POINT of VIEW

A publication of the Alameda County District Attorney's Office

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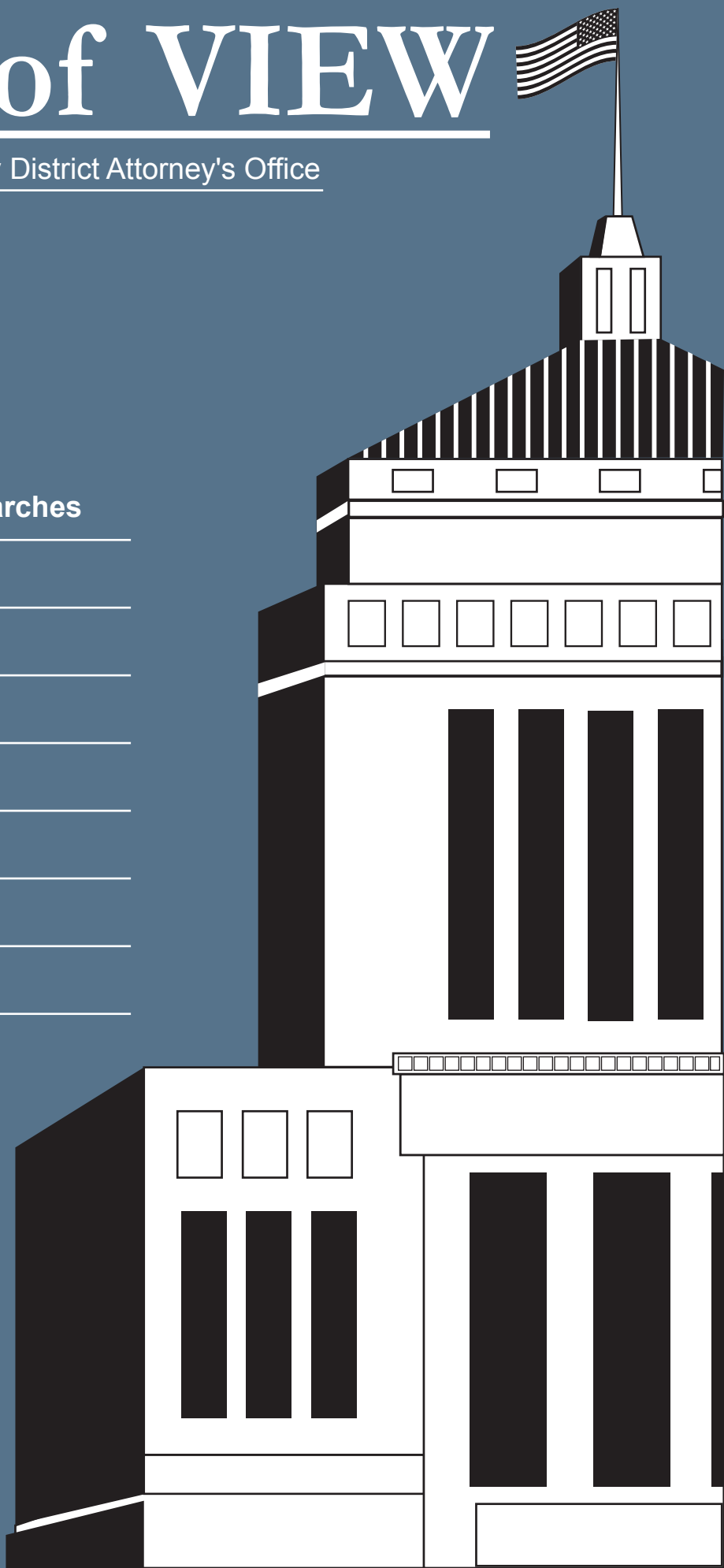
In this issue



WINTER
2016

Point of View
Since 1970

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• Volume 44 Number 1•
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Contents

ARTICLES

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Electronic Communications Searches The New California Law

A new law in California ensures that law enforcement can't snoop around your digital data without first obtaining a warrant.[1]

Effective January first, California's comprehensive Electronic Communications Privacy Act (CalECPA) became law. As the result, a search warrant is now ordinarily required to obtain copies of any electronic communication content or related data that was sent to or received by a suspect or anyone else.[2] This includes email, voicemail, text messages, subscriber information, and cell site tracking data. CalECPA also changed the required form and notice requirements of electronic communications search warrants. It accomplished all of this by adding, deleting, or modifying several sections of the Penal Code.

The consequences of these changes for law enforcement are enormous because they restrict when and how officers can obtain an entire class of information which has become crucial in many criminal investigations. They do, however, provide clarity to this important area of the law which, until now, was regulated by the federal government's disordered hodgepodge known as the Electronic Communications Privacy Act (ECPA).

One of the problems with the ECPA is that it went into effect in 1986, which was several years before electronic communications became the dominant means of personal and business contact in the United States and virtually everywhere else. As the result, it enabled officers to obtain this content and data without too much difficulty. And few people complained because most people had not yet come to view electronic communications as highly private. They do now.

As these changes were occurring, the providers of electronic communications services (especially their attorneys) were becoming more and more nervous about privacy lawsuits that might result if they continued to release this information without a search warrant. So, many of them took the position that officers must obtain a warrant for almost everything, even if the ECPA might have required only a low-level court order known as a D-Order. Moreover, many judges in California were refusing to sign D-Orders because California law did not expressly authorize them to do so. And then the Sixth and Ninth Circuits issued persuasive opinions in which they ruled that, even if the ECPA did not require a search warrant, the Fourth Amendment *did*.

Congress did, however, occasionally attempt to update the ECPA by enacting legislation such as the Stored Communications Act, the Communications Assistance for Law Enforcement Act, the Patriot Act in 2001, and the Foreign Intelligence Surveillance Amendments Act in 2008. But this legislation did not satisfactorily address the general public's concern about the privacy. So the California Legislature took the initiative and, as reported by the national news media, passed CalECPA. (It has been reported that Congress may be using CalECPA as the blueprint for a new federal privacy bill.)

In this article, we will explain the fundamentals of the new law. But first, it is important to note that it was passed by a two-thirds majority of the Legislature which means that any evidence obtained in violation of the law may be suppressed.[4] Also note that because CalECPA is more strict than ECPA, officers who comply with the California law will be in compliance with federal law.

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[1] FindLaw.com, "Digital Searches Now Require Warrants in California" (October 14, 2015) www.findlaw.com/technologist.
[2] See Pen. Code § 1546 et seq. Also see Pen. Code § 1524.3.
[3] See Pen. Code § 638.50 et seq.
[4] See Pen. Code § 1546.4; *People v. Hull* (1995) 34 Cal.App.4th 1448, 1455; *In re Lance W.* (1985) 37 Cal.3d 873.

One other thing: the information we will discuss in this introductory article is based on our understanding of CalECPA at the time we went to press. It will take a while before the Legislature and our appellate courts resolve some of the uncertainties and dubious provisions in the law. We will, of course, report on these developments as they occur.

The New Regulations

CalECPA covers nearly every form of stored electronic communications and data about such communications that might be relevant in a criminal investigation. This includes communications and data that were stored in a physical device to which officers made a physical or electronic contact (e.g., the suspect's cell phone), and information stored in equipment owned or operated by a provider(e.g., voicemail, subscriber records).[5] It also includes real time interception of cell site location information and pen register/phone trap information.

ELECTRONIC COMMUNICATION INFORMATION: As used in CalECPA, the term "electronic communication information" includes any information *about* a communication (a.k.a. "metadata.") Examples include the names of the sender and recipient of an email or text message; the time or date the communication was created, sent, or received; the IP address of a person's computer and the websites visited by that computer including the date and time of the visit.[6] The term also includes the message and cell site location information, but these subjects will be discussed separately.

It is easy to remember the requirements for obtaining electronic communication information. That's because there is only one: Officers must obtain a search warrant.[7] (It is noteworthy, and disturbing, that the Legislature decided not to permit the warrantless release of this information when it could save a life or prevent great bodily injury.)

SUBSCRIBER INFORMATION: The term "subscriber information" means general information which the subscriber submitted to the provider in order to open or maintain an account. This includes the subscriber's name, address, phone number, email address, and "similar contact information" It also includes the length of service and the types of services utilized by the subscriber.[8]

Although CalECPA provides a definition of "subscriber information," it exempted this information from its definition of "electronic communication information."[9] So we do not know for sure what officers must do to obtain it. One possibility is that providers may release it without a warrant if it is relevant to an investigation.[10] But until this is clarified, they may require a warrant.

ELECTRONIC COMMUNICATIONS: The term "electronic communication information" also includes the spoken and written words in a communication that has been stored in an electronic communications device or in equipment owned or operated by a service provider. Because "content" was included in the definition of "electronic communication information," it can only be obtained by means of a search warrant.[11] But if officers believe they have probable cause to search for communications or data stored in a device in their custody, they may seize it and promptly seek a warrant.[12]

CELL SITE LOCATION INFORMATION: "Cell Site Location Information" (CSLI) is information that identifies the physical locations of cell towers or other sites that were utilized by a provider in transmitting information to or from a particular cell phone or other device which utilized cell sites. CSLI has become useful to law enforcement because, by knowing the locations of the cell sites which carry a suspect's messages and transmission data, officers can essentially "follow" the suspect's phone and, thereby, the suspect.

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[5] See Pen. Code § 1546.1(a)(3).
[6] See Pen. Code § 1546(d). Also see Pen. Code § 1524.3.
[7] See Pen. Code § 1546.1(b)(1); Pen. Code § 1546(b)(2).
[8] Pen. Code § 1546(l).
[9] See Pen. Code § 1546(d) [electronic communication information "does not include subscriber information"].
[10] See Pen. Code § 1546.1(f).
[11] See Pen. Code § 1546(d) ["contents"]; Pen. Code § 1546.1(b).
[12] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2486].

For no apparent reason, CSLI falls into three categories: "electronic communication," "electronic communication information," and "electronic device information.[13] This seems to mean it can be obtained by means of a search warrant, exigent circumstances, or "specific consent."[14] We will discuss the term "specific consent" below in the section "Consent, probation and parole searches."

There are two types of CSLI: historical and prospective. "Historical" CSLI consists of records pertaining to cell transmissions that occurred in the past.[15] For example, if officers wanted to know if a murder suspect had been near the location where the victim's body had been found, they would seek historical data for the relevant time period.

The other type of CSLI—"prospective" information—consists of cell site data that will be obtained *after* a court issues a search warrant, or *after* officers determined that CSLI was needed because of exigent circumstances. Prospective information is usually obtained in real time, meaning it is sent directly from the provider's equipment to an investigator's computer, tablet, or cell phone. For example, if officers wanted to follow a suspect by means of cell tower transmissions (or GPS) they would seek prospective data.

