POINT of VIEW

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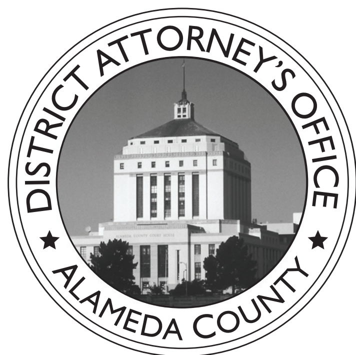

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This edition of Point of View
is dedicated to the memory of
Officer Ronil Singh
of the Newman Police Department
who was killed in the line of duty
on December 26, 2018

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Miranda: Questioning Suspects in Police Stations

"Miranda presented the clearest example of custody, namely the official isolation of a criminal suspect in a police station."[1]

One of the more enduring issues about *Miranda* is whether officers can question a suspect in a police station without obtaining a waiver. The answer is ordinarily no because most suspects who are questioned in police stations have been arrested and are therefore plainly "in custody" for *Miranda* purposes. And, as the First Circuit observed, "Everyone pretty much knows that the *Miranda* rule tells police not to question a suspect in custody unless they first advise him of his right to remain silent, among other things."[2]

What about a suspect who comes to the police station voluntarily, or who freely accept a ride from officers? This is where things get tricky. While few suspects think of police stations as warm and friendly places, the courts have consistently ruled that something more than a woeful ambience is necessary to render a visiting suspect "in custody."[3] As the Supreme Court explained, *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."[4]

Instead, *Miranda* is triggered only if there were additional circumstances that, either alone or in combination, would have caused a reasonable person in the suspect's position to believe that, even though he freely walked in the door, there had been such a dramatic change of circumstances that he would have been prevented from walking out. And when that happens, the suspect's answers to any further questioning may be suppressed if the officers failed to interrupt the interview and obtain a *Miranda* waiver.

To help prevent this from happening, officers must be able to constantly monitor the atmosphere of such interviews and, when necessary, change it. In this article, we will discuss how this can be accomplished. But first, it is necessary to explain a little more about the "reasonable person" test.

The "Reasonable Person" Test

As noted, to determine if an unarrested suspect would have reasonably believed he was free to leave a police station, it is necessary to ask how the circumstances would have been interpreted by a reasonable person in his position. "[T]he only relevant inquiry," said the Supreme Court, "is how a reasonable man in the suspect's position would have understood his situation."[5] This makes sense because, otherwise, a suspect who was questioned in a police station would automatically be deemed "in custody" if he later testified, "Honest, judge, I didn't think they'd let me go." It also "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind."[6]

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[1] *People v. Lopez* (1985) 163 Cal.App.3d 602, 605.
[2] *U.S. v. Guerrier* (1st Cir. 2011) 669 F.3d 1, 5. Also see *Stansbury v. California* (1994) 511 U.S. 318, 322.
[3] See *People v. Kenneth S.* (2005) 133 Cal.App.4th 54, 65 ["While the interview was conducted in a section of the police station to which the public was not given free access ... this was insufficient to have led a reasonable person in respondent's position to understand that he was in custody."]; *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 957 ["the FBI building requirements that mandated escorts for visitors is not in itself a basis for a reasonable person to believe that he is not free to leave"].
[4] *Oregon v. Mathiason* (1977) 429 U.S. 492, 495.
[5] *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.
[6] *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 271. Also see *Yarborough v. Alvarado* (2004) 541 U.S. 652, 668-69.

While this "reasonable person" does not exist physically, as we will now discuss, we know some things about how his "mind" works.

HE IS OBJECTIVE: While the reasonable person has average intelligence, there is something peculiar about him: he has virtually no imagination. As the result, he is aware of only those things he saw or heard in the officers' presence.[7] For example, it has been argued that any person who is questioned in a police station should be deemed in custody if he was aware that the officers thought he was the perpetrator. But this doesn't matter because reasonable people know that officers cannot arrest someone merely because they believe he is guilty.[8] Thus, the Supreme Court ruled that, "[e]ven a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go."[9]

In fact, it does not even matter that the officers had, or thought they had, probable cause to arrest him,[10] or even that they intended to arrest him at the conclusion of the interview.[11] Again, this is because "an officer's purely internal thoughts have no conceivable effect on how a reasonable person would understand his freedom of action."[12]

For example, in *People v. Blouin*[13] an officer who had probable cause to arrest Blouin for possession of a stolen car he had been driving went to his house and asked him some questions about how he obtained it. Blouin claimed that his answers should have been suppressed because the officer had probable cause to arrest him. But the court ruled it didn't matter because "[t]he officer's intent to detain or arrest, if such did in fact exist, has not been communicated to defendant."

Similarly, in *Berkemer v. McCarty*[14] a motorist who had been stopped for DUI contended he was in custody for *Miranda* purposes because (1) he was obviously drunk (e.g., he almost fell down as he stepped outside); and (2) the officer testified that, based on the stumbling and other circumstances, he was going to arrest the suspect at the conclusion of the stop. But, again, this didn't matter because, as the Supreme Court pointed out, the officer "never communicated his intention to [the driver]."

Finally, in *Oregon v. Mathiason*[15] the defendant, a burglary suspect, agreed to meet with the investigating officer at the police station. When Mathiason arrived, the officer escorted him into an office and said he wanted to discuss a burglary. After notifying Mathiason that he was not under arrest, the officer said he believed that Mathiason had committed the crime, that his fingerprints had been found at the scene, that he would probably be arrested at some point, and that his truthfulness "would possibly be considered by the district attorney or judge." Mathiason then confessed. In ruling that the interview was noncustodial, the Supreme Court said

> [T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way, He came voluntarily to the police station, where he was immediately informed that he was not under arrest.

Still, an officer's belief that a suspect was guilty must not be ignored because it is only natural for officers to treat suspects differently than people who are merely witnesses or who might have other information about the crime. But this did not happen in *Mathiason* because, as the Court pointed

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[7] See *Stansbury v. California* (1994) 511 U.S. 318, 323 [custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being interrogated"].
[8] See *Beckwith v. United States* (1976) 425 U.S. 341, 346-47; *People v. Moore* (2011) 51 Cal.4th 386, 402.
[9] *Stansbury v. California* (1994) 511 U.S. 318, 325.
[10] See *People v. Valdivia* (1986) 180 Cal.App.3d 657, 661; *People v. Robertson* (1982) 33 Cal.3d 21, 38.
[11] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 426, fn.22; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 435.
[12] *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 277, fn.8.
[13] (1978) 80 Cal.App.3d 269.
[14] (1984) 468 U.S. 420, 436, fn. 22
[15] (1977) 429 U.S. 492.

out, although the officer "put his cards on the table," he did not do so in an accusatory manner. (We will discuss the subject of accusations later in this article.)

What if the suspect was a minor? Although the courts still employ the reasonable person test, they will also consider the suspect's age and maturity because "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[16] Thus, in *U.S. v. IMM* the Ninth Circuit observed that "[a] reasonable person, and especially a reasonable twelve year old child, in IMM's position would not, under all of the circumstances, have felt that he was free to terminate the interrogation and leave."[17]

He is innocent: Unlike most suspects, the reasonable person never commits crimes, or at least he did not commit the crime for which he was being questioned. Thus the Supreme Court has said that "the 'reasonable person' test presupposes an *innocent* person,"[18] and that "the potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in [the suspect's] position."[19] This is significant because he "does not have a guilty state of mind,"[20] and will therefore view the circumstances much less ominously than the perpetrator.

No prior experience with police: Finally, the reasonable person does not have any strong opinions—good or bad—about law enforcement officers. This, too, is important because, as the Supreme Court observed, "In most cases, police officers will not know a suspect's interrogation history. Even if they do, the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative."[21] For example, in *In re I.F.* the court ruled that a suspect is not in custody merely because "he believed, based on prior contacts with law enforcement, that 'any time you're told to do something by the cops, it's an order."[22]

Relevant Circumstances

Having discussed how the courts determine whether a suspect reasonably believed he was free to leave the police station, we will now examine the circumstances that are relevant in making this call. As we will discuss, there are essentially only four.

Voluntary appearance

It is, of course, essential that the suspect voluntarily consented to be questioned at the station. It doesn't matter whether he accompanied officers in a police car or whether he took the bus—what counts is that he did so freely. As the California Supreme Court pointed out, "A reasonable person who is asked if he or she would come to the police station to answer questions, and who is offered the choice of finding his or her own transportation or accepting a ride from the police, would not feel that he or she had been taken into custody."[23] Similarly, the Ninth Circuit noted that, "[w]here we have found an interrogation non-custodial, we have emphasized that the defendant agreed to accompany officers to the police station."[24]

For example, in ruling that unarrested suspects were not in custody when they were questioned inside police stations, the courts have noted the following:

[16] *J.D.B. v. North Carolina* (2011) 564 U.S. 261, 272.
[17] (9th Cir. 2014) 747 F.3d 754, 766.
[18] *Florida v. Bostick* (1991) 501 U.S. 429, 438.
[19] *Florida v. Royer* (1983) 460 U.S. 491, 519, fn.4.
[20] *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1239 ["A reasonable person does not have a guilty state of mind"].
[21] *Yarborough v. Alvarado* (2004) 541 U.S. 652, 668.
[22] (2018) 20 Cal.App.5th 735, 767.
[23] *People v. Stansbury* (1995) 9 Cal.4th 824, 831-32.
[24] *U.S. v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 884.

- "[The suspect] voluntarily agreed to accompany the police to the station house."[25]
- "The police did not transport [the suspect] to the station or require him to appear at a particular time."[26]
- "[The officers] requested he come to the station for an interview but did not demand that he accompany them."[27]
- "[The officer] asked defendant to accompany him to his office for an interview and said 'if at any time he needed to come back, we'd drive him back, not to worry about a ride.'"[28]

Still, a suspect who technically consented to undergo questioning in a police station will nevertheless be deemed in custody if his consent was obtained by means of coercion. For example, in *U.S. v. Slaight*[29] nine officers arrived at Slaight's home to execute a search warrant. After breaking in "with pistols and assault rifles at the ready," they asked Slaight if he "would be willing to follow them to the police station for an interview. He agreed and subsequently made an incriminating statement during an un*Mirandized* interview. The Seventh Circuit ruled, however, that the statement was obtained in violation of *Miranda* because the officers "made a show of force by arriving at Slaight's en mass," and it is "undeniable" that the "presence of overwhelming armed force in the small house could not have failed to intimidate the occupants."

"You're free to leave"

Even though a suspect voluntarily consented to be interviewed at a police station, it is necessary that officers notify him that he is free to leave. This is because such a notification—commonly known as a *Beheler* admonition[30]—is considered "powerful evidence" that the suspect was not in custody.[31] There are, however, four things about *Beheler* admonitions that should be kept in mind.

