; *Mueller v. Auker* (9th Cir. 2012) 694 F.3d 989, 997 ["but neither probable cause nor a warrant is required when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable"].

The Changing Times

Alameda County District Attorney's Office

The following officers were appointed to the Inspectors Division: **Eddie Bermudez** (OPD), **Blair Alexander** (OPD), **Tim Bergquist** (OPD), **Mike Brown** (OPD), **Jeff Ferguson** (OPD), **Kendal Won** (Hayward PD), **Jean Luevano** (Union City PD), and **Ted Horlbeck** (Alameda PD). **Jon Kennedy** was promoted to lieutenant; **Lynne Breshears** and **Jim Taranto** were promoted to Inspector III. New deputy DAs: **Shannon Roy** and **Charly Weissenbach**.

Alameda County Sheriff's Office

Lt. **Donald Mattison** was promoted to captain. Sgt. **Miguel Ibarra** was promoted to lieutenant. **Alan Dumatol** and **Ricardo Gonzales** were promoted to sergeant. **John Irish** was appointed Deputy Sheriff I. The following deputies have retired: **Gilbert Chavez** (24 years), **Wayne Cass** (12 years), and **Deborah Shavies** (15 years). New deputies (POST graduates): **Cesar Amezcua** and **Daniel Davies**.

ACSO reports that the following retired deputies have died: **Vernon Asten** (hired September 1, 1948, retired July 21, 1957) and **Dwight Manrow** (hired January 18, 1975, retired April 26, 1996).

Alameda Police Department

Interim Chief **Paul Rolleri** was appointed Chief of Police. Acting Capt. **Joseph McNiff** was promoted to captain. Acting Lt. **Donald Owyang** was promoted to lieutenant. Sgt. **Wayland Gee** was promoted to acting lieutenant. Acting Sgt. **Ryan Derespini** was promoted to sergeant. **Richard Soto** was promoted to acting sergeant. New officer: **Jason Horvath**. Lt. **Ted Horlbeck** retired after 29 years of service.

Transfers: Lt. **Jill Ottaviano** from Patrol to Investigations Commander, Sgt. **Richard Bradley** from Patrol to Investigations/Violent Crimes, **Michael Sapinoso** from Patrol to Investigations/Property Crimes, **Thomas Cobb** from Patrol to Investigations/Property Crimes, Det. **Ed Dowd** from Investigations to Patrol, and **Tysen Siebert** from Patrol to Motors/Traffic. Sgt. **Anthony Munoz** completed his year as the 2013 President of CNOA. **Vanessa Dubon** was selected as the next K9 Handler.

Retired officer **Robert F. Schreiber** passed away in December 2012. He was hired as an APD officer in 1949 and retired in 1966. Retired sergeant **Alfred Jayne** passed away in August 2013. He was hired as an APD officer in 1961 and retired in 1992.

BART Police Department

Myron Lee was promoted to sergeant. **Andrew Rodrigues** retired after eight years of service. New hires: Sgt. **William Spears** and **Youn Serayheap**. New police recruits: **Marc Mabalot**, **Eric Rose**, and **Jermaine Collins**. New community service officers: **Jodi Brunker**, **Destiny Wilson**, **Gene Higgs**, and **Aliyyah Shaw**.

Berkeley Police Department

CSO **Benjamin Wynn** resigned after five years of service to accept a police officer position with SFPD. **Christopher Inami** resigned after one year of service to accept a job with the U.S. Department of State. Parking Enforcement Supervisor **Stephanie Hudson** retired after 31 years of service. **Jeff Luna** medically retired after 14 years of service. Lateral appointments: **Beau Hunt**, **Victor Li**, and **Christopher Schulz**. New public safety dispatchers: **Miguel Rivera**, **Eric Robertson**, **Wendy Sherman**, and **David Castro**.

California Highway Patrol

Dublin CHP Area: **Sigfred Neri** was promoted to sergeant and was reassigned from the Dublin Area to the San Jose Area. Sgt. **Richard Luciano** retired after over 30 years in law enforcement.