One method of obtaining prospective CSLI is through equipment owned or operated by a cell phone provider. This can be accomplished by having the provider "ping" the target's phone, which means transmitting an electronic signal that instructs the phone to disclose its current location. This information is then disseminated to officers in real time or through periodic reports.[16]

CSLI can also be obtained by means of a "cell site simulator." These are mobile devices that, when near the target's phone, essentially trick it into believing that the simulator is a cell site, and that it is the closest and most powerful cell site in its vicinity. This causes the cell phone to send the phone's current location It may also do a variety of more intrustive things. For example, when we went to press, cell site simulators were a hot topic in the news media because it was alleged in a privacy lawsuit that they can intercept communications as well as data.

PEN REGISTERS AND PHONE TRAPS: A "pen register" is a device or software application that records or decodes the phone numbers that are dialed on the target's phone over a particular period of time.[16] A "phone trap" or "trap and trace device" functions like a pen register but, instead of obtaining phone numbers dialed on the target's phone, it identifies the phone numbers of devices from which calls to the phone were made.[18]

Although pen registers and phone traps serve important functions in law enforcement, it is uncertain whether officers may obtain authorization to install and monitor them via a court order, or whether a search warrant is required. That is because the Legislature passed two bills in 2015—Senate Bill 178 and Assembly Bill 929—which establish different requirements for utilizing these devices. Specifically, SB 178 requires a warrant, while AB 929 requires a court order that does not require probable cause. In fact, AB 929 requires only a officer's declaration that the data which is likely to be obtained via the pen register and/or phone trap is relevant to an ongoing criminal investigation.

Based on its analysis of these two bills, the California Department of Justice concluded that AB 929 was superseded by SB 178 which would mean that a search warrant would be required. It appears that one reason for this conclusion is that SB 178 was the bill that established the comprehensive change in the law which we discussed earlier in this article,

[13] See Pen. Code §§ 1546(c); 1546(d); Pen. Code § 1546(g).
[14] See Pen. Code § 1546.1(b); Pen. Code § 1546.1(c).
[15] See *U.S. v. Graham* (4th Cir. 2015) __ F.3d __ [2015 WL 4637931]
[16] See *People v. Barnes* (2013) 216 Cal.App.4th 1508, 1511; *U.S. v. Skinner* (6th Cir. 2012) 690 F.3d 772, 778.
[17] See Pen. Code § 638.50(b).
[18] See Pen. Code § 638.50(c).
[19] See Pen. Code § 638.52.
[20] See Pen. Code § 638.52.
[21] See Pen. Code § 638.52(d); Pen. Code § 638.52(e).

while AB 929 pertained only to pen registers and phone traps. Although the Legislature is expected to correct this oversight, it usually takes some time which means that, until then, officers may need a search warrant.

Consent, probation and parole searches

CONSENT SEARCHES: Per CalECPA, the only type of search that can be conducted pursuant to the suspect's consent is a search for "electronic device information" which is defined as "any information stored on or generated through the operation of an electronic device, including the current and prior locations of the device" (i.e., CSLI).[24] But such consent must constitute "specific consent," a new type of consent discussed next under "Probation searches."

PROBATION SEARCHES: It is not clear whether officers may search a probationer's cell phone or other electronic communications device pursuant to a probation search condition that authorizes warrantless searches of property under the control of the probationer. Although the legal basis for probation searches is "consent,"[25] CalECPA requires something it calls "specific consent," which it defines as "consent provided directly to the government entity seeking information."[26] What does this mean?

It seems to mean that searches of electronic communications devices are not covered under the scope of a probation search. That is because such consent is not given "directly" to officers—it is given directly to the sentencing judge in exchange for the judge's agreement not to send the probationer directly to jail or prison. Assuming that's what "specific consent" means, it admittedly represents irrational legislative overreaching. After all, it would mean that officers may search the probationer's entire home and its contents—including documents and personal property—but not his cell phone. Why should a person's cell phone be entitled to more privacy than his home? This is a question the Legislature should be required to address.

PAROLE SEARCHES: Unlike probation searches, parole and postrelease community supervision (PRCS) searches are mandated by statute,[27] which means that officers will need a search warrant. (Again, it seems strange that, as with probationers, officers may search the parolee's entire home pursuant to the terms of parole but not his cell phone.)

Warrantless searches permitted

Although a warrant is ordinarily required to search electronics communications devices and records, CalECPA expressly authorizes the following warrantless searches:

ABANDONED DEVICES: Officers may search a cell phone if they have a good faith belief that it is lost, stolen, or abandoned. However, they must limit the search to files or other information that may help "identify, verify, or contact the owner or authorized possessor of the device."[28]

INFORMATION VOLUNTARILY DISCLOSED: Neither a search warrant nor other authorization is required to search or seize information that is voluntarily disclosed to an officer by the intended recipient of the information.[29]

CELL PHONES IN PRISONS: Although it sounds obvious, a warrant is not ordinarily required to search for records stored in a cell phone that was apparently abandoned in a state prison.[30] POV

Note: *We have three new search warrant forms that may be used to obtain electronic communications and data from the following: a communications provider, a device in police custody, and a device not in police custody; e.g., the suspect's cell phone. To obtain these forms in Microsoft Word format, send an email from a departmental email address to pov.alcoda.org.*

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[22] See Pen. Code § 638.53(a).
[23] See Pen. Code § 638.53(b).
[24] See Pen. Code § 1546.1(c)(3).
[25] See *People v. Bravo* (1987) 43 Cal.3d 600, 608; *People v. Medina* (2008) 158 Cal.App.4th 1571, 1575.
[26] See Pen. Code § 1546(k); Pen. Code § 1546.1(c)(3).
[27] See Pen. Code § 3067(a) [standard parole]; Pen. Code § 3453(f) [PRCS].
[28] See Pen. Code § 1546.1(c)(6).
[29] See Pen. Code § 1546.1(a)(3).
[30] See Pen. Code § 1546.1(c)(7).

Questioning Defendants

The Right to Counsel in Criminal Investigations

To bring in a lawyer means a real peril to solution of the crime.[1]

Suspects who have been charged with a crime have a Sixth Amendment right to have an attorney present during any questioning about that crime. In most cases, this is not something the investigating officers need to worry about because, by the time the case is charged, the suspect will have been either interviewed or he will have invoked. But sometimes the investigating officers or DA's investigators will want to talk to the suspect after he had become a "defendant." Frequently, the purpose of such questioning is to confront him with new evidence, such as a confession by an accomplice or to clarify something he said earlier.

For over two decades, however, this was strictly prohibited. That's because the Supreme Court ruled in 1986 that anyone who had been charged with a crime was incapable of waiving his Sixth Amendment right to counsel. The case was *Michigan v. Jackson,*[2] and it was a shocker because it meant (1) that officers could not question a defendant about the crime with which he had been charged unless his attorney was present, and (2) the first thing an attorney is apt to tell his client is "keep your mouth shut," or words along those lines. Consequently, *Jackson* made it virtually impossible to question a charged suspect.

But in 2009, there was another shocker. In *Montejo v. Louisiana*[3] the Supreme Court overturned *Jackson* and ruled that a defendant—even one who is represented by counsel—is fully capable of deciding for himself whether he wants to waive his Sixth Amendment rights and talk with officers. In other words, post-charging questioning is now permitted.

The facts in *Montejo* will help show how this issue can arise.

Jesse Montejo was arrested for murdering a man whose body had been found one day earlier. While being questioned, Montejo admitted that he shot and killed the victim during a botched burglary. He was promptly arraigned on the murder charge and an attorney was appointed to represent him. A few hours later, investigators visited Montejo in the jail and asked if he would be willing to write a letter of apology to the victim's widow. He said he would and, after being *Mirandized,* he wrote the letter which was used against him at trial. He was convicted.

When this occurred, *Michigan v. Jackson* was still the law, which meant that the letter should have been suppressed. But when the case reached the Supreme Court, the Justices were having second thoughts about *Jackson* and its strict prohibition against post-charging questioning. In fact, as noted, they agreed that *Jackson* needed to be overturned.

There were essentially three reasons for the Court's decision. First, the Court concluded that "it would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer."[4] Second, the Court noted that a suspect who does not want to talk with officers without counsel "need only say as much when he is first approached and given the *Miranda* warnings." Third, the Court pointed out that it made no sense to give a suspect a constitutional right not to talk with officers, and then *compel* him to exercise that right. Such an outcome, said the Court, would effectively "imprison a man in his privileges."

As the result of *Montejo v. Louisiana*, officers may now meet with a defendant—even one who is represented by counsel—and ask if he is willing to talk with them about the crime with which he was

[1] *Watts v. Indiana* (1949) 338 U.S. 49, 59 (conc. Opn. of Jackson, J.). Edited.
[2] (1986) 475 U.S. 625
[3] (2009) 556 U.S. 778, 785.
[4] **NOTE**: The Court also ruled that a defendant need not expressly assert his right to counsel during arraignment; instead, an invocation will also result if he merely stood mute while the arraignment judge appointed counsel.

charged (or any other crime for that matter). And if he says yes, they may question him if he waives his Sixth Amendment right to counsel.

We will discuss the subject of Sixth Amendment waivers shortly, but first we will address a more basic question: When does a suspect acquire a Sixth Amendment right to counsel? After discussing that subject and waivers, we will review an ethics issue that might arise if prosecutors question a suspect who is represented by counsel or who had been charged with a crime. We will conclude our discussion in the accompanying article in which we explain how the Sixth Amendment affects the ability of officers to use informants and undercover officers to question defendants surreptitiously.