"FREE TO LEAVE" VS. "NOT UNDER ARREST": It is best to tell the suspect that he is free to leave, as opposed to saying he is not under arrest.[32] This is because a suspect who is told he cannot leave will necessarily understand that he is not under arrest, while a suspect who is told he is not under arrest will not necessary understand that he is free to leave.[33] Thus, the Eighth Circuit said that telling a suspect that he is free to leave "weighs heavily in favor of noncustody," but when he is only told he was not under arrest, this circumstance is less important.[34]

QUALIFICATIONS ON FREEDOM TO LEAVE: Even if the suspect was told that he was free to leave, he may be deemed in custody if there were other circumstances that indicated otherwise.[35] As the Ninth Circuit observed, "The mere recitation of the statement that the suspect is free to leave or terminate the interview does not render an interrogation non-custodial *per se*. We must consider the delivery

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[25] *California v. Beheler* (1983) 463 U.S. 1121, 1122.
[26] *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664.
[27] *People v. Holloway* (2004) 33 Cal.4th 96, 120.
[28] *Green v. Superior Court* (1985) 40 Cal.3d 126, 131.
[29] (7th Cir. 2010) 620 F.3d 816.
[30] See *California v. Beheler* (1983) 463 U.S. 1121.
[31] *U.S. v. Czichray* (8th Cir. 2004) 378 F.3d 822, 826.
[32] See *Florida v. Bostick* (1991) 501 U.S. 429, 435-36 [Court notes that, in the Fourth Amendment context, it is error to apply a "free to leave" standard rather than "the principle that those words were intended to capture"].
[33] See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1164 [the officers "did not tell defendant he was free to terminate the interview and leave if he wished," but instead told him that he was not "in custody"]; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 437 ["although the defendant was told several times that he was not under arrest, he was never explicitly told that he was free to terminate the interview"].
[34] *U.S. v. Sanchez* (8th Cir. 2012) 676 F.3d 627, 631. But also see *U.S. v. Littledale* (7th Cir. 2011) 652 F.3d 698, 702 ["even though the agents did not tell Littledale that he was free to leave, they did assure him that he was not under arrest."].
[35] See *U.S. v. Colonna* (4th Cir. 2007) 511 F.3d 431, 435 ["Indeed, there is no precedent for the contention that a law enforcement officer simply stating to a suspect that he is 'not under arrest' is sufficient to end the inquiry into whether the suspect was 'in custody' during an interrogation."].

of these statements within the context of the scene as a whole."[36] For example, the courts have ruled that, despite *Beheler* admonitions, a suspect was in custody for *Miranda* purposes when he was handcuffed,[37] kept under guard,[38] or notified that he could leave after he told the truth.[39]

While it is arguable that, due to security measures, no visitor in a police station is free to leave at will, this is not a significant circumstance because it is generally understood that such security measures apply equally to all visitors. As the Supreme Court put it, "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*."[40] For example, in rejecting arguments that security measures resulted in *Miranda* custody, the courts have noted that, "[n]ot withstanding the lock on the interview room door, the evidence does not compel the conclusion that defendant could not have left whenever he wanted during the interview."[41]

Similarly, it has been deemed immaterial that the suspect "had to pass through a locked parking structure and a locked entrance to the jail to get to the interview room,"[42] or the suspect testified "how he had to push a buzzer to be let into the main lobby of the police station" and that he "was escorted to the second floor by way of an elevator that required a magnetic security card to operate."[43]

SUSPECT CONFESSED: Even if the suspect was told he could leave, he may be in custody at the point he confessed or said something that would have caused a reasonable person to believe that the officers would have arrested him if he tried to leave.[44]

THE NEED FOR REMINDERS: It might be necessary to provide multiple *Beheler* admonitions if the interview had become lengthy, especially if it was also accusatory. Thus, in *People v. Aguilera* the court observed that, "where, as here, a suspect repeatedly denies criminal responsibility and the police reject his denials, confront the suspect with incriminating evidence, and continually press for the 'truth,' [a *Beheler* admonition] would be a significant indication that the interrogation remained non-custodial."[45]

The setting

Although a suspect will not be deemed in custody merely because he was questioned in a police station, it is a relevant circumstance because people who are there to discuss their guilt or innocence may be more likely to be intimidated by the setting. For example, police stations have been described by the courts as "police-dominated" and "inherently coercive,"[46] especially when the suspect is led through a maze of corridors and through locked or electrically secured doors.[47]

As discussed earlier, however, this is not a significant circumstance because the issue is not whether the suspect's freedom had been curtailed to some extent, but whether it was curtailed to a degree "associated with formal arrest."[48] Thus, the court in *People v. Stansbury* ruled that:

> [A]lthough defendant had been admitted to the jail section of the police station through locked doors and would have needed assistance to leave the facility, these facts alone do not establish that he was in custody.[49]

[36] *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1088.
[37] *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 676.
[38] *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1482.
[39] *People v. Aguilera* (1996) 51 Cal.App.3d 1151, 1166.
[40] *Howes v. Fields* (2012) 565 U.S. 499, 509.
[41] *Green v. Superior Court* (1985) 40 Cal.3d 126, 136.
[42] *People v. Stansbury* (1995) 9 Cal.4th 824, 834.
[43] *US v. Budd* (7th Cir. 2008) 549 F.3d 1140, 1146 ["These are not extraordinary circumstances"].
[44] *U.S. v. Slaight* (7th Cir. 2010) 620 F.3d 816, 819 [the suspect "couldn't have believed they would actually let him go"].
[45] (1996) 51 Cal.App.4th 1151, 1164, fn.7.
[46] *Miranda v. Arizona* (1966) 384 U.S. 436, 446; *People v. Celaya* (1987) 191 Cal.App.3d 665, 672.
[47] See *People v. Stansbury* (1995) 9 Cal.4th 824, 834; *U.S. v. Budd* (7th Cir. 2008) 549 F.3d 1140, 1146.
[48] *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 672.
[49] (1995) 9 Cal.4th 824, 834.

What about the fact that the suspect was questioned in an interrogation room? This is somewhat more indicative of custody than interrogations in other rooms (e.g., an office or conference room[50]) because interrogation rooms are normally small, stark, locked, and even "claustrophobic."[51] Thus, in discussing this issue, the courts have noted such things as:

- "[M]ost of the interrogation took place in closely confined quarters—a room about four by six or six by eight feet."[52]
- "*Miranda* presented the clearest example of custody, namely the official isolation of a criminal suspect in a police station."[53]
- Suspects who are questioned in police stations are "cut off from the outside world."[54]
- "The [interview] rooms are 7 by 12 feet, have no windows and require a key to enter or exit."[55]
- The atmosphere of most interrogation rooms is "cold and normally hostile."[56]

Nevertheless, circumstances such as these are seldom important because, as the Supreme Court observed, "Often the place of questioning will have to be a police interrogation room because it is important to assure the proper atmosphere of privacy and non-distraction if questioning is to be made productive."[57] Or, as the Court explained in *Oregon v. Mathiason*, "[A] noncustodial situation is not converted to one in which *Miranda* applies simply because [it] took place in a coercive environment."[58]

The tone of the interview

The tone or atmosphere of the interview is especially important because it may cause the suspect to reasonably believe that, regardless of what he was told at the outset, he is no longer free to leave. Technically, the interrogating officers have complete control over the tone because it depends mainly on what they say and how they say it. But because officers have emotions which often surface during interrogations (especially anger and frustration when the suspect is not forthcoming), they may not realize that the tone had become coercive. They must therefore stay alert to the manner in which they are questioning the suspect, at least until they are ready to *Mirandize* him. And one way of doing this is to keep track of whether the tone was "investigative" or "accusatory."

INVESTIGATIVE INTERVIEWS: An interview is not apt to be custodial if the nature and manner of the questions would have caused a reasonable person to believe their objective was just to obtain information about the crime under investigation or related subjects, as opposed to seeking a confession or admission. For example, in ruling that suspects were not in custody during stationhouse interrogations, the courts have noted the following:

- "Instead of pressing [the suspect] with the threat of arrest and prosecution, [the officer] appealed to his interest in telling the truth."[59]
- The questions "were nonaccusatory, and defendant was largely permitted to recount his observations and actions through narrative."[60]

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[50] See, for example, *Howes v. Fields* (2012) 565 U.S. 499, 515 [a "well-lit, average-sized conference room"]; *U.S. v. Menzer* (7th Cir. 1994) 29 F.3d 1223, 1232 ["well lit, there were two windows exposing the interview room to [an office] area."].
[51] *U.S. v. Slaight* (7th Cir. 2010) 620 F3 816, 820. Also see *Green v. Superior Court* (1985) 40 Cal.3d 126, 131; *U.S. v. Molina-Gomez* (9th Cir. 2015) 781 F.3d 13, 22; *U.S. v. Boslau* (8th Cir. 2011) 632 F.3d 422, 428 [" small, windowless" room].
[52] *Blackburn v. Alabama* (1960) 361 U.S. 199, 204.
[53] *People v. Lopez* (1985) 163 Cal.App.3d 602, 605.
[54] *Miranda v. Arizona* (1966) 384 U.S. 436, 445. Also see *Howes v. Fields* (2012) 565 U.S. 499, 511.
[55] *Green v. Superior Court* (1985) 40 Cal.3d 126, 131.
[56] *People v. Bennett* (1976) 58 Cal.App.3d 230, 239.
[57] *Culombe v. Connecticut* (1961) 367 U.S. 568, 579.
[58] (1977) 429 U.S. 492, 497.
[59] *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664.
[60] *People v. Stansbury* (1995) 9 Cal.4th 824, 832.

- The officer "conducted his inquiry in a conversational tone, and there is no evidence he posed confrontational questions or pressured the defendant in any manner."[61]
- "[T]he questions focused on information the defendant had indicated he possessed rather than on defendant's potential responsibility for the crimes."[62]
- The officers "did not attempt to challenge [the suspect's] statements with other known facts suggesting his guilt, they merely asked [him] about the allegations."[63]
- "[T]he tone of the officers throughout the interview was courteous and polite."[64]

ACCUSATORY INTERVIEWS: In contrast, full-blown accusatory interviews are usually custodial regardless of any contrary circumstances because they often consist of assertions that officers had grounds to arrest the suspect which, as noted earlier, is a key circumstance. Consequently, the courts often take note of such things as whether the suspect was "continuously urged to confess," and whether "their questions clearly manifested a belief that [the suspect] was culpable and they had evidence to prove it."[65]

For example, in *People v. Aguilera*,[66] San Jose police officers received a tip that Aguilera was involved in a gang-related shooting. So they went to his house and obtained his consent to accompany them to the station to talk about it. At the beginning, Aguilera consistently claimed he was not involved, which caused one of the officers to tell him that his story was "bullshit," accuse him of "fabricating an alibi," and notifying him that his fingerprints had been found on one of the cars used by the shooters. Aguilar eventually confessed, but the court ruled that his confession should have been suppressed because, at the time he confessed, he had not been *Mirandized.* Among other things, the court noted that the interrogation "was intense, persistent, aggressive, confrontational, accusatory, and, at time, threatening and intimidating." The court added, "Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee."

In another case, *People v. Boyer,*[67] the defendant became a suspect in the murder of an elderly couple in Fullerton. He, too, voluntarily accompanied officers to the police station for an interview and was not *Mirandized*. But then, after bringing him into "a small interrogation room," the officers questioned him in a manner that the court described as "coercive," "aggressive," and "prolonged" (it lasted two hours). On two occasions, Boyer asked if he was under arrest but the officers "evaded" the questions and continued their questioning. He eventually confessed but the California Supreme Court suppressed the confession because the officers' questioners were "directly accusatory" and because the officers had informed him that they had all the necessary evidence to prove his guilt.