Hayward CHP Area: Transferring in: Lt. **Aristotle Wolfe** (from Golden Gate Division). Transferring out: **Paul Cheever** (to Golden Gate Division).

East Bay Regional Parks Police Department

Sgt. **Ryan Lehew** retired with seven years of service. **Tim Raymond** joined Santa Rosa PD. New officers: **Ernie Haga** (officer/helicopter pilot), **Patrick Brookens**, **James Michalosky**, and **Michael Hall** (recruit officer/helicopter pilot). New Dispatcher: **Caitlin O'Dea**. New SWAT team members: Sgt. **David Phulps**, **Ryland Macfadyen**, and **Anthony Dutra**. **Gary Castaneda** rotated into the Detective unit. The department was awarded its first CALEA reaccreditation on August 3rd.

FREMONT POLICE DEPARTMENT

Brian Shadle and **Ramin Mahboobi** were promoted to sergeant. The following officers have retired: Sgt. **Kevin Gott** (29 years), Sgt. **Curt Codey** (29 years), **Teresa Martinez** (28 years), **Bill Wack** (26 years), and **Pat Brower** (13 years). New officers: **Michael Collins**, **Christopher Stark**, **Benjamin Harmon**, **Donald O'Neal**, and **Trevor Stinson**.

HAYWARD POLICE DEPARTMENT

Capt. **Darryl McAllister** was appointed Deputy Chief for the Union City PD. He served HPD for 32 years. **Jose Banuelos** and **Cory Linteo** were promoted to sergeant. The following officers have retired: Sgt. **Mike Beal** (28 years), Insp. **Kevin Atkins** (29 years), **Ron Ortiz** (25 years), and **Jay Cooper** (18 years). New officers: **Ryan Sprague**, **Michael Nguyen**, **Leyland Butcher**, **Angelo Liloc**, **Ethan Porter**, **Jared Carter**, **Ngia (Rick) Tran**, **Eric Serrano**, and **Guillermo DeLira**.

NEWARK POLICE DEPARTMENT

Grant Clark retired after 34 years in law enforcement; 26 years with NPD. **Michael Taylor** received an Alameda County Red Cross Act of Courage Hero Award for his efforts to disarm a knife-wielding mentally ill man inside of a local coffee shop. His split second decision protected innocent bystanders and resulted in the safe resolution of this incident.

Former NPD K9 **Uras** passed away on October 27, 2013 after serving the citizens of Newark from 2003 to 2010. In addition to their enforcement duties, Uras and his partner Sgt. **Ray Hoppe** brought joy to the youth in the community at special events.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Dave Watson retired after 36 years of service. Police Service Aide **Angie Thompson** retired after 15 years of service. New officers: **Tyler Walstrum** and **Brian Quon** (both were formerly reserve officers). New Police Service Aide: **Daniel Alderete**. **Denise Smith** accepted a position with the Marin County Sheriff's Department; **Victor Li** accepted a position with the Berkeley Police Department.

OAKLAND POLICE DEPARTMENT

The following officers have retired: Chief **Howard Jordan** (25 years), Capt. **Edward Poulson** (26 years), Lt. **Blair Alexander**, (21 years), Lt. **Johnny Davis, Jr.** (28 years), **Edwin Bermudez** (25 years), **Jesly Zambrano** (7 years), **Aaron Frye** (26 years), **Justin Buna** (8 years), **Sarah Whitmeyer** (16 years), **Michael Brown** (30 years), **Rafek Saleh** (7 years), **Maureen Vergara** (11 years), **Albert Smith** (24 years), **Kevin McDonald** (23 years), and **Gregg Williams** (21 years).