When a "Suspect" Becomes a "Defendant"

As noted, a suspect acquires a Sixth Amendment right to counsel when he is "charged" with a crime. The reason "charging" is the triggering event is that it represents the point at which the government crosses "the constitutionally-significant divide"[5] between criminal investigation and criminal prosecution.[6] Said the Supreme Court, "[A]fter a formal accusation has been made, a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment."[7]

When a suspect is "charged"

Because "charging" is the pivotal event, you would think there must be a clearly defined point at which it occurs. But for many years, no one knew for sure where that point was located. That is because, in case after case, the Supreme Court would routinely say (and the lower courts would routinely repeat) that it might occur when prosecutors filed a criminal complaint against the suspect, or maybe when a judge issued a holding order at the conclusion of a preliminary hearing, or possibly when the suspect was indicted by a grand jury, or at least when he was arraigned on the charge.[8]

As the result of this uncertainty, defense attorneys would argue (and some still do[9]) that a suspect's Sixth Amendment rights should attach at some point while the criminal investigation was underway. For example, they have argued that a "suspect" was transformed into a "defendant" when he became the "focus" of a criminal investigation or otherwise a "person of interest," or when a judge issued a warrant to search his home, or when officers had probable cause to arrest him, or when he had been charged with another crime that was "closely related" to the crime under investigation.[10]

All of these arguments were ultimately rejected, but it was not until 2008 that the Supreme Court decided on an explicit and workable definition of the term. The case was *Rothgery v. Gillespie County*,[11] and the Court announced that a suspect would become "charged" with a crime if—and only if—he had been arraigned on that crime in a criminal courtroom. Said the Court:

> [A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Although *Montejo* and *Rothgery* helped clarify a lot of things, there is still some confusion about a few other aspects of the Sixth Amendment's Right to Counsel. As we will now discuss, much of the confusion centers on Sixth Amendment waivers, Sixth Amendment invocations, and suspect-initiated questioning.

[5] *U.S. ex rel. Hall v. Lane* (7th Cir. 1986) 804 F.2d 79, 82.
[6] See *Kirby v. Illinois* (1972) 406 U.S. 682, 689 [when a suspect is "charged" he must face "the prosecutorial forces or organized society"]; *Moran v. Burbine* (1986) 475 U.S. 412, 430 ["By its very terms, [the Sixth Amendment] becomes applicable only when the government's role shifts from investigation to accusation."].
[7] *Michigan v. Jackson* (1986) 475 U.S. 625, 632. Edited.
[8] See, for example, *Kirby v. Illinois* (1972) 406 U.S. 682, 689; *Rothgery v. Gillespie County* (2008) 554 U.S. 191, 198.
[9] See, for example, *People v. Cunningham* (2015) 61 Cal.4th 609, 648.
[10] See, for example, *Hoffa v. United States* (1966) 385 U.S. 293, 310; *People v. Clair* (1992) 2 Cal.4th 629, 657; *People v. Woods* (2004) 120 Cal.App.4th 929, 941; *People v. Webb* (1993) 6 Cal.4th 494, 527; *People v. Cunningham* (2015) 61 Cal.4th 609, 648.
[11] (2008) 554 U.S. 191, 213.

Sixth Amendment Waivers

There are two ways to obtain a Sixth Amendment waiver. First, if the suspect was in custody, officers can do so by obtaining a *Miranda* waiver (which they would have to do anyway). The reason a *Miranda* waiver will suffice is that the Supreme Court has ruled that a suspect who waives his *Miranda* rights necessarily waives his Sixth Amendment right to have counsel present during interrogation. As the Court explained in *Patterson v. Illinois*, "By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, [the officer] conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him."[12]

If the suspect was out of custody, a *Miranda* waiver would not be required, but it is still an option. (This is the only situation in which officers would seek a *Miranda* waiver from a suspect who was not in custody.) The other option is to obtain a customized Sixth Amendment waiver by advising the suspect of the following: (1) You have the right to consult with an attorney before questioning. (2) You have the right to have counsel present during questioning. (3) If you cannot afford an attorney, one will be appointed at no cost. (4) Anything you say may be used against you in court.[13]

One other thing: While being advised of their Sixth Amendment right to counsel, suspects often ask if a waiver also constitutes a waiver of their right to be represented by an attorney in court. The answer is no.[14]

Sixth Amendment Invocations

Although officers may question a defendant if he waives his Sixth Amendment right to counsel, the question arises: What if he had previously *invoked* his Sixth Amendment rights by, for example, requesting court appointed counsel? Does that mean that, as in *Miranda*, any such questioning is unlawful? As we will now explain, the answer is no because of a significant difference between *Miranda* and Sixth Amendment invocations.

Miranda invocations almost always occur on the street or in interview rooms, and they can occur only during or shortly before custodial interrogation. More important, the objective of a *Miranda* invocation is to notify officers that the suspect either does not want to answer any questions or he wants to have an attorney present while he does so. For these reasons a *Miranda* invocation signifies the end of the interview.

In contrast, Sixth Amendment invocations almost always occur in courtrooms—usually at arraignment—when a defendant either arrives with an attorney or he asks the court to appoint one. This constitutes a Sixth Amendment invocation because it demonstrates to the judge that the suspect wants to be represented by counsel during all further court proceedings. But because it does not demonstrate that the defendant is unwilling to talk with officers without an attorney, they are free to question him if he waives his Sixth Amendment rights. As the Supreme Court observed in *Montejo*, "[I]t would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer."

Defendant-Initiated Questioning

A defendant will sometimes contact investigators directly or through jail staff and say he wants to talk to them about the charged crime. Even if the defendant is represented by counsel, officers may meet with him and, if he waives his *Miranda* rights, question him about the crime with which he was charged or any other crime he wishes to discuss.

NO NOTICE TO ATTORNEY: If a suspect initiates questioning, officers are not required to notify his attorney of the impending interview. For example, in *People v. Sultana*[15] the defendant hired a lawyer to represent him on a murder charge in Santa Cruz. After he was held to answer, he notified the investigating officer that he wanted to meet with him. At the start of the meeting, Sultana waived his *Miranda*

[12] (1988) 487 U.S. 285, 298.
[13] See *Patterson v. Illinois* (1988) 487 U.S. 285, 298
[14] See *Patterson v. Illinois* (1988) 487 U.S. 285, 293, fn.5.
[15] (1988) 204 Cal.App.3d 511.

rights and later made some incriminating statements. On appeal, he argued that his statements should have been suppressed because the officer was required to notify his attorney before talking to him. But the court disagreed, saying, "The State is not required [under Supreme Court precedent] to contact a defendant's attorney of record prior to questioning where the defendant has initiated interrogation and waived his right to counsel following *Miranda* warnings."

DEFENDANT INITIATES INTERVIEW WITH KNOWN AGENT: A defendant will be deemed to have automatically waived his Sixth Amendment rights if he initiates a conversation about a charged crime with a civilian who he knows is a police agent or is otherwise assisting officers. For example, in *Jenkins v. Leonardo*[16] the defendant, after being charged with rape, made several phone calls to the victim from the jail. The victim notified police who asked her to try to get him to talk about the crime if he should call again. They also furnished her with a recording device. Jenkins called again and made some incriminating statements which were used against him. On appeal, he contended that his statements should have been suppressed because he did not waive his Sixth Amendment right to counsel. The Second Circuit ruled, however, that the Sixth Amendment "does not prohibit questioning when a charged and represented suspect initiates a conversation with someone he knew or should have known was a state agent."

Ethics Issues for Prosecutors

So far we have been discussing the restrictions imposed by the Sixth Amendment on the questioning of charged suspects. Apart from the constitutional issues, there is a California ethics regulation that might be interpreted to mean that prosecutors cannot play any role in such operations. Specifically, Rule 2-100 of the California State Bar's Rules of Professional Conduct prohibits prosecutors from questioning a suspect if (1) he is represented by counsel, (2) the communication pertained to a crime for which he was represented, and (3) the defendant's attorney did not consent to the communication.

Because these restrictions apply regardless of whether the suspect had been charged with a crime, and regardless of whether he was questioned by prosecutors or by officers acting under their direction, the courts and State Bar have had to address the apparent conflict between Rule 2-100 and the Supreme Court's interpretation of the Sixth Amendment. Specifically, they had to decide whether prosecutors violate Rule 2-100 if they advise, direct, or participate in the questioning of a charged suspect who had invoked his Sixth Amendment right to counsel. For the following reasons they determined that such conduct does not violate Rule 2-100 if it occurred before the defendant was charged.

As the State Bar explained in its "Discussion" of Rule 2-100, it "does not apply if the prohibition has been overridden by a "statutory scheme or case law." It then pointed out that one such overriding legal principle is that prosecutors have the authority to "conduct criminal investigations, as limited by the relevant decisional law." This is a strong indication that the rule does not apply to investigatory, precharging questioning by prosecutors because, as discussed in this article, there is nationwide and extensive case law in which such questioning is expressly permitted by the Sixth Amendment.

Consequently, in interpreting this language, the California Attorney General concluded, "During the investigative phase of a criminal or civil law enforcement proceeding, Rule 2-100 of the California Rules of Professional Conduct does not prohibit a public prosecutor, or an investigator under the direction of a public prosecutor, from communicating with a person known to be represented by counsel, concerning the subject of the representation, without the consent of such counsel."[17] POV

[16] (2nd Cir. 1993) 991 F.2d 1033.

[17] (1992) 75 Ops.Cal.Atty.Gen. 223. Also see *U.S. v. Carona* (9th Cir. 2011) 660 F.3d 360, 365 [the informant "was acting at the direction of the prosecutor in his interactions with Carona, yet no precedent from our court … has held such indirect contacts to violate Rule 2–100"]; Professionalism, A Sourcebook of Ethics and Civil Liability Principles for Prosecutors (2001, California District Attorneys Association) pp. VI-6 et seq.; Standard 24.6.

Surreptitious Questioning

[Surreptitious questioning] is one of its most effective law enforcement techniques for investigating complex crime.[1]

In the accompanying article, "Questioning Defendants," we discussed a situation in which a defendant was questioned by an officer about the crime for which he was charged—and the defendant knew the officer was an officer. In this article, we will change the scenario: The person asking the questions was an undercover officer, informant, or other third person.

In these situations, *Miranda* does not present a problem because the Supreme Court has ruled that questioning by a police agent is an exception to the rule that a waiver is required. But the Sixth Amendment right to counsel *can* present a problem because, unlike *Miranda* (which is concerned solely with coercion), the purpose of the Sixth Amendment is to prevent officers from interfering with the attorney-client relationship. And such interference will result regardless of whether the questioner was a known officer or police agent

The reason this presents a problem is that, as discussed in "Questioning Defendants," a suspect who has been charged with a crime cannot be questioned about that crime unless he waives his Sixth Amendment right to counsel. And it's impossible for a police agent to obtain a waiver because suspects tend to become suspicious when undercover officers or informants start advising them of their rights. Fortunately, the Supreme Court solved this problem by ruling that a waiver is unnecessary if the agent did not "deliberately elicit" the information. What constitutes "deliberate elicitation"? We will address that question shortly. But first, it is necessary to explain the term "police agent."

"Police Agents"

In addition to undercover officers (who are necessarily police agents), there are two types of civilian police agents: (1) people who were promised something for obtaining incriminating information from a defendant, and (2) people who were given sufficient encouragement or a sufficiently strong incentive to do so.