Finally, in *U.S. v. IMM,*[68] the Ninth Circuit ruled that the suspect was in custody because the investigating officer "repeatedly confronted IMM with fabricated evidence of guilt and engaged in elaborate deceptions. The detective fed IMM facts that fit the detective's predetermined account of what must have happened, accused IMM of dishonesty whenever IMM disagreed with the detective's false representations, and forced IMM to choose between adopting the detective's false account of events as his own and calling his own grandfather a liar."

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[61] *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404.
[62] *People v. Moore* (2011) 51 Cal.4th 386, 396.
[63] *U.S. v. Norris* (9th Cir. 2005) 428 F.3d 907, 913.
[64] *People v. Spears* (1991) 228 Cal.App.3d 1, 25.
[65] *In re I.F.* (2018) 20 Cal.App.5th 735, 778. Also see *People v. Saldana* (2018) 19 Cal.App.5th 432, 457.
[66] (1996) 51 Cal.App.4th 1151.
[67] (1989) 48 Cal.3d 247.
[68] (9th Cir. 2014) 747 F.3d 754, 747.

CONFRONT WITH EVIDENCE: In many cases in which an interview had been deemed custodial, the officers will have informed the suspect of the evidence that pointed to his guilt. Whether this will convert a noncustodial interview into a custodial one will depend in part on whether the information was presented in an informative or accusatory manner. For example, in ruling that a suspect was not in *Miranda* custody, the courts have noted the following:

- "The fact that [the officer] told respondent that he had information that respondent was involved in the robbery was insufficient by itself to constitute custody and to countervail these other factors."[69]
- The tenor of the conversation was "business-like," with one agent "presenting the evidence of [the suspect's] involvement rather than questioning Ambrose."[70]
- "[P]olice expressions of suspicion, with no other evidence of a restraint on the person's freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody."[71]

In contrast, in ruling that confronting suspects with incriminating evidence was a strong indication of custody, the courts have noted the following:

- The officer "launched into a monologue on the status of the investigation including that a newly contacted witness *disputed defendant's claim* as to the last time defendant had visited the victims' residence."[72]
- An officer who was questioning a murder suspect described the crime scene, "including the condition of the victim, bound, gagged, and submerged in the bathtub, and said to defendant that the victim 'did not have to die in this manner and could have been left there tied and gagged in the manner in which he was found."[73]
- When the detective said, "Think about that little fingerprint on [the Uzi]," he implied that defendant's fingerprint had been found on the Uzi, and thus indirectly accused defendant of personally shooting the victims. [T]his comment was likely to elicit an incriminating response and thus was the functional equivalent of interrogation."[74]

"WE HAVE PROBABLE CAUSE": Even if the incriminating evidence was presented in an informative manner, and even if the officers told the suspect that he was free to leave, a reasonable person might believe he was not free to leave if it was apparent that the officers had all the evidence they needed to make an immediate arrest. For example, when this issue arose in *United States v. Slaight* the Seventh Circuit ruled that the suspect was in custody for *Miranda* purposes because, said the court, he "knew the police had him nailed so far as illegal possession of computer images was concerned, and he couldn't have believed they would actually let him go."[75]

DURATION OF THE INTERVIEW: The tone of the interview and its duration are related because the longer it goes on without resolution, the more likely the officers will need to bring pressure on the suspect to tell the truth.

Still, the duration of an interview is seldom a significant factor in and of itself. Thus, the California Supreme Court in *People v. Moore* noted that "the interview was fairly long—one hour and 45 minutes—but not, as a whole particularly intense or confrontational."[76] POV

[69] *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 65.
[70] *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 958
[71] *People v. Moore* (2011) 51 Cal.4th 386, 402.
[72] *People v. Boyer* (1989) 48 Cal.3d 247, 248
[73] *People v. Sims* (1993) 5 Cal.4th 405, 444.
[74] *People v. Davis* (2005) 36 Cal.4th 510, 555
[75] (7th Cir. 2010) 620 F.3d 816, 819.
[76] (2011) 51 Cal.4th 386, 402.

Securing a Residence Pending a Search Warrant

The securing of premises while a warrant is obtained is a salutary and common police practice.[1]

Officers who have probable cause to believe that evidence of a crime is currently located inside a certain residence will ordinarily go through regular channels and seek a search warrant. But what if they have good reason to believe that the evidence would be destroyed, or that its evidentiary value would be compromised, before a warrant could be issued and executed? What are their options?

One of them is to forcibly enter, search for the evidence, and seize it. While this option could conceivably pass muster under the exigent circumstances exception to the warrant requirement, it is highly unlikely. That is because the exigent circumstances exception will be applied only if the officers responded to the situation in an objectively reasonable manner.[2] And there is almost always a more reasonable—and equally effective—alternative: Secure the premises while an officer seeks a search warrant.

Types of Securing

There are two ways in which officers may secure a residence or any other structure. First, they may secure it from the outside by establishing a perimeter or otherwise posting officers at strategic positions around the outside the building to make sure that no one enters. Unlike securing from the inside, this option constitutes only a temporary seizure—not a search—and it is therefore less intrusive and more apt to be deemed reasonable.[3] (This is, of course, a usesful alternative only if officers were satisfied that no one was currently inside.)

The other option is to secure the premises from the inside by forcibly entering, then conducting a sweep or "walk through" to make sure there is no one on the premises who could destroy the evidence. And if they find anyone, they will either arrest, detain, or release them.

Securing from the inside is usually the best option if officers know or have reason to believe the premises are occupied. As the California Supreme Court explained, "[I]f the exigent circumstance being responded to is the possibility that there may be other persons within the premises who might destroy evidence, then the logical first step is a 'sweep' of those premises to see if in fact anyone else is present."[4] And then, if no one is found, "the police should then merely maintain control of the premises while a search warrant is obtained."

In this article, we will dissuss the requirements for conducting each method of securing, and also some related matters, including procedural requirements.

Securing from the Inside

To secure a residence from the inside constitutes both a search and a seizure. Accordingly, officers must have probable cause to believe the following circumstances existed:

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[1] *People v. Larry A.* (1984) 154 Cal.App.3d 929, 936.
[2] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331 [an intrusion based on exigent circumstances must be "tailored to that need"].
[3] See *United States v. Jacobson* (1984) 466 U.S. 109, 113 ["A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."].
[4] *People v. Seaton* (2001) 26 Cal.4th 598, 632 [quoting from 3 *LaFave, Search and Seizure* (3d ed.1996) § 6.5(b), p. 353].

(1) **Evidence inside**: There is evidence on the premises that could be destroyed or compromised.
(2) **A person inside**: There is someone inside.
(3) **Motive to destroy**: The person inside would have a motive to destroy the evidence if he knew that a search was imminent.[5]

There is evidence inside: Proof that destructible evidence is on the premises may be based on direct proof, such as seeing it there or learning about it from a reliable informant. In the absence of direct proof, officers might be able to satisfy this requirement if they were aware of circumstances from which they could reasonably make the following inference: Because people who commit the crime under investigation ordinarily possess things that are used to commit or facilitate such a crime, it is reasonable to believed that such things are currently inside his home. As the Court of Appeal pointed out, "[R]easonable inferences may be indulged as to the presence of articles known to be usually accessory to or employed in the commission of a specific crime."[6] For example, in *People v. Farley* the California Supreme Court ruled that, because officers had probable cause to believe that the suspect shot and killed fellow employees at his workplace, it was reasonable to infer that he possessed "photographs and documents" related to the business, and documents "concerning his employment at [the business]."[7]

There is someone inside: Proof that someone is inside may also be based on direct or circumstantial evidence. Examples of direct evidence include seeing people through a window or open door,[8] hearing voices inside,[9] and learning from a neighbor or reliable informant that the premises are currently occupied.[10] Examples of circumstantial proof include hearing a noise inside such as a TV or footsteps,[11] a movement of curtains or shades,[12] or sometimes seeing the suspect's car parked in the driveway.[13]

Threatened destruction: An officer's belief that a person on the premises constitutes a threat to the evidence is commonly based on circumstantial proof, such as hearing the sounds of running or other commotion after officers knocked and announced. The existence of such a threat may also be based on an officer's knowledge that the occupants had become aware that a search was imminent. As the Supreme Court observed in a knock-notice case, the suspect's "apparent recognition of the officers combined with the easily disposable nature of the drugs justified the officers' ultimate decision to enter without first announcing their presence and authority."[14]

In contrast, in *People v. Gentry* the court ruled there was an insufficient threat that marijuana would be destroyed since "[t]he only evidence of urgency and threat of removal of evidence was the informant's statement that marijuana was being

[5] See *People v. Strider* (2009) 177 Cal.App.4th 1393, 1399 ["The United States Supreme Court has indicated that entry into a home based on exigent circumstances requires probable cause to believe that the entry is justified by one of [the investigative emergency] factors"]; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193 ["Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home."].
[6] *People v. Senkir* (1972) 26 Cal.App.3d 411, 421. Also see *U.S. v. Jones* (3rd Cir. 1993) 994 F.2d 1051, 1055-56.
[7] (2009) 46 Cal.4th 1053, 1099.
[8] See *People v. Dyke* (1990) 224 Cal.App.3d 648, 659 [officers saw someone open the curtains then immediately close them].
[9] See *People v. Mack* (1980) 27 Cal.3d 145, 149 ["multiple voices"]; *People v. Dyke* (1990) 224 Cal.App.3d 648, 659 [someone inside said. "It's the fucking pigs"]; *U.S. v. Junkman* (8th Cir. 1998) 160 F.3d 1191, 1193 [someone yelled "cops"!].
[10] See *Guevara v. Superior Court* (1970) 7 Cal.App.3d 531, 535; *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 5.
[11] See *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 9 ["[U]pon entering the apartment the officer had heard sounds coming from elsewhere than the open areas."]; *U.S. v. Taylor* (6th Cir. 2001) 248 F.3d 506, 514 ["noises suggesting that more than one person was present in the apartment"]; *U.S. v. Lopez* (1st Cir. 1993) 989 F.2d 24, 26, fn.1 ["fast moving footsteps].
[12] See *U.S. v. Waters* (8th Cir. 2018) 883 F.3d 1022, 1026.
[13] See *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866; *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396.
[14] *Richards v. Wisconsin* (1997) 520 U.S. 385, 396.

sold by out of the trunk of his car at a 'very fast rate.' This 'very fast rate' was wholly undefined. There was no evidence of how much marijuana was sold or in what period of time. There was also no evidence that the marijuana would be depleted by the time a warrant could be issued."[15]

Similarly, in *U.S. v. Etchin*, the court found there was insufficient indication of a threat when the only facts were that an officer "heard a man's voice inside, that she thought the man might be [a suspect], and that she feared that evidence might be destroyed. This is too vague to justify a finding that there was an ongoing crime in the house requiring immediate entry."[16]

Securing from the Outside

Because securing from the outside constitutes a seizure (not a search), the requirements are much less demanding. Although they are the same as securing from the inside, the cases indicate that securing from the outside requires only *reasonable suspicion*—not probable cause. As the California Supreme Court explained:

> Permitting police officers the limited intrusion of temporarily prohibiting entry to a dwelling when they have a reasonable suspicion that contraband or evidence of a crime is inside, while the officers themselves remain outside, will enable them to carry out their investigations free from the fear that such evidence or contraband will be destroyed.[17]

For example, in *Illinois v. McArthur*[18] the defendant's wife requested that officers accompany her while she removed her belonging from the family's mobile home. She also said she had just seen her husband "slide some dope underneath the couch." After the defendant joined the officers on the front porch, an officer asked if he would consent to a search of the home. When he refused, the officer told him that, pending issuance of a search warrant, "he could not reenter the trailer unless a police officer accompanied him." About two hours later, the warrant was signed and officers entered the home, recovered the drugs, and arrested McArthur.