Trevor Mackson and **Rufus Wright III** were promoted to sergeant. New officers: **Tony Chang**, **Primitivo Cruz, Jr.**, **Nikola Dokic**, **Raul Elias**, **Mario Fajardo**, **Michael Fox**, **Robert Gallinatti**, **Matthew Galvan**, **Rishna Gracie**, **Christopher Hatcher**, **Joel Hight**, **Shaun Hunt**, **Shawn Jing**, **Robert Malone III**, **Avjeet Mann**, **JaNey Meeks**, **Ronald Moore**, **Beau Nelson**, **Jorge Navarro Martinez**, **Mae Phu**, **Bryan Pong**, **Gregory Rosin**, **Gregory Ruef**, **Erwin Samaniego**, **Matthew Smith**, **Michael Tacchini**, **Kristina Tikkanen**, **Andriy Volynets**, **Jeffrey Wildman**, **Jerry Wingate III**, **Jordan Woo**, **Kenneth Au**, **Brooklyn Beckwith**, **Laura Baker**, and **Colin Cameron**. OPD reports that the following active duty officers have died: **Sor Yang** (died May 13, 2013), **Porter Weston** (died July 31, 2013), and **William Burke** (died September 20, 2013).

PLEASANTON POLICE DEPARTMENT

Lateral appointments: **Travis Oliver** (ACSO), **Catrina Clark** (San Mateo PD), **Tyler Paulsen** (Clearlake PD), **Bradlee Middleton** (Clearlake PD). **Bradley Palmquist** joined the department from (South San Francisco PD). **Nick Albert** transferred from the Patrol Division to the Special Enforcement Unit. **Matt Kroutil** transferred from the Patrol Division to the Traffic Unit.

SAN LEANDRO POLICE DEPARTMENT

Lt. **James Lemmon** retired after 28 years of service. Sgts. **Mike Sobek** and **Robert McManus** were promoted to lieutenant. Det. **Mark Clifford** was promoted to sergeant. **Maria Cortez** was promoted from police service aide to PST. Sgt. **Joe Molettieri** transferred from Patrol Division to Traffic Division. New Assignments: Public Safety Dispatcher, **Erica Roseman**; Police Department Specialist, **Heidi DeRespini**; PST, **Eddie Dunkin**; PST, **Matthew Kerner**; and Parking Aide, **Taylor Smith**. Former Police Department Specialist **Mike Dalisay** joined ACSO. The following Community Service Officers were assigned as PST IIs: **Richard Holman**, **Jenny Crosby**, **Kris Herrera**, **Frank Grove**, **Larry Puent**, **Lesley Carr**, **Edgar Reinhardt**, and **Edward Bell**. POV

War Stories

A robbery plan with one flaw

One evening, a man walked into the public restroom in a building in downtown Oakland and noticed that the only occupant was an elderly man who was washing up. Recognizing an ideal robbery opportunity, he slugged the man, grabbed his wallet, and walked out. But there was one glitch: The robber had been so excited at seeing such an easy target the he had forgotten that he was in the restroom in the lobby of the Glenn Dyer Detention Facilitiy where he had been visiting an inmate. As he exited the bathroom and remembered where he was, it was too late. The victim started screaming and, with so many sheriff's deputies and OPD officers in the vicinity, the robber barely made it out the front door.

More county jail shenanigans

Outside the county jail in Bellingham, Washington a man with a bow and arrow attached a bag of marijuana to an arrow and shot it up to the fresh-air exercise area, apparently a gift for an incarcerated friend. But he was a lousy shot and the arrow ended up on the roof. A deputy happened to see the man shoot the arrow, so he detained him while another deputy went up to the roof and recoverd it, along with the marijuana. When questioned about the incident, the man readily admitted shooting the arrow but insisted that he was merely aiming for a squirrel who was climbing up the side of the jail. When asked why he had attached a bag of marijuana to the arrow, he said he wanted a lawyer.

Rendezvous with handcuffs

Late one night in Salinas, an officer spotted two men burglarizing a car. One of them got away, but the officer nabbed the other one. While handcuffing him, the officer noticed that he was carrying a walkie-talkie. Figuring the two men were using the radios in their criminal enterprise, the officer whispered into the radio, "Where you at, man?" "By the airport," came the whispered reply. "Okay," mumbled the officer, "meet me at Denny's in about five minutes" and we'll get some breakfast. He arrived promptly, but so did the arresting officers.