Express promises

A person will be deemed a police agent if officers promised him something in return if he obtained incriminating information from a defendant, or if there was a "preexisting arrangement" whereby the person reasonably believed he would receive a specific benefit or advantage.[2] Examples of such promises and arrangements include promises to pay the informant for his assistance,[3] promises to provide him with safe housing,"[5] and agreements "to assist [the informant's] parole application by detailing the extent of his cooperation with the government,"[4]

Implied promises

Even if officers did not expressly promise the informant a particular benefit, a promise will be implied if it was reasonably likely to be interpreted as one. For example, in *In re Neely*[6] the defendant was arrested and charged with murder. His accomplice, Centers, confessed but claimed Neely was the shooter. So officers requested that Centers ask Neely where he had hidden the murder weapon. He succeeded, but the court ruled that Centers was a police agent because the officer had told him that he"could be charged with anything from first degree murder to a parking ticket, depending upon the degree of Centers's cooperation with the authorities." Simi-

[1] *U.S. v. Powe* (9th Cir. 1993) 9 F.3d 68, 70.
[2] *People v. Dement* (2011) 53 Cal.4th 1, 33-34.
[3] *United States v. Henry* (1980) 447 U.S. 264, 271-72 ["The arrangement between [the informant] and the agent was on a contingent-fee basis; [the informant] was to be paid only if he produced useful information."].
[4] *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1358.
[5] *People v. Memro* (1995) 11 Cal.4th 786, 828.
[6] (1993) 6 Cal.4th 901, 910.

larly, a person will be deemed a police agent if he had been outfitted with recording equipment before meeting the defendant or if he engaged the defendant is a recorded telephone conversation.[7]

In contrast, in *People v. Moore*[8] the defendant had been charged with shooting a police officer and had been placed in a cell with a prisoner named White. Because Moore was considered a suicide risk, an officer asked White to "babysit" him. One day while talking with Moore, White asked him why he was in jail, and Moore said he had "shot a cop." Moore argued that his statement should have been suppressed because White was a police agent, but the court disagreed because the request to "babysit" did not directly or impliedly include a request to elicit incriminating information from Moore.

Two other things should be noted about express and implied promises. First, an agency relationship will not result merely because the informant received some after-the-fact benefit. For example, the courts have ruled that an informant did not become a police agent merely because an officer later testified on his behalf at the penalty phase of his capital trial,[9] or because the informant "subsequently received what appears to have been favorable treatment as to various penalties,"[10] or because the informant "may have gotten the [prison] placement he desired."[11]

Second, a penal institution's policy of rewarding inmates who provide useful information will not render all inmates who furnish such information police agents. As the California Supreme Court explained, "[A] general policy of encouraging inmates to provide useful information does not transform them into government agents."[12]

Providing an incentive

As noted, an informant will also be deemed a police informant if officers provided him with a sufficient incentive to obtain incriminating information from the defendant. Thus, the California Supreme Court said that "the critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused."[13]

The most common (and most powerful) incentive is a promise to an informant with a pending case that officers would notify prosecutors if he assisted them. Although there is an inference that the person would receive some benefit from prosecutors, he will not be deemed a police agent if, for example, officers merely notified him that his cooperation "might be useful in later plea bargain negotiations."[14] Similarly, in ruling that an informant was not a police agent, the courts noted the following:

- "The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant that full cooperation might be beneficial in an unspecified way."[15]
- The officer told the suspect his cooperation would be brought to the DA's attention "for consideration."[16]
- The informant was told that the DA would be informed that he was "honest."[17]

In light of these rulings, the question arises: How should officers respond when they are being cross examined at a suppression hearing, and defense counsel suggests that they promised the informant something more than merely notifying the DA of his cooperation? An example of a good response is found in *In re Williams*[18] where an officer who was

[7] See *Massiah v. United States* (1964) 377 U.S. 201; *Maine v. Moulton* (1985) 474 U.S. 159, 174.
[8] (1985) 166 Cal.App.3d 540.
[9] *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249-50.
[10] *People v. Williams* (1997) 16 Cal.4th 153, 204.
[11] *People v. Howard* (1988) 44 Cal.3d 375, 401.
[12] *People v. Williams* (1988) 44 Cal.3d 1127, 1141; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240.
[13] *People v. Whitt* (1984) 36 Cal.3d 724, 742. Also see *Randolph v. California* (9th Cir. 2004) 380 F.3d 1133, 1139.
[14] *People v. Jones* (1998) 17 Cal.4th 279, 298.
[15] *People v. Carrington* (2009) 47 Cal.4th 145, 174. Also see *People v. Dement* (2011) 53 Cal.4th 1, 3.
[16] *People v. Ramos* (2004) 121 Cal.App.4th 1194.
[17] *People v. Jones* (1998) 17 Cal.4th 279, 298.
[18] (1994) 7 Cal.4th 572, 598-99.

testifying at a motion to suppress was asked the following question: "And did you ever in any way indicate to [the informant] that in some way, he should be given consideration in [his pending] case for his testimony in Williams' case?" The investigator responded:

> My statement to him has been the same that I've made to many people that wind up in the county jail for one reason or another. "I will go to the District Attorney with the information you give me. I will make it known to the District Attorney, whatever information you have given me in the past. And that's all I can do."

The court ruled the informant was not a police agent.

Targeting the suspect

A person might be deemed a police agent if officers identified the defendant to him as someone who had information they wanted. For example, the courts have ruled that a person (such as a co-conspiractor or cellmate) became a police agent when officers told him they had a special interest in the person's activities.[19] Similarly, in *U.S. v. York*[20] an FBI agent told a jailhouse informant about "the type of information he was interested in receiving" which, said the Seventh Circuit, "was tantamount to an invitation to [the informant] to go out and look for that type of information."

Officers fail to intervene

Officers will sometimes become aware that an informant has been deliberately eliciting information from a defendant on his own initiative. The question arises: Will an agency relationship result if they took no action to stop him? The cases indicate that the answer is no unless they said something that could reasonably be interpreted as encouraging the informant to continue his activities.

For example, in *People v. Pensinger*[21] the defendant was charged with murdering and mutilating a five-month old girl in San Bernardino County. While being held in the county jail, Pensinger confessed to an inmate named Howard who later notified investigators. They listened to his story but did not ask him to do anything further. During the next four weeks, Howard initiated five more meetings with the investigators, during which he told them about additional incriminating statements that Pensinger had made. In ruling that Howard was not a police agent, the California Supreme Court said, "[T]hough the police interviewed Howard about defendant's statements on six occasions, each interview was at Howard's instigation," and furthermore the investigators told him "he was not their agent, and to expect no reward."

Similarly, in *People v. Dominick*[22] the court rejected the argument that an informant was a police agent merely because he told a DA's investigator that he would let him know if he "came across something" while he was in jail. As the court pointed out, "The investigator told him to 'stay in touch' but at no time instructed him to seek out any information from inmates concerning criminal activity."

Not police agents

INFORMANT "HOPED" FOR REWARD: An informant does not become a police agent merely because he hoped or expected some reward.[23] As the Seventh Circuit observed, "Undoubtedly, most inmates who provide information to law enforcement officials harbor the hope that their service will not go unrewarded. But we must not confuse speculation about [an informant's] motives for assisting the police for evidence that the police promised [the informant] consideration for his help or, otherwise, bargained for his active assistance."[24]

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[19] *In re Neely* (1993) 6 Cal.4th 901, 915.
[20] (7th Cir. 1991) 933 F.2d 1343.
[21] (1991) 52 Cal.3d 1210. Also see *People v. Williams* (1997) 16 Cal.4th 153, 204; *People v. Coffman* (2004) 34 Cal.4th 1, 67.
[22] (1986) 182 Cal.App.3d 1175.
[23] See *People v. Dement* (2011) 53 Cal.4th 1, 29; *People v. Fairbank* (1997) 16 Cal 4th 1223, 1248 ["Of course, [the informant] may have hoped to receive some benefit in exchange for his ongoing receipt of information, but he nevertheless continued to act on his own initiative."].
[24] *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1357.

For example, in *U.S. v. York*,[25] the court pointed out that while a jailhouse informant "had some expectation that he would benefit" by seeking information from the defendant, there was "no evidence that the government had directed or steered the informant toward the defendant." The court added, "That informants realize there is a market for information about crime does not make each inmate who enters the market a government agent." The D.C. Circuit put it this way: Although the informant was "acting as an entrepreneur" and was hoping to "make a sale to the Government," that "does not make the Government responsible for his actions."[26]

PRIOR RELATIONSHIP WITH OFFICERS: An informant does not become a police agent just because he had worked as an informant in the past. As the California Supreme Court explained, "[N]o constitutional question arises unless the informant is an agent of the state *at the time* he or she elicited the statements that would be the subject of later testimony."[27] A prior working relationship may, however, be relevant, if the informant had previously received some benefit for providing information."[28]

INFORMANT WORKING ON HIS OWN: An informant or other person who deliberately elicits information from a charged suspect is not a police agent if he did so on his own initiative.[29] As the court said in *People v. Catelli*,[30] "When on his or her own initiative, rather than at the state's behest, an informant obtains incriminating information from an accused, there is no [Sixth Amendment violation]." Or in the words of the Seventh Circuit, "There is a distinct difference between passively receiving information provided by enterprising inmates and striking deals with inmates."[31] Furthermore, even if the informant and officers had spoken about engaging in such conduct, he will likely not be deemed a police agent if officers told him in no uncertain words that they did not want his assistance and that he should stay out of the matter.[32]

"Deliberately elicit"

As noted, even if someone is deemed a police agent, his attempt to obtain incriminating information from a charged suspect will not violate the Sixth Amendment unless he "deliberately elicited" the information.[33] What is "deliberate elicitation?"

In one way, the meaning is virtually the same as that of "interrogation" as used in *Miranda* because both terms encompass both direct questioning about a crime and casual or devious attempts to obtain information. The only difference is that, as the name implies, "deliberate elicitation" under the Sixth Amendment can occur only if the agent's objective was to obtain incriminating information, while "interrogation" under *Miranda* does not technically require such a specific intent.