The case ended up in the Supreme Court where McArthur argued that the evidence should have been suppressed because, by preventing him from entering the trailer, the officers had violated the Fourth Amendment. In rejecting the argument, the Court pointed out that the officers "neither searched the trailer nor arrested McArthur before obtaining a warrant. Rather, they imposed a significantly less restrictive restraint, preventing McArthur only from entering the trailer unaccompanied."

Similarly, in *People v. Bennet*[19] the defendant was arrested by police in Santa Ana for a murder that had occurred there. When a homicide investigator learned that Bennett had been staying at a motel in Victorville, he phoned the manager who said that Bennet was still technically a guest but he was only paid-up until check-out at 11 A.M. the next day. After informing the manager that Bennett would not be returning, the officer "asked her not to let anyone into the room without law enforcement permission." As the result, the manager placed a

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[15] (1992) 7 Cal.App.4th 1255, l1263-64. Edited. Also see *U.S. v. Santa* (11th Cir. 2000) 236 F.3d 662, 670 ["Ramirez and Santa, unaware of their impending arrest, had no reason to flee or to destroy [evidence]."].

[16] *U.S. v. Etchin* (7th Cir. 2010) 614 F.3d 726, 734.

[17] *People v. Bennett* (1998) 17 Cal.4th 373, 387. Also see *Illinois v. McArthur* (2001) 531 U.S. 326, 331 ["we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable"]; *Mora* v. *City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 224 ["As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action."]; *In re Randy G.* (2001) 26 Cal.4th 556, 566 ["there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails"]. Also see *People v. Troyer* (2011) 51 Cal.4th 599, 607 ["We decline to resolve here what appears to be a debate over semantics. Under either approach [i.e., reasonable suspicion vs. probable cause] our task is to determine whether there was an objectively reasonable basis [for the entry]."].

[18] (2001) 531 U.S. 326.

[19] (1998) 17 Cal.4th 373, 385.

"cuff lock" on the door. In ruling that this intrusion was reasonable, the California Supreme Court said, "[P]ermitting the officers to bar entry will give the officers sufficient time to seek a warrant, thereby allowing a neutral and detached magistrate to determine whether the officers have probable cause to search."

In contrast, in *U.S. v. Shrum*[20] the defendant, Walt Shrum, phoned 911 in Kingman, Kansas and reported that his 36-year old wife had just stopped breathing. While waiting for the paramedics, the responding officer and Mr. Shrum performed CPR on her, and then accompanied the paramedics to the hospital where Ms. Shrum was pronounced dead. An investigator with the local sheriff's department responded to the hospital and was notified that "it was not a suspicious death."

At the sheriff's station, Mr. Shrum was questioned for over two hours about the circumstances surrounding his wife's death. And at some point the investigator told Mr. Schrum that he was going to secure the family home, saying "I'm gonna go ahead and hold onto your house as a scene, okay, until I get done with the autopsy." The defendant, who was distraught, said "That's fine" and that "anything that I can do to help." The investigator later explained during a suppression hearing that he secured the premises "because there was a 36-year old female that just goes into a code is not a common . . . so securing anything that may have given us information into that was the reason for the scene being held."

In the course of the interview, the investigator obtained Mr. Shrum's consent to enter the house to obtain medicine that Ms. Shrum had been taking. While inside, the investigator saw some ammunition and, when he learned that Mr. Shrum was a felon, he notified a local ATF agent and asked him to obtain a warrant to search the house for the ammunition and a firearm. In the course of the search, the investigator and an ATF agent found two firearms, 806 rounds of ammunition, and some methamphetamine. Mr. Shrum was immediately arrested and later charged with possession of the contraband. When his motion to suppress it was denied, he pled guilty.

On appeal, however, the Tenth Circuit ordered the evidence suppressed because the investigator did not even have reasonable suspicion to believe that a crime had occurred. Said the court:

> [T]he Government has never suggested that probable cause (or any form of articulable suspicion for that matter) justified the initial seizure of Defendant's home. And we have news for the Government. No such thing as a "crime scene exception," let alone an "unexplained death scene exception" to the Fourth Amendment exists.

The court also ruled that Mr. Shrum's consent to enter the home was given involuntarily because it "was the direct result of the illegal seizure of his home rather than an act of free will." Finally, the court ruled that the good faith rule did not even apply because "a reasonably well trained officer would have understood the seizure of Defendant's home under the circumstances presented was contrary to the Fourth Amendment."

Procedural Issues

Exit or remain inside? If officer secure a residence from the inside, it does not seem to matter whether they remain inside or outside while waiting for the warrant. But if they remain they may not search or photograph anything or otherwise "exploit" their presence inside.[21]

Do not seize evidence in plain view: If officers see evidence in plain view while conducting a sweep, they should not seize it under the plain view

[20] (10th Cir. 2018) __ F.3d __ [2018 WL 5986370].

[21] See *Utah v. Strieff* (2016) __ U.S. __ [136 S.Ct. 2056, 2065]; *Wong Sun v. United States* (1963) 371 U.S. 471, 488; *U.S. v. Shrum* (10th Cir. 2018) __ F.3d __ [2018 WL 5986370] [the officer "took fifty-six photographs of the kitchen and bedroom from various angles"].

rule. Instead, having determined there is no one on the premises who poses a threat to the evidence, they should leave it and wait for the warrant.

If an occupant wants to enter: Unless there was good reason to prohibit it, officers should allow an occupant to enter for a legitimate purpose, but may insist that an officer accompany him.[22] And, if that happens, the officer may stay "literally at [his] elbow at all times."[23]

Diligence in seeking warrant: Even if officers had sufficient grounds to secure the premises, and even though they did not conduct the search until the warrant was issued, the search may be invalidated if they were not diligent in seeking the warrant. Thus in *U.S. v. Song Ja Cha* the Ninth Circuit said, "Here, even if the police officers acted diligentlly during the seizure . . . they took [26 hours], a much longer time than was reasonably necessary to obtain the warrant.[24]

What to tell the judge: As a matter of ethical "full disclosure," an officer who is writing a search warrant affidavit after the premises have been secured from the inside should inform the judge that officers had made a warrantless entry. Thus, in *U.S. v. Bah,* the Sixth Circuit said, "We are, however, troubled by the officer's failure to inform the magistrate judge that, prior to the warrant application, separate officers had conducted a warrantless search of the Blackberry."[25]

When the search may begin: Officers may begin the search when the warrant is issued; they need not wait until it is brought to the scene. As the First Circuit observed, "Courts have repeatedly upheld searches conducted by law enforcement officials notified by telephone or radio once the search warrant was issued."[26]

Notify officers of warrant limits: If the affiant phones the officers on the scene that the warrant had been issued, he must also notify them of the terms of the warrant so they will know where they can search, and what evidence they may search for and seize.[27]

The "Independent Source Rule"

It is not surprising that judges sometimes disagree with the conclusions of officers that there was good reason to believe that evidence inside would be destroyed if they waited for a warrant. Even if they agree that a threat existed, they may disagree as to whether it was necessary to eliminate it by securing the premises from the inside. Sometimes judges also disagree as to whether there was insufficient time to obtain a warrant.

When this happens, prosecutors may be able to invoke the "independent source rule" whereby the evidence discovered on the premises will not be suppressed if they can prove it would have been discovered and seized regardless of whether the officers made a warrantless entry. As the Supreme Court explained, in *Murray v. United States*, "The ultimate question is whether the search pursuant to warrant was in fact a genuinely independent source

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[22] *Illinois v. McArthur* (2001) 531 U.S. 326, 335; *People v. Breault* (1990) 223 Cal.App.3d 125, 133; *U.S. v. Cha* (9th Cir. 2010) 597 F.3d 995, 1000; *US v. Garcia* (7C 2004) 376 F3 648, 651.

[23] *Washington v. Chrisman* (1982) 455 U.S. 1, 6. Also see *People v. Breault* (1990) 223 Cal.App.3d 125, 133; *U.S. v. Reid* (8th Cir. 2014) 769 F.3d 990, 992 ["When an arrestee chooses to reenter her home for her own convenience, it is reasonable for officers to accompany her and to monitor her movements."]; *U.S. v. Nascimento* (1st Cir. 2007) 491 F.3d 25, 50 ["[I]t was not inappropriate for the police to escort Nascimento to his bedroom in order that he might get dressed."]; *U.S. v. Garcia* (7th Cir. 2004) 376 F.3d 648, 651 ["It would have been folly for the police to let [the arrestee] enter the home and root about [for identification] unobserved."].

[24] (9th Cir. 2010) 597 F.3d 995, 1001. Compare *U.S. v. Holzman* (9th Cir. 1989) 871 F.2d 1496, 1507-08 [13–hour seizure of a hotel room was reasonable]; *U.S. v. Perez-Diaz* (1st Cir. 2017) 848 F.3d 33, 41.

[25] (6th Cir. 2015) 794 F.3d 617, 634.

[26] *U.S. v. Bonner* (1st Cir. 1986) 808 F.2d 864, 868-69. Also se *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 553-54; *U.S. v. Martinez-Garcia* (9th Cir. 2005) 397 F.3d 1205, 1211-12.