Taking a bite out of crime

Late one night, two BART police officers were chasing an armed robbery suspect through some backyards in East Oakland. The suspect, desperately looking for a place to hide, spotted a big doghouse so he crawled inside and waited. He heard the officers nearby but figured he'd fooled them. That is, until he noticed that the rightful occupant of the dog house—a vicious pit bull—had just awakened from a deep sleep. The officers heard the suspect screaming and they rescued him, but not before the pit bull had left a lasting impression on the man.

Consumer fraud in China

Speaking of dogs, police in China are investigating complaints that the zoo in the People's Park of Luohe has been displaying a big dog—a Tibetan mastiff— in a cage that was supposedly inhabited by a lion. Visitors to the zoo became suspicious when the lion started barking at them.

Passing the buck

A man called the CHP office in Tracy and said a man was currently vandalizing his property:

CHP: Where do you live?
Man: Florida.
CHP: Are you saying that a man in Tracy is vandalizing your property in Florida?
Man: That's right.
CHP: How's he doing it?
Man: He's using other-worldly mind powers to disable my electrical appliances.
CHP: Well, that's an interstate crime so you need to call the FBI in Florida. They specialize in other-worldly cases.
Man: Great! Thanks.

Trouble in paradise

Fire investigators in Maui determined that a fire that destroyed a house was caused by a short circuit in the homeowner's newly-installed fire alarm system. The homeowner was especially irked because, just one year earlier, burglars broke into his house and stole his new burglar alarm system.

A good choice

Newark police were dispatched to a check cashing company where a man was trying to pass a stolen check. The man wasn't carrying any ID so he made up a name and DOB and verbally identified himself. An officer ran the name and, coincidentally, it came back with two outstanding felony warrants. "It's like this," the officer told the man, "Either you give me your true name, in which case you'll be going to jail for trying to pass a stolen check; or you can keep lying, in which case you'll be going to jail on two felony warrants. What's it gonna be?" Without missing a beat, the suspect said, "I'll go with the check rap."

Clueless and without an angle

During a preliminary hearing in Santa Clara County, the defendant's attorney was cross examining one of the arresting officers:

Attorney: Isn't it a fact that you had a discussion about this case with the district attorney during the morning recess?

Officer: That's right.

Attorney: What did you discuss?

Officer: I asked him what your angle was.

Attorney: And what did he say?

Officer: He said you didn't have an angle, or a clue.

Justice in Berkeley

A bicyclist who was cited for failing to stop at a stop sign fought the ticket in traffic court. "I stopped for the sign," judge. " In fact, I always stop for stop signs. Maybe the cop just didn't see me." The officer then took the witness stand and pulled out a tape recorder on which he had recorded the entire stop:

Officer: I stopped you for not stopping at the stop sign.

Bicyclist: I go through that intersection all the time. It's too much work to get the bike going again up the hill.

Officer: You should still stop.

Bicyclist: Well, and no judge would ever convict me.

At that point, the Traffic Commissioner interrupted, saying, "I think I've heard enough."

You can say that again

While conducting a probation search of a drug user's home, police in Washington didn't find any drugs but they did find some paraphernalia called a "Whizzinator." As the result, a petition to revoke his probation was filed. At the hearing, an officer testified that a Whizzinator is a device that drug users utilize when they are required to take urine tests. "It looks something like a jock strap but with a phony penis attached to it. And the 'penis' is connected to a bag which ideally contains 100% drug-free urine." He also explained that if users can't find any drug-free urine (which is often the case), they can buy "dehydrated toxin-free urine" from the Whizzinator folks for only $150. At this point, the judge interrupted the proceedings, saying, "This just simply grosses the court out."

We welcome all war stories—
gross or otherwise.

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