As a practical matter, however, there is no significant difference between deliberately eliciting and interrogating. That is because, although *Miranda* "interrogation" does not technically require an intent to obtain incriminating information, such an intent will almost always exist or be implied. After all, when a person is acting as a police agent and he talks with a suspect and asks questions that were reasonably likely to elicit an incriminating response, it is apparent that he intended to obtain incriminating information. As the California Supreme Court observed, deliberate elicitation results even if the agent merely "stimulates conversation with a defendant relating to the charged offense or actively engages the defendant in such conversation."[34]

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[25] (7th Cir. 1991) 933 F.3d 1343.
[26] *U.S. v. Watson* (D.C. Cir. 1990) 894 F.2d 1345, 1348.
[27] *People v. Memro* (1995) 11 Cal.4th 786, 828. Emphasis added.
[28] See *In re Williams* (1994) 7 Cal.4th 572, 598.
[29] See *People v. Coffman* (2004) 34 Cal.4th 1, 67; *People v. Dement* (2011) 53 Cal.4th 1, 35.
[30] (1991) 227 Cal.App.3d 1434, 1442.
[31] *U.S. v. York* (7th Cir. 1991) 933 F.2d 1343, 1357.
[32] See *In re Wilson* (1992) 3 Cal.4th 945, 952 *People v. Memro* (1995) 11 Cal.4th 786, 828.
[33] See *Fellers v. United States* (2004) 540 U.S. 519, 524; *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459; *People v. Williams* (2013) 56 Cal.4th 165, 188-89.
[34] *In re Neely* (1993) 6 Cal.4th 901, 915.

For example, in the landmark case of *Massiah v. United States*[35] the defendant and his codefendant, Colson, were indicted on federal narcotics charges. After they bailed out, Colson agreed to assist federal agents in obtaining evidence against Massiah. Specifically, he permitted them to hide a radio transmitter under the seat of his car, and he agreed to engage Massiah in a conversation there about their drug trafficking. During the conversation, Massiah made several incriminating statements which were used against him at trial. Although Colson did not directly question Massiah about his criminal activities, the Supreme Court ruled that he implicitly did so because "the damaging testimony was elicited from the defendant without his knowledge."

About ten years later, the Court applied this principle in *Maine v. Moulton*,[36] ruling that a wired informant had deliberately elicited statements from the defendant when, during a casual conversation, he "reminisced" about their criminal activities" and also, after apologizing for his poor memory, he "repeatedly asked [the defendant]to remind him about the details of [their crimes]."

In contrast, in *People v Catelli*[37] the defendant, who was in custody on several sex charges, arranged to meet with an undercover officer who was posing as a thug-for-hire. Catelli asked him to "convince" his victims to "change their stories," and the officer asked Catelli "a number of questions designed to have [him] elaborate on his request." Catelli's responses to these questions were used against him at trial, but the court ruled they should have been suppressed because the officer's conversation with Catelli was "deliberately designed to elicit incriminating statements from defendant."

Inferring deliberate elicitation

Even if it is unclear whether an officer actually instructed a police agent to elicit incriminating information, an agency relationship may be inferred if he had given the person an incentive to do so, or had otherwise created a situation in which he was likely to try.[38]

For example, in *United States v. Henry*[39] the defendant was being held in the Norfolk city jail on a bank robbery charge. One of his fellow inmates was a man named Nichols who was not only a paid informant, he worked on "a contingent-fee basis," meaning he would not be paid unless he obtained "useful" information. An FBI agent who was investigating the bank robbery asked Nichols to "be alert" for any incriminating information from Henry, and Nichols later reported back that Henry "told him about the robbery." Even though there was no direct evidence that the agent had asked Nichols to obtain incriminating information, the Supreme Court ruled that he had effectively done so because he had created "a situation likely to induce Henry to make incriminating statements."

Similarly, in *In re Neely*[40] the California Supreme Court inferred that a jailhouse informant had deliberately elicited information from a murder suspect, Neely, based on the following: (1) a sheriff's deputy told the informant that he "was seeking specific information from [Neely] as to the whereabouts of the murder weapon, (2) the deputy "encouraged and instructed" the informant on how he could obtain this information, and (3) the deputy arranged for the informant and Neely to be placed in close contact so that the informant would have an opportunity to do so.

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[35] (1964) 377 U.S. 201.
[36] (1985) 474 U.S. 159.
[37] (1991) 227 Cal.App.3d 1434.
[38] See *People v. Whitt* (1984) 36 Cal.3d 724, 742 ["[T]he critical inquiry is whether the state has created a situation likely to provide it with incriminating statements from an accused."]; *In re Neely* (1993) 6 Cal.4th 901, 917-18 [a deputy told the informant that he "was seeking specific information from [the defendant] as to the whereabouts of the murder weapon," and the deputy "encouraged and instructed [the informant] as to the means by which [he] could procure this information from [the defendant]"]; *U.S. v. Sampol* (D.C.Cir. 1980) 636 F.2d 621, 638 [court inferred that an informant deliberately elicited incriminating statements from the defendant because the terms of his probation required that he "go all out" in obtaining such statements].
[39] (1980) 447 U.S. 264.
[40] (1993) 6 Cal.4th 901.

Monologues

In addition to restricting direct forms of questioning, the Sixth Amendment prohibits officers and other police agents from utilizing more subtle methods of inducing defendants to make incriminating statements. This was what happened in the famous Sixth Amendment case of *Brewer v. Williams*[41] in which an escaped mental patient named Robert Williams abducted and murdered a 10-year old girl in Des Moines, Iowa. After Williams had been charged with the crime, an attorney notified investigators that he was Williams' attorney and that Williams would shortly surrender himself to police in Davenport which was about 160 miles away.

Williams did, in fact, surrender, and two investigators were sent to Davenport to transport him back to DesMonies. Shortly after the trip began, Williams and one of the investigators began a "wide-ranging" conversation that included religion. Knowing that Williams claimed to be deeply religious, the investigator then delivered to Williams the so-called "Christian Burial Speech" in which he urged Williams to reveal where the girl's body had been buried so that she could get a proper Christian burial. Williams did so, and this fact was used against him at trial. Although the officer did not ask Williams any questions, the Supreme Court ruled "[t]here can be no serious doubt [that the officer] deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him."

What police agents may do

An undercover officer or informant does not deliberately elicit information if he acts merely as a passive listener—also known as a "listening post," or "ear"—and simply reports the suspect's words to officers.[42] For example, in *Kuhlmann v. Wilson*[43] the defendant, who had been charged with robbery and murder, was placed in a jail cell with an informant named Benny Lee. Officers had asked Lee to "keep his ears open" for the names of Wilson's accomplices. Although Wilson did not identify them to Lee, he made some admissions that were used against him at trial. In ruling that Wilson had failed to prove that his admissions were deliberately elicited, the Supreme Court said:

> [A] defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

What to tell informants

Before an informant begins such an undercover operation, officers must tell him exactly what he can and cannot do and say. This is because, if the informant disregards the officers' instructions, a statement by the defendant may be admissible because the officer would have acted lawfully and reasonably, and the Supreme Court has ruled that the suppression of evidence is permitted only to deter police misconduct.[45]

It is not, however, sufficient to tell the informant not to "interrogate" or "question" the defendant, or to "act normally," or to just "be yourself."[45] Instead, they should explain that his role is that of an "ear," and that he may do nothing to stimulate a conversation about the charged crime.[46] For example, in *People v. Dement*[47] the California Supreme Court ruled that officers had properly instructed an informant when they told him to "not to elicit information from [defendant] on our behalf, that he was not to discuss the case with him," and "not ask defendant anything specific to this case." POV

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[41] (1977) 430 U.S. 387.
[42] See *In re Wilson* (1992) 3 Cal.4th 945, 950; *People v. Williams* (1997) 16 Cal.4th 153, 205; *P v. Pensinger* (1991) 52 C3 1210, 1249; *People v. Martin* (2002) 98 Cal.App.4th 408, 422.
[43] (1986) 477 U.S. 436.
[44] See *Herring v. United States* (2009) 555 U.S. 135, 144; *Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2426].
[45] See *Maine v. Moulton* (1985) 474 U.S. 159, 177, fn.14; *People v. Whitt* (1984) 36 Cal.3d 724, 742.
[46] See *U.S. v. Lentz* (4th Cir. 2008) 524 F.3d 501, 517-18.
[47] (2011) 53 Cal.4th 1, 35.

Recent Cases

People v. Bridgeford

(2015) 241 Cal.App.4th 887

Issue

After a double murder suspect invoked his right to counsel, did investigators violate *Miranda* by releasing him from custody, rearresting him about three hours later, then, after obtaining a *Miranda* waiver, resuming their questioning about the murders?

Facts

Late one night, Bridgeford and two other men, one of them armed with a .22 caliber rifle, committed a home invasion robbery in Dos Palos. The resident of the house told deputies that he heard one of the robbers address an accomplice as "Bryan" and, although the robbers wore masks, he was positive that "Bryan" was a childhood friend named Bryan Bridgeford. The next day, two men were found murdered in a garage located off a nearby highway. They were shot with a .22 caliber rifle and a shotgun.

One day later, a Dos Palos police officer visited Bridgeford at his home for the purpose of questioning him about the robbery. The officer began by asking Bridgeford if he knew why he wanted to talk to him. Surprisingly, Bridgeford responded that it was because of the murders "that happened on the highway." Although Bridgeford had not yet been connected to the murders, the officer notified Merced County sheriff's deputies who were investigating the case. The deputies were aware that Bridgeford was an active member of the Norteños, and that the two murder victims were Sureños.

Six days later, the investigators transported Bridgeford to a sheriff's station for questioning about the murders. Although he was told he was not under arrest, he was handcuffed and, as the result, was effectively "in custody" for purposes of both *Miranda* and the Fourth Amendment.[1] Upon arrival, Bridgeford was *Mirandized* but immediately invoked his right to counsel. He was then released from custody. Within an hour or so, investigators executed a warrant to search the home of another Norteño, Jose German who was also suspect in the murders. During the search, they found a .22 caliber rifle hidden under the mattress of German's bed. German was arrested.

Based mainly on the discovery of the rifle and interviews with German and other people, investigators determined that they now had probable cause to arrest Bridgeford for the murders. So they went to his workplace and arrested him. The arrest occurred about two to three hours after his release from custody.

Bridgeford was transported back to a sheriff's station where he waived his *Miranda* rights but denied any involvement in the murders. Investigators then placed him in a wired room with German. Soon after the investigators left them alone, German told Bridgeford that deputies had found the rifle in his home, and that they knew Bridgeford was one of the shooters. Investigators then removed Bridgeford from the room and continued to question him about the murders and German's comments. He eventually confessed, and his confession was used by prosecutors at trial. He was convicted of two counts of gang-related first degree murder.

Discussion

In 2010 the Supreme Court ruled in *Maryland v. Shatzer* that officers may not ordinarily seek to interview or reinterview a suspect who had invoked his *Miranda* right to counsel unless they waited 14 days.[2] The theoretical purpose of the 14-day waiting period was to give the suspect an opportunity to consult with an attorney before further questioning. Why 14 days? The Court admitted it was "arbitrary" but explained that a two-week waiting period was necessary to protect against "gamesmanship,"

[1] See *Dunaway v. New York* (1979) 442 U.S. 200, 215; *People v. Taylor* (1986) 178 Cal.App.3d 217, 228.
[2] (2010) 559 U.S. 98.

whereby "the police will release the suspect briefly and then promptly bring him back into custody for reinterrogation."