[27] See *U.S. v. Dubrofsky* (9th Cir. 1978) 581 F.2d 208, 213.

of the information and tangible evidence at issue here."[28]

How can officers and prosecutors prove that the issuance of the warrant was truly independent of anything that the officers saw during the warrantless entry? First, they must prove either that (1) the affidavit in support of the warrant did not contain any information that was obtained as the result of the warrantless entry; or (2) if such information was included, probable cause for the warrant would have existed if the information was deleted from the affidavit.[29] As the Court of Appeal observed:

> What is critical is not whether the evidence had been earlier discovered during the unlawful search but rather whether the search warrant was predicated upon facts gained from an independent source.[30]

For example, in ruling that this requirement was satisfied in *Murray*, the Court noted that "[i]n applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during the entry."[31]

Similarly, in *Segura v. United States*, the Supreme Court pointed out that "[n]one of the information on which the warrant was secured was derived from or related in any way to the initial entry into [Segura's] apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry. It is therefore beyond dispute that the information possessed by the agents before they entered constituted an independent source for the discovery and seizure of the evidence now challenged."[32]

In addition to proving that the information obtained during the warrantless entry was unnecessary to establish probable cause, officers and prosecutors must also prove that the decision to seek a search warrant was made *before* the officers had made the warrantless entry.[33] This is because, as the Court of Appeal observed in *People v. Koch*, "[I]f the officers would not have sought a warrant but for their illegal observations, the taint [of the illegal entry] would not have been purged."[34]

Although this can be difficult to prove exactly when officers made the decision to seek a warrant, the following circumstances be relevant:

Officer was writing warrant: That an officer was writing a warrant or was en route to the police station to write one before the premises were secured, is strong evidence that officers had decided to seek a warrant beforehand.[35] It is not, however, an absolute requirement.[36]

Officer's testimony: A court may consider an officer's testimony that he would have sought a warrant if, in light of the objective circumstances, such testimony was plausible.[37]

Probable cause plainly existed: It is relevant that the evidence of the defendant's guilt was so strong that a reasonable officer would have sought a warrant.[38]

Seriousness of the crime: The seriousness of the crime might be relevant because of the likelihood that officers would take special care to make sure the evidence was not suppressed for lack of a warrant. POV

[28] (1988) 487 U.S. 533, 543. Also see *People v. Lamas* (1991) 229 Cal.App.3d 560, 571 [it is "undisputed that the officers had determined to obtain a search warrant prior to any entry into the apartment."]; *U.S. v. Silva* (1st Cir. 2009) 554 F.3d 13.
[29] See *Murray v. United States* (1988) 487 U.S. 533, 540; *People v. Koch* (1989) 209 Cal.App.3d 770, 784.
[30] *People v. Koch* (1989) 209 Cal.App.3d 770, 786
[31] (1988) 487 U.S. 533, 546.
[32] (1984) 468 U.S. 796, 814. Edited.
[33] See *Murray v. United States* (1988) 487 U.S. 533, 540.
[34] (1989) 209 Cal.App.3d 770, 788.
[35] See *U.S. v. Etchin* (7th Cir. 2010) 614 F.3d 726, 737 [before other officers entered, a detective "set to work on an affidavit"]; *U.S. v. Alexander* (7th Cir. 2009) 573 F.3d 465, 477.
[36] See *U.S. v. Christy* (10th Cir. 2014) 739 F.3d 534, 543.
[37] See *U.S. v. Brooks* (8th Cir. 2013) 715 F.3d 1069, 1075-76; *U.S. v. Budd* (7th Cir. 2008) 549 F.3d 1140, 1148.
[38] See *U.S. v. Maxi* (11th Cir. 2018) 886 F.3d 1318, 1330; *U.S. v. Soto* (1st Cir. 2015) 799 F.3d 68, 83.

"Tested" Police Informants

"Because [the DEA agent] supported his statement of the [informant's] reliability with reference to the latter's history of providing information to authorities, we have at least some assurance of reliability."[1]

Few people aspire to become police informants. But for those who do, the highest accolade is to be deemed a "tested" one. Also known as "confidential reliable informants" or "CRIs," tested informants are people who have provided officers with a sufficient amount of accurate information in the past to justify the belief that the information they are currently providing is accurate. In the words of the Supreme Court, "Because an informant is right about some things, he is more probably right about other facts."[2]

There is, of course, a big difference between tested and untested informants. As we discussed in the Fall 2018 edition, information from untested confidential informants (i.e. "CIs") is virtually useless unless it has been corroborated. In contrast, information from tested informants may, in and of itself, establish probable cause for a warrantless arrest or search, or the issuance of a warrant. And it will almost always constitute reasonable suspicion to detain.[3] The question, then, is how can officers prove that an informant qualifies as "tested"?

The cases instruct that officers must be prepared to prove the following: (1) the number, or approximate number, of accurate tips the informant provided; and (2) an explanation of why it was reasonable to believe the tips were accurate.

Number of Accurate Tips

The first thing judges will need to know is the number of times the informant furnished accurate information in the past. It does not matter that they do not know the exact number. But they must at least provide a ballpark figure. Thus, officers cannot satisfy this requirement by providing some vague quantity such as "many times" or on "numerous" occasions.[4] Note that in counting the number of tips, officers may include tips provided to outside agencies.[5]

How many accurate reports will be required? Although there is no minimum, it usually takes two or more because, otherwise, it will be difficult to demonstrate a pattern of reliability. A court may, however, find that an informant was tested if he had provided accurate information only once, so long as there was no reason to believe the current information was false.[6] As the Court of Appeal explained, "Just where along the line an untested informant becomes a reliable one is not subject to rigid standards and given numbers." The court added that, "[w]hile one past incident showing reliability is not sufficient to compel a magistrate to

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[1] *U.S. v. Trinh* (1st Cir. 2011) 665 F.3d 1, 10-11.

[2] *Illinois v. Gates* (1983) 462 U.S. 213, 244. Also see *People v. Spencer* (2018) 5 Cal.5th 642, 664 ["An informant's veracity or reliability may be established by her having provided tips that proved true."]; *People v. Terrones* (1989) 212 Cal.App.3d 139, 146 ["If the informant has provided accurate information on past occasions, he may be presumed trustworthy on subsequent occasions."].

[3] See *U.S. v. Elmore* (2nd Cir. 2007) 482 F.3d 172, 181 ["Where the informant is known from past practice to be reliable, no corroboration will be required to support reasonable suspicion."].

[4] See *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1464 ["the affiant vaguely refers to 'numerous occasions' on which the informant provided [information]"].

[5] See *People v. Lopez* (1986) 181 Cal.App.3d 842, 845.

[6] See *People v. Cedeno* (1963) 218 Cal.App.2d 213, 219 ["[A]n arrest and search may be made solely on the basis of information received from a single reliable informant."]; *People v. Berkoff* (1985) 174 Cal.App.3d 305, 309; *People v. Barger* (1974) 40 Cal.App.3d 662, 667-68. Also see *People v. Hansborough* (1988) 199 Cal.App.3d 579, 584 [twice]; *U.S. v. Elliot* (9th Cir. 2003) 322 F.3d 710, 716 ["[The informant's] record of providing six reliable drug-related tips in the preceding three months was sufficient to overcome any doubts raised by his motives and prior criminal and personal behavior."].

accept the reported observations of the informant as true, he does not abuse his discretion if he arrives at that conclusion."[7]

Proof of Accuracy

Although officers must prove that an informant provided accurate information in the past, there are no strict requirements as to what kinds of proof will suffice. As the California Supreme Court said, "It is sufficient that the prior information was accurate or was of such substance as to cause a reasonable person to conclude that it is reliable."[8]

But one thing that is absolutely required is that officers provide facts, not unsupported conclusions. For example, in *Rodriguez v. Superior Court*[9] an officer claimed that his informant was reliable because his tips had been "corroborated with various sources and that [his] information has been found to be factual." This explanation was inadequate, said the court, because "[t]here is nothing to indicate how the information was corroborated nor how it was shown to be factual."

Similarly, officers cannot establish an informant's track record by reporting that his tips led to "ongoing investigations," "police surveillance," or some other ambiguous achievement.[10] Claims such as these are insufficient because they do not logically lead to the conclusion that officers had verified the accuracy of the information.[11]

The strongest proof of accuracy is that the informant's tip resulted in one or more convictions, holding orders, indictments, arrests, productive search warrants, or the seizure of contraband or other evidence. Thus, in such cases, the courts have noted the following:

- "[T]he fact that [the informant] had previously given information which led to the arrest of a forgery suspect is additional justification for regarding him as a reliable informant."[13]
- The confidential informant "provided trustworthy information and had demonstrated his knowledge of the drug trade in the Portland area."[14]
- The informant's "record of providing six reliable drug-related tips in the preceding three months was sufficient to overcome any doubts raised by his motives and prior criminal and personal behavior."[15]
- The affiant reported that the informant "had supplied him with information on five prior occasions, leading to the recovery of a large quantity of heroin and the arrest of nine persons."[16]
- "The assertion that the informant had given information to the affiant in excess of ten times over the last two years resulting in the issuance of search warrants, the seizure of controlled substances and the arrest of numerous suspects, establishes the reliability of the informant."[17]
- "[T]he affidavit stated facts showing that the informant had provided accurate information concerning another murder.[18]

The question has arisen whether an informant will be deemed tested if he merely participated in a controlled buy of drugs or other contraband. Although some courts have cited this as a relevant circumstance, it is questionable because, in most cases, the informant is just carrying out the instruc-

[7] *People v. Gray*(1976) 63 Cal.App.3d 282, 288.
[8] *People v. Dumas* (1973) 9 Cal.3d 871, 876. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 233.
[9] (1988) 199 Cal.App.3d 1453, 1464.
[10] See *Illinois v. Gates* (1983) 462 U.S. 213, 239; *People v. French* (2011) 201 Cal.App.4th 1307, 1317.
[11] See *U.S. v. Fleury* (1st Cir. 2016) 842 F.3d 774, 778 [affiant "used stock phrases"].
[12] *People v. Superior Court (McCaffrey)* (1979) 94 Cal.App.3d 367, 374 [Edited].
[13] *People v. Superior Court (Johnson)* (1972) 6 Cal.3d 704, 714.
[14] *U.S. v. Brown* (1st Cir. 2007) 500 F.3d 48, 55.
[15] *U.S. v. Elliott* (9th Cir. 2003) 322 F.3d 710, 716.
[16] *People v. Neusom* (1977) 76 Cal.App.3d 534, 537.
[17] *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1117.
[18] *People v. Barger* (1974) 40 Cal.App.3d 662, 667.

tions of the officers. As the Court of Appeal observed in *People v. Mason*, "On its face, the statement that [the informant] 'made controlled buys of controlled substances under the direction and supervision of law enforcement officers' does not indicate [the informant] provided any information to the police. He merely made controlled buys."[19] Still, a controlled buy that was successful would probably render the informant "tested" if the he was the person who initiated the investigation into the seller.[20]

A similar attack on an informant's reliability may be based on his having provided officers with information that led to the issuance of a search warrant that was unproductive. But this is rarely an indication of unreliability because warrants are based on probabilities, not certainties. As the court observed in *People v. Murphy,* "Circumstances change: narcotics dealers move about, sell and use up their narcotics supplies, or they cache them in new places."[21]

Finally, a lesser proof of accuracy may suffice when the informant's tip is used to detain or pat search a suspect, as opposed to arresting or searching him. As the Supreme Court explained in *Adams v. Williams*, "[W]hile the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.[22]

Other Issues

PERSONAL KNOWLEDGE: Even if an informant provided accurate information in the past, he will seldom be deemed tested unless his current tip was based on his personal knowledge; i.e., not rumor or other hearsay. Thus, in ruling that an informant was not sufficiently reliable to become tested, the court in *People v. French* said "the affidavit states nothing about [the informant's] reliability, and the informant's knowledge rests on hearsay, not personal observation."[23]

FACTS, NOT CONCLUSIONS: To prove that an informant qualifies as a CRI officers must present facts—not opinions or conclusions. As one court put it, "[A]lthough hearsay may be relied upon in seeking a search warrant, the hearsay has little value where the informant is untested and the information is uncorroborated and lacking in detail."[24] For example, the Seventh Circuit was critical of an affiant who "offered no explanation" about how the informant knew there were firearms in defendant's home.[25]

Of particular importance is that an informant cannot become tested merely because an officer wrote or testified he was "credible" or "trustworthy." For example, when this issue was raised in *People v. French*, the Court of Appeal said, "Confidential reliable informant one [CRI-1] is described as a 'confidential reliable informant,' but that simple assertion is inadequate to establish reliability because the affidavit contains no facts in support."[26]

The court also ruled that the affidavit failed to establish the reliability of another informant because, "[w]thout any indication of how often CRI-2's past information was corroborated or how recently it was provided, CRI-2's status as a reliable informant is not established." Similarly, in *U.S. v. Fleury* the First Circuit criticized an affiant because he "used stock phrases, such as 'provided information to law enforcement personnel in the past' that 'led to the seizure of evidence.'"[27]

[19] (1982) 132 Cal.App.3d 594, 599. Edited.
[20] See *People v. Berkoff* (1985) 174 Cal.App.3d 305, 310; *People v. Mason* (1982) 132 Cal.App.3d 594, 599; *People v. Love* (1985) 168 Cal.App.3d 104, 106-7, 110.
[21] (1974) 42 Cal.App.3d 81, 87. Also see *United States v. Harris* (1971) 403 U.S. 573.
[22] (1972) 407 U.S. 143, 147.
[23] (2011) 201 Cal.App.4th 1307, 1317.
[24] *People v. French* (2011) 201 Cal.App.4th 1307, 1317. Also see *People v. Hansborough* (1988) 199 Cal.App.3d 579, 584.
[25] *U.S. v. Dismuke* (7th Cir. 2010) 593 F.3d 582, 587
[26] (2011) 201 Cal.App.4th 1307, 1317. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 239.
[27] (1C 2016) 842 F3 774, 778.