But what if there was no "gamesmanship?" What if the officers released the suspect after concluding—in good faith—that they lacked probable cause? Are they prohibited from initiating questioning during the 14-day window if they lawfully arrest the suspect based on newly-discovered evidence? Unfortunately, the Supreme Court in *Shatzer* did not address this issue so the trial court was required to do so. And it concluded that, although Bridgeford was out of custody for only two to three hours, this was enough time for him to decide whether he wanted to have an attorney present during questioning. Consequently, the court ruled that Bridgeford's confession was obtained lawfully.

The Court of Appeal saw things differently. It concluded that *Shatzer* imposed a strict, no-exceptions, 14-day wait period and, accordingly, it ruled that Bridgeford's confession should have been suppressed because his "break in custody was far less than the 14 days required under *Shatzer*."

Comment

Bridgeford is probably not the final word on this subject because it was an unusual case. For one thing, a two to three hour wait is way too short. In addition, the possibility of a ploy could not be eliminated because the investigators had probable cause to arrest Bridgeford for the robbery and, therefore, they could have kept him in custody.

People v. Douglas

(2015) 240 Cal.App.4th 855

Issue

Before searching a person pursuant to a parole or PRCS search condition, what level of proof must an officer have that the person was, in fact, searchable?

Facts

A Richmond police officer whose assignment was to keep tabs on parolees and probationers happened to notice Douglas sitting in a parked car. The officer testified he "knew" that Douglas was on Postrelease Community Supervision (PRCS) because he had arrested him on a felony firearms charge just two years earlier, and also because his duties included "regularly monitor[ing] to see who is on probation and parole." So he decided to search Douglas based on the statutory requirement that all people released on PRCS are subject to warrantless searches.

As the officer walked up to the car, Douglas pulled away from the curb. The officer ordered him to stop and he complied; but when the officer ordered him to get out of the car, Douglas started to "scuffle." As the officer was handcuffing him, Douglas dropped a loaded .380 caliber semiautomatic handgun on the floorboard. The officer arrested him for felony possession of a firearm and, when Douglas's motion to suppress was denied, he pled guilty.

One other thing: The officer testified that, before conducting a parole or PRCS search, he would usually confirm through a police database that the person was actually on parole or PRCS. But he explained that, because of Douglas's defiant conduct, there was no time to seek confirmation before searching the floorboard for the gun.

Discussion

Although it turned out that Douglas was on PRCS, he argued that his gun should have been suppressed because the officer did not have enough information to make that determination. Before addressing this issue, the court explained that, pursuant to California's Criminal Justice Realignment Act of 2011, a judge who sentences a defendant to state prison for certain low-level offenses may order that the defendant serve his time in a local county jail. Furthermore, upon his release, he will be supervised by a probation officer instead of a parole officer.

Despite some similarities between PRCS and probation, a PRCS release is more akin to parole because all PRCS releasees are subject to essentially the same search conditions as parolees; i.e., they are "subject to search at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer."[3] Because these search conditions are mandatory, an officer who knows that a person is on PRCS is also

[3] See Penal Code § 3453(f); *People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422; *People v. Jones* (2014) 231 Cal.App.4th 1257.

deemed to know that he is searchable. As the court in *Douglas* pointed out, "[A]n officer's knowledge that the individual is on PRCS is equivalent to knowledge that he or she is subject to a search condition."

Nevertheless, Douglas argued that the search of his floorboard was unlawful because the officer did not confirm his PRCS status beforehand and, therefore, he lacked sufficient knowledge that he was on PRCS.[4] The court ruled, however, that the term "knowledge," as used in the Realignment Act, does not require actual knowledge or even direct knowledge. Instead, it requires only *reasonable suspicion,* which means the officer must simply have an "objectively reasonable belief" based on the totality of circumstances.[5] Accordingly, this determination may be based on circumstantial evidence and the officer's training and experience in interpreting this evidence. On the other hand, hunches and unsupported conclusions are useless.[6]

Applying these principles to the facts, the court ruled that, for the following reasons, the officer had an objectively reasonable belief that Douglas was on PRCS. First, he knew about Douglas's prior arrest for weapons possession. Second, he was presumably aware that the ordinary term of PRCS is three years. Third, the officer's duties included the monitoring of parolees, PRCS releasees, and probationers who live in Richmond. Therefore, said the court, the search was lawful because the officer was able to make a "rough calculation that Douglas would still be on PRCS as a result of that earlier offense."

Comment

While we are on the subject of postrelease searches, there are two recent cases in which the courts addressed issues pertaining to the scope of probation searches. By way of background, the term "scope" refers to the places and things that may be searched pursuant to the terms of probation. "Scope" is not an issue in parole and PRCS cases because, as noted earlier, these search conditions are standardized. In contrast, the scope of probation searches will vary because the sentencing judge—not a statute—determines what may be searched. Consequently, one significant difference between parole and probation searches is that officers who conduct probation searches must be able to prove that they knew what places and things the sentencing judge had authorized them to search.

The first recent case in which this issue was addressed was *People v. Romeo,*[7] in which the court ruled that prosecutors may prove the permissible scope of a probation search by introducing a copy of the probation order (which will almost always specify the permissible scope of the search) or by proving that the officer who conducted the search was personally aware of the probation order and its scope. But because no such evidence had been presented in *Romeo*, the court ruled the search was unlawful.

The second case was *People v. Wolfgang*[8] in which a Riverside County sheriff's deputy ran a warrant check on a suspect and was advised that he was on probation for brandishing a weapon. Although the deputy was not told that Wolfgang was subject to a probation search condition, he assumed he was because "generally when a person is on probation for a weapons violation, they have search conditions." In fact, the deputy testified that he "had never encountered an individual on probation for a weapons violation who was not subject to some type of search condition."

As in *Douglas*, the court in *Wolfgang* ruled the facts known to the deputy constituted sufficient circumstantial proof. Said the court, "[A]lthough the deputy did not ask dispatch and was not told whether defendant's probation included a search condition, the deputy, based on his training and experience, was aware that search conditions are part of probationary terms for an individual placed on probation for weapons violations."

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[4] See *People v. Schmitz* (2012) 55 Cal.4th 909, 916; *In re Jaime P.* (2006) 40 Cal.4th 128.
[5] Also see *United States v. Arvizu* (2002) 534 U.S. 266, 273.
[6] See *Illinois v. Gates* (1983) 462 U.S. 213, 239; *United States v. Sokolow* (1989) 490 U.S. 1, 7.
[7] (2015) 240 Cal.App.4th 931.
[8] (2015) 240 Cal.App.4th 1268, 1276

People v. Brown

(2015) 61 Cal.4th 968

Issues

(1) Was the occupant of a parked car detained when a deputy pulled in behind him and activated his emergency lights? (2) If so, did the deputy have grounds to detain him?

Facts

At about 10:30 P.M., a man phoned San Diego County 911 and reported that four people were fighting in an alley behind his home. He confirmed his address and said he heard one of the men say "the gun was loaded." He also said that the men lived two houses away from him, that a car was parked in the alley, and he could hear screaming. The 911 operator could also hear the screaming over the phone and immediately dispatched deputies to the fight, notifying them that one of the men may have a gun.

The first deputy arrived about three minutes later and had started to drive down the alley when he saw a car approaching him. He didn't see anyone else in the alley so, as the driver passed his patrol car, he yelled "Hey. Did you see a fight?" The driver ignored the deputy and kept driving. The deputy turned around and tried to catch up with him. He found the car a few seconds later parked at the side of a street. The driver was still inside, so he stopped behind it, activated his overhead emergency lights, approached the car, and spoke to the driver, Shauntrel Brown. The deputy quickly determined that Brown was under the influence, and arrested him for DUI.

Brown later filed a motion to suppress the deputy's observations of his physical condition on grounds that (1) the deputy had detained him when he turned on his emergency lights, and (2) the deputy did not have grounds to detain him. The Court of Appeal ruled that Brown had not been detained at the outset, and affirmed his conviction. Brown appealed to the California Supreme Court.

Discussion

WAS BROWN DETAINED? The U.S. Supreme Court has ruled that a person is "detained" if (1) he reasonably believed he was not free "to decline the officers' requests or otherwise terminate the encounter,"[9] and (2) the person submitted to the officer's show of authority.[10] It is also settled that a detention results if an officer's words or actions constituted a command to stop.[11]

The question, then, was whether Brown was automatically detained because the deputy turned on his emergency lights. The courts have consistently ruled that an officer's activation of emergency lights constitutes a command to stop to motorists and pedestrians who reasonably believed the lights were directed at them.[12] As the Court of Appeal observed, "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."[13]

For example, if a vehicle was travelling on a street or freeway and an officer pulled behind it and turned on his red lights, the officer's actions would reasonably be interpreted as a command to stop. In contrast, when an officer drives through traffic with his emergency lights on, a reasonable motorist who sees the lights behind him would understand that the lights were directed at all nearby motorists, and that their purpose was simply to clear traffic.[14] Similarly, if an officer stopped behind a disabled or wrecked vehicle, a reasonable person in the driver's position would understand that the purpose of the emergency lights was merely to warn approaching motorists of the hazard.

Based on these principles, the court in *Brown* ruled that, because the deputy stopped directly behind Brown's car and turned on his emergency lights, "a reasonable person in Brown's position would have perceived the [deputy's] actions as a show of authority, directed at him and requiring that he submit by remaining where he was."

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[9] *Florida v. Bostick* (1991) 501 U.S. 429, 436. Also see *Brendlin v. California* (2007) 551 U.S. 249, 256-57.
[10] See *California v. Hodari D.* (1991) 499 U.S. 621, 626; *Brendlin v. California* (2007) 551 U.S. 249, 254.
[11] See *People v. Verin* (1990) 220 Cal.App.3d 551, 556; *People v. Bates* (2013) 222 Cal.App.4th 60, 65.
[12] See *Brower v. County of Inyo* (1989) 489 U.S. 593, 597; *People v. Ellis* (1993) 14 Cal.App.4th 1198, 1202, fn.3.
[13] *People v. Bailey* (1985) 176 Cal.App.3d 402, 405-406.
[14] See *Brendlin v. California* (2007) 551 U.S. 249, 254; *Lawrence v. U.S.* (D.C. App. 1986) 509 A.2d 614, 616, fn.2.

DID BROWN SUBMIT? As noted, even if a suspect reasonably believed that he was not free to terminate the encounter, a detention will not result if he did not comply with the command.[15] In most cases, a refusal to submit results from an affirmative act by the suspect; e.g., a vehicle pursuit, the suspect resists or runs. But a suspect's submission may also be passive in nature. For example, a pedestrian will be deemed to have passively submitted if he stood still after he was ordered to stop, or if a passenger on a bus remained on his seat as the result of an officer's show of authority.[16] Consequently, the court ruled that "Brown submitted to the deputy's show of authority by staying in his car at the scene."

GROUNDS TO DETAIN? The next question was whether the deputy had sufficient grounds to detain Brown. Because the detention was based mainly on Brown's presence in an alley where a large fight had just been reported by a 911 caller, the legality of the detention depended on whether the deputy (or, as discussed later, the 911 operator) reasonably believed the caller was reliable.

Based mainly on DUI arrests resulting from 911 calls, this determination is based on a fairly limited number of circumstances, some of which were relevant here. Specifically, it was relevant that the caller phoned 911 instead of a non-emergency number because it is common knowledge that 911 calls are automatically traced and recorded, and therefore people who phone 911 are—at least to some extent—leaving themselves exposed to identification even if they gave a false name or refused to identify themselves.[17] It was also relevant that the caller reported the fight immediately. As the court observed, "the caller's report was contemporaneous, a factor that has long been treated as especially reliable." In addition, the caller disclosed his address and the 911 system confirmed that he was calling from that address. Finally, the caller provided the 911 operator with lots of details about the fight, as opposed to a conclusory statement such as "some guys are fighting." There was one additional circumstance: the 911 operator could hear the fighting over the phone. In light of these circumstances, the court ruled that the 911 operator had sufficient reason to believe the caller was reliable.

THE OFFICIAL-CHANNELS RULE: Finally, Brown argued that, even if the 911 operator had good reason to believe that the caller was reliable, the detention was unlawful because the deputy knew nothing about the caller or his reliability; i.e., he was merely dispatched to the scene of a fight, possibly involving a gun. However, pursuant to the "official channels" rule, an officer may detain or arrest a suspect based solely or in part on information transmitted through official channels (e.g., departmental briefing, BOLO), or from a governmental database (e.g. AWS).[18] For example, an officer may arrest a suspect based solely on information from another officer who said he had probable cause even though the arresting officer was unaware of underlying facts.

Applying this principle, the court ruled that when a 911 dispatcher notifies officers of a crime in progress, it is ordinarily reasonable for the officers to believe that the dispatcher reasonably concluded that the caller's information and his apparent reliability were sufficient, at least for a detention. Said the court, "[I]f a 911 call has sufficient indicia of reliability, a dispatcher may alert other officers by radio, who may then rely on the report, even though they cannot vouch for it."[19] Consequently, the court ruled that Brown was lawfully detained.

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[15] See *California v. Hodari D.* (1991) 499 U.S. 621, 626; *Brendlin v. California* (2007) 551 U.S. 249, 254.

[16] See *Florida v. Bostick* (1991) 501 U.S. 429.

[17] See *Navarette v. California* (2014) __ U.S. __ [134 S.Ct. 1683, 1689]; *People v. Dolly* (2007) 40 Cal.4th 458, 467 ["[M]erely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify the caller by his voice."]; *U.S. v. Edwards* (9th Cir. 2014) 761 F.3d 977, 985.

[18] See *United States v. Hensley* (1985) 469 U.S. 221, 231; *Illinois v. Andreas* (1983) 463 U.S. 765, 771, fn.5; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1521, 1523-24; *Case v. Kitsap County Sheriff* (9th Cir. 2001) 249 F.3d 921, 928.

[19] **NOTE**: A defendant may challenge a 911 operator's conclusion that a caller appeared to be reliable by filing a *Harvey-Madden* motion which would require that prosecutors present evidence or testimony which supports the conclusion. See *People v. Harvey* (1958) 156 Cal.App.2d 516; *People v. Madden* (1970) 2 Cal.3d 1017. This requirement, said the court in *Brown*, "can be met by calling the police dispatcher as a witness at the suppression hearing or by introducing a recording of the 911 call." And because Brown had stipulated that a recording of the 911 call could be received in evidence, the prosecution had complied with the *Harvey-Madden* rule.

People v. Linn

(2015) 241 Cal.App.4th 46

Issue

During a traffic stop based on the actions of a passenger, was the driver automatically detained because the officer had taken temporary possession of her driver's license?

Facts

A Napa police motorcycle officer was on patrol when he noticed that the passenger in a car passing by was holding a lit cigarette out the window. Just then, he saw the passenger flick the cigarette, causing some ashes to fly out. Thinking this constituted a violation of the Vehicle Code,[20] the officer pulled behind the car intending to make a traffic stop. But before he could turn on his red lights, the driver, Nicole Linn, pulled into a parking space.

The officer stopped his motorcycle in the parking space next to Linn's and, after she and the passenger had exited, he told them he wanted to talk to them, and he explained why. At some point during this discussion the officer told Linn to put down a cigarette and a can of soda pop she was holding.[21] She complied. The officer also asked Linn and her passenger to hand him their driver's licenses. They complied, and the officer used the information on the licenses to run warrant checks. Apparently when the records check came back negative, Linn started to walk away, but the officer told her to "stay there." Linn complied. The officer testified that, at about this time. he detected the odor of alcohol on Linn's breath. When Linn denied that she had been drinking, the officer checked her horizontal gaze nystagmus and administered a breath best. The results of the test were not included in the court's opinion. All we know is that Linn was arrested and charged with DUI.

Before trial, Linn filed a motion to suppress, claiming that she was illegally detained by the time the officer smelled the odor of alcohol; and, therefore, the test results and the officer's observations should be suppressed. The trial court granted the motion based on the 1995 case of *People v. Castaneda*[22] in which a panel of the Court of Appeal ruled that a person who is contacted by an officer is automatically detained if the officer takes hold of the person's driver's license, even if the person voluntarily handed it to the officer. Said the *Castaneda* court, "Although Castaneda was not restrained by the officer asking for identification, once Castaneda complied with his request and submitted his identification card to the officer, a reasonable person would not have felt free to leave."

Although the trial court granted Linn's motion to suppress, the Napa County appellate division ruled the that detention was lawful because it thought that *Castaneda* didn't make much sense. Linn appealed.

Discussion

The central issue on appeal was whether Linn had been detained at the point the officer smelled alcohol on her breath. If so, and if the officer lacked grounds to detain her, all of the officer's observations should have been suppressed because they would have been the fruit of an illegal detention.

A basic rule of detentions is that an encounter between an officer and a civilian ordinarily becomes a detention if the officer's words or actions reasonably indicated that the person was not free to decline the officer's request or otherwise terminate the encounter.[23] Although certain circumstances will, in and of themselves, result in a detention (e.g., an encounter at gunpoint), in most cases the determination must be based on the totality of circumstances.[24]

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[20] See Veh. Code § 23111. **NOTE**: Although the passenger's actions might not have constituted a violation of the Vehicle Code (because an ash is by definition, not burning) the defendant did not raise this issue on appeal.

[21] **NOTE**: Although the officer testified that he did not "command" Linn to do these things, the trial court concluded that he had. As discussed below, this did not affect the outcome.

[22] (1995) 35 Cal.App.4th 1222.

[23] See *Florida v. Bostick* (1991) 501 U.S. 429, 436; *Brendlin v. California* (2007) 551 U.S. 249, 256-57; *California v. Hodari D.* (1991) 499 U.S. 621, 626.

[24] See *Florida v. Bostick* (1991) 501 U.S. 429, 437-38.

As noted, however, the trial court ruled that a single circumstance—the officer's act of taking temporary possession of Linn's license—had transformed the encounter into a detention. For this reason alone, it was apparent that *Castaneda* violated the basic rule about considering the totality of circumstances. But it was also contrary to common sense. After all, it makes no sense to say that an officer does not need legal grounds to ask to see a person's driver's license, but that he needs reasonable suspicion to actually takes hold of it.

Consequently, the court in *Linn* ruled, as did two previous appellate panels,[25] that *Castaneda's* automatic detention rule was contrary to Supreme Court precedent. Said the court, "[A]n officer's taking of a voluntary offered identification card, while it may be considered as a factor in evaluating whether a detention has occurred . . . is not alone definitive in resolving that question."

The issue, then, was whether the totality of circumstances would have caused Linn to reasonably believe—*before* the officer smelled the odor of alcohol on her breath—that she was not free to leave. The court concluded she reasonably believed she was not free to leave at that point mainly because (1) the officer seemed to have focused his investigation on her, rather than the passenger; (2) the officer had not only taken hold of Linn's driver's license, but had held on to it while running a warrant check; and especially, (3) the officer told Linn to put out her cigarette and put down her can of soda. Said the court, "Whether characterized as requests or commands, these directives represent a significant exercise of coercive authority."[26]

Consequently, the court ruled that Linn had been illegally detained when the officer smelled alcohol on her breath, and that Linn's motion to suppress should have been granted.

Comment

Although the court in *Linn* did not address the issue, the Supreme Court in *Brendlin v. California*[27] ruled that, when an officer makes a traffic stop, all of the occupants of the vehicle are automatically—and legally—detained. This is because the officer has a right to issue commands to the occupants in order to maintaine control of the situation. As the Court in *Brendlin* pointed out, "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 from the physical focal point of an investigation into faulty behavior or wrongdoing."

This means that if the officer in *Linn* had grounds to stop Linn's car (which the defense did not challenge) she would have been *lawfully* detained, at least at the outset. Even so, it is likely the evidence would have been suppressed because, by the time the officer smelled alcohol, his actions were apparently in excess of those that were reasonably necessary to maintain control.

U.S. v. Cacace et al.

(2nd Cir. 2015) 796 F.3d 176

Issues

(1) Did the wife of a mafia boss give an FBI operative valid consent to enter her home? (2) Did the operative exceed the scope of consent when she stole an address book and, if so, was she then acting as a police agent or a private citizen?

Facts

In the course of an FBI investigation into the mafia's operations in New York, several members of the Colombo crime family were indicted on charges

[25] *People v. Leath* (2013) 217 Cal.App.4th 344, 353 ["The right to *ask* an individual for identification in the absence of probable cause is meaningless if the officer needs probable cause to *accept* the individual's proof of identification."]; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1254. Also see *U.S. v. Tavolacci* (D.C. Cir 1990) 895 F.2d 1423, 1425 ["A seizure is not established by a mere request for identification, nor by the initial holding and review of such documentation."].