Finally, in *U.S. v. Dismuke* the court noted that the case had become complicated because the officer's affidavit "described the confidential informant as 'reliable' without offering any explanation for that assertion."[28]

Worse yet, judges may assume that an officer who resorts to mere conclusions does not understand the fundamentals of probable cause. This occurred in a search warrant case in which the Court of Appeal commented that the officer's "entire affidavit is infected [with conclusions] beginning with its bald description of the informant as a 'confidential reliable informant."[29]

WHERE PROOF MUST BE MADE: In most cases, proof that an informant is reliable must be contained in affidavits for search or arrest warrants, probable cause declarations, or while testifying at suppression or preliminary hearings

DON'T PROVIDE UNNECESSARY DETAILS: Because it is essential that officers at suppression hearings provide no information that would reveal or tend to reveal the informant's identity, they may refuse to disclose an such information pursuant to the nondisclosure privilege.[30] Furthermore, officers who are writing search warrant affidavits need not provide a detailed account of the informant's record of reliability. As the First Circuit observed, "[A]n informant's reliability need not invariably be demonstrated through a detailed narration of the information previously furnished to law enforcement—for example, by listing the number or names of persons arrested or convicted as a consequence of the informant's prior assistance."[31]

INCLUDING NEGATIVE INFORMATION: Even if a confidential informant had a good track record, officers must notify the court if they had reason to believe that his latest information was unreliable or otherwise questionable; e.g., the informant and the suspect were enemies. As the California Supreme Court observed in *People v. Kurland*, "[W]hen the affiant knows or should know of specific facts which bear adversely on the informant's probable accuracy *in the particular case*, those facts must be disclosed."[32]

Officers need not, however, disclose information that merely indicates that the informant's reliability is questionable, so long as officers make clear that he is untested.[33] This is because "judges understand that criminal suspects often have criminal records and frequently are uncooperative or untruthful before they eventually cooperate and provide truthful admissions."[34]

As one judge pointed out, "We have all handled enough narcotics cases and thus gained knowledge of the habits of peddlers, that we may perhaps reasonably suspect that such a person who deals a small amount of merchandise from his home, has more where it came from."[35]

Thus, in *Kurland*, the Court pointed out that "in most cases, the issue of possible unreliability is adequately presented to the magistrate when the affidavit reveals that the affiant's source of information is not a citizen-informant but a garden-variety police tipster ... because predictable details of the informer's criminal past will usually be cumulative and therefore immaterial." POV

[28] (7th Cir. 2010) 593 F.3d 582, 587.
[29] *People v. Superior Court (McCaffery)* (1979) 94 Cal.App.3d 367, 374. Edited.
[30] See Evid. Code § 1041(a)(2); *People v. Hobbs* (1994) 7 Cal.4th 948, 962; *U.S. v. Napier* (9th Cir. 2006) 436 F.3d 1133, 1136 [the privilege "extends to information that would tend to reveal the identity of the informant."].
[31] *U.S. v. Taylor* (1st Cir. 1993) 985 F.2d 3, 5-6. Also see *Swanson v. Superior Court* (1989) 211 Cal.App.3d 594, 599.
[32] (1980) 28 Cal.3d 376, 393.
[33] See *People v. Webb* (1993) 6 Cal.4th 494, 522; *People v. Gallo* (1981) 127 Cal.App.3d 828, 841 [because the informant was a "garden variety police tipster," there was "no reasonable probability that the details of his criminal record would have [mattered]."]; *U.S. v. Ruiz* (9th Cir. 2014) 758 F.3d 1144, 1149 ["The magistrate judge knew nothing of Scales's history of drug sales, her evasiveness concerning the drug paraphernalia at the scene of the shooting .... These are serious omissions."].
[34] *U.S. v. Stropes* (9th Cir. 2004) 387 F.3d 766, 772.
[35] *People v. Golden* (1971) 20 Cal.App.3d 211, 218-19 (dis. opn. of Kaus. J.).

Obtaining Financial Records

Indeed, the totality of bank records provides a virtual current biography.[1]

In many criminal investigations, a suspect's financial records may contain a wealth of evidence. For example, they may reveal the suspect's income, assets, debts, credit card and ATM use, credit rating, and spending habits. A single document, such as a loan application, might provide investigators with a complete summary of the account holder's financial affairs, including "his habits, his opinions, his tastes, and political views."[2] In addition, ATM records and credit card receipts may reveal the suspect's whereabouts at any particular time.

Although officers might find copies of these records in the suspect's home or office, they will usually find a complete set in the institution's files. Moreover, by obtaining the records from the institution, they may prevent the suspect from learning that he is under investigation.

But because financial records include so much personal information, the release of this information is heavily restricted by various California privacy statutes. Most of these restrictions are contained in the Right to Financial Privacy Act (RFPA)[3] which sets forth the procedure that officers must follow to obtain these records from a "financial institution," which includes any business that lends or transfers money.[4]

In case there is any confusion, it should be noted that the U.S. Supreme Court in 2018 ruled that a customer's financial records are not "private" under the Fourth Amendment. This is mainly because they are not in the customer's possession or control.[5] But this does not make it easier to obtain these records in California because financial institutions here will ordinarily refuse to provide such records unless officers comply with the RFPA.

The following basic information may, however, be released to officers by a financial institution based simply on a request:

GENERIC INFORMATION: Information may be released if it is "not identified with, or identifiable as being derived from, the financial records of a particular customer."[6]

INFORMATION FOR FAMILY SUPPORT, ELDER ABUSE: A California family support agency may request information that is necessary to enforce a family support order against a parent. Specifically, upon a written request, the institution may disclose the number of accounts that have been opened by the parent, the current balances in the accounts, and the address of the branch where the account is located.[7]

How to Obtain

There are several ways in which officers may obtain financial information about a suspect from the suspect's bank or other financial institution.

Search warrant

The most common method of obtaining this information is via search warrant. Although the procedure for obtaining these warrants is similar to basic warrants, there are some differences.

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[1] *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 247.
[2] *People v. Blair* (1979) 25 Cal.3d 640, 652. **NOTE**: The term "financial records" means "any original or any copy of any record or document held by a financial institution pertaining to a customer of the financial institution." Gov. Code § 7465(a).
[3] Gov. Code § 7460 *et seq.* **NOTE**: Information contained in a suspect's credit report is confidential under the Federal Fair Credit Reporting Act and the California Consumer Credit Reporting Agencies Act.
[4] See Fin. Code § 4052(c), 12 U.S.C. § 1843(k).
[5] See *Carpenter v. United States* (2018) __ US __ [138 S.Ct. 2206, 2216] ["the third-party doctrine applies to … bank records"].
[6] Gov. Code § 7480(a).
[7] Gov. Code § 7480(e).

SERVICE ON CUSTODIAN OF RECORDS: The warrant will usually be served on the institution's custodian of records who will determine where the listed records are located, make copies, and mail or otherwise deliver them to the officers. Officers can usually obtain the address of the custodian of records by phoning or emailing the institution.

NONDISCLOSURE ORDERS: Although California law permits the institution to notify the customer that it has received a warrant for his records,[8] the affiant may apply for a "nondisclosure order" that prohibits the institution from making such a notification, at least until the conclusion of the investigation.[9] To obtain a nondisclosure order, the affiant must explain in the affidavit why the criminal investigation would be compromised by disclosure.[10]

TIME RESTRICTIONS: The financial institution must produce the records within ten days after the warrant was served.[11] But this can create problems because, depending on the number and nature of the records, the financial institution may need more time. If so, the institution or affiant can ask the court to extend the time limit to "whatever period of time is reasonably necessary."[12] However, if officers do not need the records within ten days, they may informally agree to an extension.

Although search warrants become void if they are not "served" within ten days after issuance, they are deemed "served" when they are delivered to the institution.[13] Thus, it is immaterial that officers did not obtain the records within ten days after the warrant was issued.

Institution was the victim

A financial institution may voluntarily furnish an account holder's financial records to investigators if the institution reasonably believes that (1) it is the victim of the a crime, and (2) the information contained in the records will assist in the investigation of that crime.[14] To put it another way, the institution may voluntarily furnish the records when it is not a "neutral" party.[15]

The institution is, of course, a "victim" if it has suffered an actual financial loss as the result of the crime. But it is also a victim if there existed a potential loss. This typically occurs when the account holder is suspected of writing bad checks on his account, in which case the institution may suffer a loss if it honored the check.[16] It may also occur if the account holder had a motive to deny knowledge of the transaction in question. For example, in *People v. Nosler*[17] a person named Owens was suspected of transporting stolen cattle and using his Visa card to buy gasoline for trucks that were later used by his accomplice, Nosler. When an officer questioned Owens about this he claimed his Visa card was "missing." Later, his bank voluntarily provided investigators with the credit card receipts which were admitted into evidence at trial for grant theft. Both men were convicted.

On Appeal, Owens and Nosler contended that the receipts should have been suppressed because his bank was not a "victim" since it had not suffered an actual loss. The court ruled, however, that an actual loss was not required; that the exception applies when, as here, the account holder will likely claim that his credit card had been stolen or misplaced, in which case the bank might be on the hook. As the court explained, "[T]he disputed credit card charge directly implicates Owens in the theft and his innocence can only be maintained if he disaffirms making the charge."

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[8] Gov. Code § 7475.
[9] Gov. Code § 7475.
[10] Gov. Code § 7475 [nondisclosure order is permitted "upon a finding that such notice would impede the investigation"].
[11] Gov. Code § 7475.
[12] Gov. Code § 7475.
[13] See *People v. Zepeda* (1980) 102 Cal.App.3d 1, 7 ["the warrant was actually served when the search began"].
[14] Gov. Code § 7470(d); *People v. Nece* (1984) 160 Cal.App.3d 285, 290; *People v. Nosler* (1984) 151 Cal.App.3d 125, 132.
[15] *People v. Blair* (1979) 25 Cal.3d 640, 652.
[16] See *People v. Johnson* (1975) 53 Cal.App.3d 394, 396-97 *People v. Hole* (1983) 139 Cal.App.3d 431, 438.
[17] (1984) 151 Cal.App.3d 125.

Records are "evidence"

California law also permits financial institutions to furnish investigators with an account holder's records if there was reason to believe the records were evidence of a crime, regardless of whether the firm was a victim or potential victim.[18] This is permitted because it is simply good public policy. As the Court of Appeal noted, "Without such an exception, a bank aware of facts indicating criminal activity, involving its customer and/or itself, would be forced to stand idly to the side, without any other sensible recourses other than to merely *hint* such to the police."[19]

For example, in *People v. Nece*[20] the defendant was embezzling large sums of money from his employer, Baker Commodities, by transferring the money into his personal account at the Bank of America. A bank administrator happened to notice the transfers and found them "unusual." So she froze the account, alerted Baker Commodities, and gave officers the records of the transactions. In refusing to suppress the records, the court pointed out that California allows "the disclosure of normally private information to the police, by a financial institution, when the latter has a genuine reason to suspect that a crime has or is being committed, and/or that it may suffer as a victim thereof."

Crime report filed

An institution must release certain account information if an officer certifies in writing that a crime report has been filed in which it was alleged that the institution's drafts, checks, or other orders are being used fraudulently.[21] The purpose of this rule is mainly to provide investigators with a mechanism for quickly obtaining the information they need in bad check cases; i.e., they can simply notify the bank that a crime report had been filed pertaining to a particular transaction, and request the necessary information.[22] Although this information may also be obtained via the "bank as victim" and "records are evidence" rules, it appears that this provision was enacted because there had been some uncertainty as to whether officers could lawfully initiate contact with the suspect's bank, or whether they must wait for the bank to make the overture. This uncertainty was later eliminated by the Court of Appeal when it ruled that officers could initiate contact if their decision to do so was neither "random" nor "unwarranted."[23]

INFORMATION THAT MUST BE RELEASED: The institution must furnish the following information:

- The number of items dishonored.
- The number of items paid which created overdrafts.
- The amount of dishonored items and items paid which created overdrafts and a statement explaining any credit arrangement between the bank and customer to pay overdrafts.
- The dates and amounts of deposits and debits, and account balances on these dates.
- A copy of the signature and any addresses on a customer's signature card.
- The date the account opened and, if applicable, the date it was closed.
- Surveillance photographs and video recordings of persons accessing the crime victim's financial account via an ATM or from within the financial institution on the dates on which illegal acts involving the account were alleged to have occurred.[26]

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[18] See Gov. Code § 7470, § 7471(c).
[19] *People v. Nece* (1984) 160 Cal.App.3d 285, 291.
[20] (1984) 160 Cal.App.3d 285.
[21] Gov. Code § 7480(b).
[22] See *People v. Muchmore* (1979) 92 Cal.App.3d 32, 35.
[23] *People v. Nece* (1984) 160 Cal.App.3d 285, 292.
[24] See *People v. Muchmore* (1979) 92 Cal.App.3d 32, 36.
[25] See Gov. Code § 7480(b).
[26] See Gov. Code § 7480(b).

Consent

An account holder may authorize the institution to release financial information to officers. Such authorization must be in the following form:[27]

(1) **Writing**: The form must be in writing.
(2) **Signed and dated**: The authorization must be signed and dated.
(3) **Law enforcement agency identified**: The authorization must specify the agency whose officers are to receive the records.
(4) **Records described**: The records must be particularly described. See "Search warrant" (Describing the records), below.
(5) **Time window**: The authorization must specify whether the records are limited to transactions that occurred over a certain time period.
(6) **Right to revoke**: The authorization must give the account holder notice that he has the right to revoke the authorization at any time.

Within 30 days of obtaining records from the institution, officers must notify the customer in writing of what records they received. If, however, officers believe that such notice would impede their investigation, they may seek an extension.[28]

Describing the Records

Officers who are seeking a suspect's financial records by way of search warrant or consent must describe them in some detail.[29] This requirement not only serves the suspect's privacy interests by preventing the disclosure of irrelevant records, it helps the firm's employees determine what records they must produce. It also assists investigators who, otherwise, might have to spend a lot of time reading useless documents.

How much particularity is required? If officers are utilizing a search warrant, they must furnish any information that is both (1) reasonably available to them, and (2) reasonably necessary to identify the requested documents.[30] As the Court of Appeal explained, "[T]he requirement of reasonable particularity is a flexible concept, reflecting the degree of detail known by the affiant and presented to the magistrate. While a general description may be sufficient where probable cause is shown and a more specific identification is impossible, greater specificity is required in a case where the identity of the objects is known."[31]

PROVIDING DATES: Officers will usually want records pertaining to transactions that occurred during a certain period of time. If so, this should be specified in the request; e.g., "All deposit slips and account statements from July 4, 2011 through and including October 31, 2012."

"INCLUDING, BUT NOT LIMITED TO ..." To make sure they get everything they need, officers will sometimes preface their description with something like, "including, but not limited to." In the abstract, this phrase is ambiguous because it does not provide any criteria for determining what other documents must be produced. Still, most judges permit it by interpreting the phrase to mean that the listed records are illustrative of the records that are seizable under the warrant.[32]

USING BOILERPLATE: In the context of search warrants, "boilerplate" consists of a list (usually lengthy) of records copied verbatim from other warrants or court orders.[33] Although boilerplate will sometimes accurately describe the records for which probable cause exists, in most cases the list is overbroad. Consequently, officers who utilize boilerplate must carefully review the list to make sure that it includes only those records that are supported by probable cause. POV

[27] See Gov. Code §§ 7470(a)(1), 7473.
[28] See Gov. Code § 7473(d); *People v. Meyer* (1986) 183 Cal.App.3d 1150, 1163.
[29] Gov. Code § 7470(a).
[30] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 778; *Bay v. Superior Court* (1992) 7 Cal.App.4th 1022, 1026.
[31] *People v. Smith* (1986) 180 Cal.App.3d3 72, 89.
[32] See *U.S. v. Riley* (2nd Cir. 1990) 906 F.2d 841, 844.
[33] See *People v. Frank* (1985) 38 Cal.3d 711, 722; *Cassady v. Goering* (10th Cir. 2009) 567 F.3d 628, 636, fn.5 [the affiant "appeared to use stock language" and "a form warrant that could be applied to almost any crime"].

Probable Cause: What Does "Probable" Mean?

The obvious question about probable cause is: How likely must it be that the defendant committed a crime, or that the place or item contains criminal evidence?[1]

The term "probable cause" may be the most commonly used and debated legal term in the field of law enforcement. But nobody really knows what it means. It might be assumed that probable cause requires at least a 50.1% chance because anything less would not be "probable." But the Supreme Court has consistently refused to assign it a probability percentage because it views probable cause as a non-technical standard based on common sense, not mathematical precision. As the Court explained, probable cause "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of circumstances."[2] While it is true that probable cause is incapable of precise quantification into percentages, the Court has said some other things about the required level of proof that make it possible to be somewhat more specific.

The required probability

First off, we can debunk the idea that probable cause requires more than a 50% chance. This is because the Supreme Court has said that probable cause does not require "any showing that such belief be correct or more likely true than false."[3] Thus, the California Supreme Court pointed out that "[t]he showing required in order to establish probable cause is less than a preponderance of the evidence [i.e., less than 50.1%] or even a prima facie case [i.e. lower still]."[4] Similarly, in *U.S. v. Melvin* the First Circuit said, "[A]ppellant reads the phrase 'probable cause' with emphasis on the word 'probable,' and would define it mathematically to mean 'more likely than not' or 'by a preponderance of the evidence.' This reading is incorrect."[5]

The question remains: How much lower than 50% is required? Nobody knows. But because the existence of probable cause can result in arrests, searches, and other highly intrusive police actions, it is probably not much below 50%. We say this because anything less would strip the word "probable" of any meaning.

Searching multiple locations for one item

Additional proof that the word "probable" has a special meaning is found in search warrant cases where the location of the evidence can only be determined by reasonable inference. In these cases, if it is reasonable to infer that the evidence could be located in, say, one of three locations, it does not matter that there is only a 33.3% chance that it is located in any one of the locations. For example, if officers in a murder case do not know where the suspect hid the murder weapon, it is often reasonable to infer that it is located in either his home, vehicle, or storage locker. Although there is only a 33% chance of finding the gun in any one of these places, warrants may—and frequently do—authorize searches of all three locations. As in the Califor-

[1] "How much 'probable cause' do the police need?" Nolo, nolo.com.
[2] *Maryland v. Pringle* (2003) 540 U.S. 366, 371. Also see *United States v. Sokolow* (1989) 490 U.S. 1, 7.
[3] *Texas v. Brown* (1983) 460 U.S. 730, 742.
[4] *People v. Carrington* (2009) 47 Cal.4th 145, 163. Also see *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783 ["requires less than a preponderance of the evidence"]; *U.S. v. Ortiz* (4th Cir. 2012) 669 F.3d 439, 446 [probable cause "is less demanding than a standard requiring preponderance of the evidence"]; *U.S. v. Garcia* (5th Cir. 1999) 179 F.3d 265, 269 [the required probability "need not reach the fifty percent mark"].
[5] (1st Cir. 1979) 596 F.2d 492, 495.

nia Supreme Court said, "There is no logical inconsistency in the conclusion that an affidavit establishes probable cause to believe that evidence of a crime will be in any one of a suspect's homes or vehicles."[6] Or, as the Ninth Circuit put it, officers "need not confine themselves to chance by choosing only one location for a search."[7]

Combinations of circumstances

One of the lesser-known—but most important—principles of probable cause is that the chances of having it increase *exponentially* as the number of incriminating circumstances increase. As the California Supreme Court observed in *People v. Hillary*, "The probability of the independent occurrence of these [multiple] factors in the absence of guilt of defendant was slim enough to render suspicion of defendant reasonable and probable."[8]

To illustrate, assume that probable cause can be determined by means of a scorecard. Also assume that officers spotted a man on a street near the location of robbery that had just occurred, and that he matched a somewhat general description of the perpetrator. So the officers pull out their scorecards and give the suspect a PC score of two; i.e., one point because he resembled the perpetrator and a second point because he was near the crime scene shortly after the robbery occurred. But he would also be entitled to a bonus point because the combination of these two independent circumstances is, in effect, an additional incriminating circumstance or "coincidence of information."[9] Thus, the court in *People v. Joines* pointed out that the "fact that there were two persons fitting descriptions given for the two suspects narrowed the chance of coincidence."[10]

This is especially important in cases where there were two or more perpetrators (let's say two), and the next day officers spotted two people who were (1) standing together, (2) on the street near the crime scene, and (3) the physical descriptions of both resembled those of the perpetrators. It would be arguable that the officers had probable cause because, as one judge aptly put it:

> When you have identification of one person and you have identification of a second person and then you make an interrelationship between the two, the inference value is progressing in logarithmic quantities. And so I think the inference value is very, very high, sufficient to constitute probable cause.[11]

Here are some other examples of how the existence of two or more independent incriminating circumstances can significantly boost the probability of having probable cause or, at least, grounds to detain:

- The male suspect was wearing a white shirt similar to that of one perpetrator, and his female companion was wearing a green dress similar to that of his accomplice.[12]
- The suspect resembled the perpetrator, plus he was detained shortly after the crime occurred at the location where the perpetrator was last seen or on a logical escape route.[13]
- "The descriptions significantly matched as to age, height, weight, sex, race, and the bag being carried."[14]

POV

[6] *People v. Easley* (1983) 34 Cal.3d 858, 870.
[7] *U.S. v. Hillyard* (9th Cir. 1982) 677 F.d2 1336, 1339.
[8] *People v. Hillary* (1967) 65 Cal.2d 795, 804.
[9] *llinois v. Gates* (1983) 462 U.S. 213, 222, fn.7; *Ker v. California* (1963) 374 U.S. 23, 36 ["To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement."].
[10] (1970) 11 Cal.App.3d 259, 263.
[11] *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1173.
[12] *People v. Little* (2012) 206 Cal.App.4th 1364, 1370.
[13] *People v. Atmore* (1970) 13 Cal.App.3d 244, 246.
[14] *People v. Brian A.* (1985) 173 Cal.App.3d 1168, 1174.