[26] **NOTE**: Because the testimony of the parties was conflicting on the issue, the Court of Appeal disregarded the allegation that the officer had commanded Linn to "stay there."

[27] (2007) 551 U.S. 249 Also see *Arizona v. Johnson* (2009) 555 U.S. 323, 332 ["a passenger is seized, just as the driver is, from the moment a car stopped by the police comes to a halt on the side of the road"]; *U.S. v. Jones* (6th Cir. 2009) 562 F.3d 768, 774 ["*Brendlin* makes it clear that, generally, when a police officer pulls over a vehicle during a traffic stop, the officer seizes everyone in the vehicle"].

including conspiracy, murder, and racketeering. The defendants included Thomas Gioeli (aka Tommy Shots, aka Tommy Machines), and Dino Calabro (aka Big Dino). Before trial, Calabro and his wife began cooperating with the FBI. Later, Ms. Calabro notified an FBI agent that she could obtain photos of Gioeli and other mafia "captains" that Ms. Gioeli had taken at various social events. She also explained that she and Ms. Gioeli were friends and that Ms. Gioeli had offered to loan her the photos. Because the photos could help establish a conspiracy, the FBI agent told her to go ahead, but he instructed her not to take anything without Ms. Gioeli's permission.

While Ms. Calabro was visiting Ms. Gioeli at her home, and as they looked at the photo albums, Ms. Gioeli left the room for a few minutes during which time Ms. Calabro stole an address book which she gave to the FBI agent. Some of the information in the book was later used by the agent to obtain a warrant to search the Gioelis' home. During the search, agents seized photo albums, address books, cell phones, and wallets containing business cards." The seized items were used by prosecutors in the trial of Gioeli, Calabro, and several others. Gioeli was convicted of three counts of conspiracy to commit murder.

Discussion

On appeal to the Second Circuit, Gioeli argued that the address book should have been suppressed because (1) Ms. Calabro's consensual entry into his home was invalid since she had misrepresented the true purpose of her visit; and (2), even if the consent was effective, Ms. Calabro's theft of the address book exceeded the scope of consent.

VALID CONSENT? As a general rule, when an undercover officer or other police agent obtains consent to enter a suspect's home, the consent is effective even though the operative or officer had misrepresented his true purpose. That is because consent to enter or search, unlike a waiver of constitutional rights, need not be "knowing and intelligent."[28]

There are, however, limits. But these limits are based, not on rigid rules, but on whether the officer or operative had lied about the fundamental nature of the intrusion. As the Ninth Circuit explained, "Not all deceit vitiates consent. The mistake must extend to the essential character of the act itself rather than to some collateral matter which merely operates as an inducement."[29] For example, an undercover officer who obtains a drug dealer's consent to enter his home to buy drugs has not lied about the fundamental nature of his intrusion because he did, in fact, enter for the purpose of buying drugs or at least speaking to the suspect about doing so. Although he lied about his underlying motivation, this was immaterial because whenever a person admits a visitor into his home, he can never be certain of the visitor's true purpose. In contrast, consent given to an undercover officer has been deemed ineffective when he claimed he was a deliveryman, building inspector, or property manager; or when the officer truthfully identified himself but claimed he needed to enter because he had received a tip that a bomb had been hidden inside.[30]

Applying these principles, the court in *Cacace* ruled that Ms. Calabro had initially obtained valid consent because she did, in fact, want to enter for the purpose of looking at photo albums and borrow photos; she merely did not reveal her purpose for doing so. And because her misrepresentation did not extend to the "essential character" of the intrusion, the entry was consensual.

SCOPE OF CONSENT: Even if an officer or operative has made a lawful consensual entry into a house, the entry may become unlawful if he did something that exceeded the scope of consent. As the Supreme Court explained, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer [or operative] and the suspect?"[31] Applying this standard, it was clear

[28] See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 243.
[29] *Theofel v. Farley-Jones* (9C 2004) 359 F3 1066, 1073. Edited.
[30] See *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9; *People v. Reyes* (2000) 83 Cal.App.4th 7, 10; *People v. Mesaris* (1970) 14 Cal.App.3d 71; *In re Robert T.* (1970) 8 Cal.App.3d 990, 993-94; *People v. Hodson* (1964) 225 Cal.App.2d 554.
[31] *Florida v. Jimeno* (1991) 500 U.S. 248, 251.

that Ms. Calabro did not exceed the scope of consent when she entered the house, viewed the photo albums and borrowed some photos. The theft of the address book, however, was not consensual and therefore exceeded the scope of consent.

Nevertheless, the court ruled the address book was admissible because, as a general rule, there can be no Fourth Amendment violation if evidence was obtained by a civilian who, at the time, was not working as a police agent. And when Ms. Calabro stole the book, she was not a police agent because she was disobeying the explicit instructions of the FBI agent. Said the court, "Mrs. Calabro exceeded the scope of her government agency; the government did not know of her intent to do so; and, as far as we can ascertain from the record, it had no reason to suspect that she might do anything more than borrow photographs with Ms. Gioeli's permission."[33]

For these reasons, the court ruled the search warrant was valid and the evidence seized during its execution was seized lawfully.

U.S. v. Rahman

(7th Cir. 2015) 805 F.3d 882

Issue

Did fire investigators exceed a business owner's consent to search for the cause and origin of a fire in his business?

Facts

At about 3:30 A.M., fire broke out in a two story building in Milwaukee that housed four businesses downstairs and ten apartments upstairs. During the fire, the second floor collapsed onto the first floor, rendering the building a total loss. The floors did not, however, collapse into the basement (which is a circumstance that will become relevant later).

The owner of one of the businesses was Feras Rahman who, when he arrived at the scene, consented to a search of his business, the Black & White Café, to determine the cause and origin of the fire. The relevant parts of the subsequent investigation are as follows:

Day Two: The day after the fire, an ATF investigator noticed that a restaurant across the street had a surveillance camera that pointed in the direction of the café. He reviewed the video and it showed the fire originated "in or above" the café and that it did not originate in the basement. Consequently, from this point on the sole purpose of the investigation was to determine the cause of the fire, not its origin. An investigator went into the basement to retrieve the restaurant's alarm box because it "can give investigators the date and time the system detects the outbreak of a fire and because it "might shed light on the fire's cause and origin."

Day Three: Investigators searched the basement for a safe, laptop, bank bags and receipts that Rahman said were located there. None were found. Because these items were plainly not the cause of the fire, it appears the purpose of the search was to obtain evidence that Rahman set the fire to claim insurance money. But also in the basement they seized a surveillance DVR machine that, unlike the other items, was capable of providing evidence as to the cause of the fire.

Day Four: An investigator searched the basement for any valuables because the absence of pricy items may indicate the fire was set to cover up a burglary, and that the arsonist removed them before starting the fire. No valuables were found.

Day Five: An odor of gasoline was detected on the first floor. An investigator took another look at the surveillance video from a restaurant across the street. It showed that, when Rahman left the café on the night of the fire, he was carrying "a large, white rectangular box."

Based on this information, the investigators obtained a warrant to search Rahman's home for evidence of arson. Among other things they found a laptop computer inside a hidden white rectangular box. Rahman was charged with arson and with making false statements to a federal investigator. When his motion to suppress was denied, his case went to trial. He was convicted of making false statements, but acquitted of arson.

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[32] Also see *People v. Dement* (2011) 53 Cal.4th 1, 35 [officer "specifically told him that he was not to elicit information from defendant on our behalf"].

[33] *Michigan v. Clifford* (1984) 464 U.S. 287, 293.

Discussion

On appeal to the Seventh Circuit, Rahman argued that his motion to suppress should have been granted because the investigation soon became a full-blown criminal investigation that exceeded the scope of his "cause and origin" consent. Thus, he argued that his conviction for making false statements should be overturned because it was based on evidence obtained during those searches.

In *Michigan v. Clifford*, the Supreme Court observed that "[a] burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze," and that "officials need no warrant to remain for a reasonable time to investigate the cause of the blaze after it has been extinguished."[33] It also ruled, however, that "additional investigations begun after the fire has been extinguished and fire and police officials have left the scene, generally must be made pursuant to a warrant or the identification of some new exigency."[34]

Because prosecutors relied solely on Rahman's consent to search, it appears that fire and police personnel vacated the building after the fire was extinguished. Thus, the subsequent entries did not fall within *Clifford's* warrantless search exception, and that the validity of the subsequent entries depended on the validity of Rahman's consent.

So the central issue was whether Rahman's consent to search for the cause and origin of the fire included consent to search for the various items of incriminating evidence that the investigators discovered. He contended it did not because, almost from the outset, the investigators believed he had set the fire and, therefore, their objective was to obtain incriminating evidence—not to determine the cause and origin of the fire. Prosecutors countered that, because arson constitutes a "cause" of a fire, a person's consent to search for the cause of a fire necessarily includes consent to search for evidence of arson. The court rejected both arguments.

Specifically, the court ruled that, while a search for evidence of whether a fire was set is a "cause" investigation, a search for evidence as to the identity of the arsonist does not. That is because, said the court, a reasonable person who consents to a cause and origin search "would understand the request to be for consent to determine where the fire occurred and what sparked the fire"—not to determine the identity of the person who set the fire.

The question arises: How can fire investigators determine whether their search of a particular place or thing qualifies as a search for "cause," not a search for evidence that incriminates a certain person? The court ruled that it depends on the "primary" motivation of the investigators at the time the entry or search was made. Said the court, "[T]he term 'origin and cause' excludes any search whose *primary object* is to find information of criminal activity."[35]

But this raises another question: Because motivation is subjective, how can the courts determine the purpose of a particular entry or search? The court ruled it may be reasonable to infer that the primary objective of investigators was to find incriminating evidence if (1) the evidence was found in an area of the structure that had already been eliminated as the origin of the fire, and (2) the investigators could not articulate some factual basis for believing that evidence as to the cause of the fire might be found in that area.[36]

Applying this test to the facts of the case, the court ruled that the investigators reasonably believed that the alarm box and surveillance DVR contained evidence as to the cause of the fire and were therefore admissible. As for the rest of the evidence—primarily the *absence* of bank bags, a laptop, business receipts, and valuable items—the court ruled that testimony as to their absence should have been suppressed because they were discovered during searches whose primary objective was to find evidence that Rahman had set the fire. POV

[34] *Michigan v. Clifford* (1984) 464 U.S. 287, 293.

[35] **NOTE**: The court added that investigators who are conducting a lawful search for evidence of cause and origin do not need a warrant to seize evidence of arson that they find while conducting the search.

[36] **NOTE**: Although the court did not specify the level of proof that is required, it seems likely that reasonable suspicion, based on articulable facts, would suffice.

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