Recent Cases

People v. Gutierrez

(2018) 27 Cal.App.5th 1155

Issue

If a DUI arrestee opts for a blood test, must officers nevertheless obtain a search warrant?

Facts

Gutierrez was arrested for DUI and informed that he was required to choose between a breath or blood test. He chose a blood test. After he was charged with DUI, he filed a motion to suppress the test results, claiming that all DUI blood testing now requires a search warrant. The motion was denied and Gutierrez appealed.

Discussion

There are five circumstances in which officers may theoretically order that a DUI arrestee submit to a blood test: (1) exigent circumstances, (2) search incident to arrest, (3) probable cause, (4) actual consent, and (5) implied consent.[1]

We say "theoretically" because the exigent circumstances exception to the warrant requirement has been made virtually obsolete in DUI cases since 2013 when the Supreme Court ruled that the natural dissipation of alcohol from the bloodstream is no longer an exigent circumstance.[2] And then in 2016 the Court ruled that the search incident to arrest exception does not apply to DUI blood tests because they are so much more intrusive than breath tests.[3] This leaves probable cause, implied consent, and express consent. But, sad to say, these three exceptions to the warrant requirement are not without some uncertainties.

PROBABLE CAUSE: In 2018 the California Court of Appeal ruled that officers may require a driver to submit to a blood test if the officer had probable cause to believe that the driver was under the influence of drugs or the combined influence of alcohol and drugs.[4] But this ruling is now under review by the California Supreme Court and may therefore be overturned or modified this year.

IMPLIED CONSENT: Under California's implied consent rule, drivers who are arrested for DUI are deemed to have impliedly consented to breath or blood testing.[5] It is undisputed that such consent is effective if the driver opts for a breath test. But if he chooses a blood test, the U.S. Supreme Court ruled that consent can be implied only if the driver was not notified that he would suffer penal consequences as the result of the refusal.[6] The Court reasoned that such a notification would constitute coercion and therefore render the driver's consent involuntary. As the result, the DMV removed the following language from form DS 367: "Refusal or failure to complete a test will also result in a fine and imprisonment if this arrest results in a conviction of driving under the influence." This was not an issue in *Gutierrez* because the arresting officer did not give such a notification.

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[1] **NOTE**: DUI blood testing may also be permitted if the driver was subject to a probation or parole searches of his "person." See *People v. Jones* (2014) 231 Cal.App.4th 1257, 1269 [blood draw falls within the "search of a person"].

[2] *Missouri v. McNeely* (2013) 569 U.S. 141, 152. Also see *People v. Meza* (2018) 23 Cal.App.5th 604, 611-12 ["The People offered no evidence to explain why [the arresting officer] could not have sought a warrant during any of that time."].

[3] *Birchfield v. North Dakota* (2016) 579 U.S. __ ["We conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving."].

[4] *People v. Vannesse* (2018) 23 Cal.App.5th 440, 446 [if the officer notified a driver who was suspected of being under the influence of drugs that he had a choice of a blood or breath test, and if the arrestee chose the breath test, the officer "could and would have required him to submit to a blood test pursuant to [Veh. Code section 23612(a)(2)(C)]."

[5] See Veh. Code § 23612.

[6] *Birchfield v. North Dakota* (2016) 579 U.S. __ . Also see *People v. Arter* (2017) 19 Cal.App.5th Supp. 1 4 [if the officer had been requesting a blood test, the court indicated the following language in an implied consent advisory would violate *Birchfield*: "You have the right to refuse, but that refusal may be used against you in a court as an admission of guilt."].

More recently, the California Court of Appeal ruled that, although the implied consent law states that DUI arrestees must be informed that they have a right to either a blood or breath test,[7] this is not a constitutional requirement and, therefore, the test results cannot be suppressed on grounds that the officers did not inform him of his right to a breath test.[8] The California Supreme Court has also granted review of this case.

ACTUAL CONSENT: This brings us to actual consent and *Gutierrez*. Gutierrez argued that because obtaining a blood sample is so much more intrusive than obtaining a breath sample, it should not be permitted under any circumstances without a warrant. The court disagreed, ruling, that a warrant is not required if (1) the arrestee consented after being advised of his options under California's implied consent rule, and (2) the arrestee's decision was voluntary in the sense that he was not coerced or informed that a refusal to consent would result in criminal sanctions. Thus, the court concluded that, by choosing a blood test, "Gutierrez effectively volunteered for whatever additional intrusion a blood test involves, over and above the intrusion the test entails." Thus, the court ruled that Gutierrez's blood test results would be admissible at trial.[9]

Comment

The law pertaining to DUI blood testing has become entirely too complicated and therefore uncertain, as demonstrated by *Gutierrez*. Here is a driver who freely and voluntarily consented to a blood draw, and yet the trial judge and the local appellate panel disagreed on whether DUI arrestees can effectively consent to take a blood test. And the Court of Appeal could only decide the matter by engaging in a lengthy and technical analysis of the law as it now exists.

This is an area of the law that officers throughout the country must navigate hundreds of times a day. And yet it has become so convoluted that many judges (and therefore many officers) are unable to make sense of it, or at least explain it in terms that can be clearly understood.

It is, however, not difficult to understand who is at fault for this situation. It is the U.S. Supreme Court which, over the past 15 years or so, has had difficulty writing coherent opinions in DUI cases and several other search and seizure cases as well.[10]

This is unsatisfactory. Instead, as the Justices themselves observed in 1981 (but apparently forgot), "[T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[11]

People v. Delgado

(2018) 27 Cal.App.5th 1092]

Issue

Did detectives violate *Miranda* while questioning a murder suspect?

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[7] See Veh. Code § 23612.

[8] *People v. Vannesse* (2018) 23 Cal.App.5th 440, 447.

[9] **NOTE**: The court in *Gutierrez* ruled that such express consent is valid under either of two exceptions to the warrant requirement: (1) search incident to arrest, and (2) plain consent. We did not discuss this issue because it would have made the discussion unnecessarily technical. It is sufficient to note that, although the Supreme Court in *Birchfield* ruled that a blood test may not "be administered as a search incident to arrest," the court in *Gutierrez* ruled that *Birchfield* did not apply when, as here, the driver freely opts for a blood test instead of a breath test.

[10] See, for example *Georgia v. Randolph* (2006) 547 U.S. 103 [see 2006 Point of View Online cases]; *Arizona v. Gant* (2009) 556 U.S. 332 [see 2009 Point of View Online cases]; *City of Ontario v. Quon* (2010) 560 U.S. 746 [see 2010 Point of View Online cases]; *United States v. Jones* (2012) 565 U.S. 400 [see 2012 Point of View Online cases]; *Florida v. Jardines* (2013) 569 U.S. 1, 9 [see 2013 Point of View Online cases]; *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609] [see 2015 Point of View Online cases].

[11] *New York v. Belton* (1981) 453 U.S. 454, 458 [quoting from LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142.

Facts

Delgado shot and killed DeShawn Cannon and his girlfriend in what was probably a drug rip-off. At the scene, Sacramento County sheriff's detectives found Cannon's cell phone which contained a text message pertaining to a drug deal. This led them to Delgado who the detectives mistakenly believed was wanted on an arrest warrant. Delgado was arrested, driven to the sheriff's station, held in an interrogation room and shackled.

About an hour later, a detective entered the room to question him. The detective testified he was "surprised" to find Delgado in shackles because he did not consider him a suspect at that point. So he removed the shackles and told Delgado that he was free to leave. Then, without advising Delgado of his *Miranda* rights, he asked him some questions about the murder and, although Delgado denied involvement, he said some things that were in conflict with information from a witness.

After obtaining these statements, the detective left Delgado alone in the room but suggested to another detective that he continue to question him about the murder. According to the court, when the second detective entered the interrogation room, he "demanded" that Delgado unlock his cell phone and told him that he could not leave until he complied. After Delgado complied, the detective questioned him "at length" about the murders without *Mirandizing* him. In the course of the interview, Delgado confessed that he had shot Cannon. Confession one.

Another detective who had been listening to the interview from another room phoned the interrogation room and told the detective that "it was time" to advise Delgado of his *Miranda* rights. The detective did so and then, in the court's words, "invited" him to repeat his confession he had just made. He did so. Confession two.

Before trial, Delgado filed a motion to suppress confessions one and two. The court suppressed the confession one but not confession two. Consequently, confession two was used against Delgado at trial, and he was found guilty of two counts of first-degree murder.

Discussion

On appeal, Delgado argued that his motion to suppress confession one should have been granted because he had not yet been *Mirandized* and had therefore not waived his rights. He also argued that confession two should have been suppressed because it was the product of an illegal "two-step" interrogation process.

CONFESSION ONE: It is settled that officers may not interrogate a suspect who is in custody unless he expressly or impliedly waived his *Miranda* rights.[12] The Attorney General argued that a waiver was not required before Delgado made confession one because he had just been notified that he was free to go and was therefore was no longer in custody for *Miranda* purposes. Even so, said the court, Delgado was back in custody before he made the first confession because, when the second detective entered the room, he told Delgado that he could not leave until the contents of his phone had been downloaded. Thus, the court ruled that confession one should have been suppressed.

CONFESSION TWO: As a general rule, if officers obtain a statement from a suspect in violation of *Miranda*, a second statement will also be suppressed. There is, however, an exception to this rule. Specifically, a second statement may be admissible if (1) the *Miranda* violation was neither coercive in nature nor the result of a tactical (i.e., intentional) *Miranda* violation, and (2) the suspect freely waived his rights before he made the second statement.[13]

[12] See *Illinois v. Perkins* (1990) 496 U.S. 292, 297 ["It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation."]; *Stansbury v. California* (1994) 511 U.S. 318, 322 ["An officer's obligation to administer *Miranda* warnings attaches only where there has been such a restriction on a person's freedom as to render him 'in custody.'"].

[13] See *Oregon v. Elstad* (1985) 470 U.S. 298; *Missouri v. Seibert* (2004) 542 U.S. 600.

Delgado argued that the detectives had, in fact, deliberately violated *Miranda* because their conduct demonstrated that they were engaged in an illegal "two-step" interrogation process. What's the "two step"?

It is a technique or ploy in which officers intentionally interrogate a suspect in custody without obtaining a *Miranda* waiver. Although they know that any statement he makes will be suppressed, their plan is to *Mirandize* him immediately afterward and encourage him to repeat it.[14] The two-step works on the proven theory that the suspect will usually waive his rights and repeat his *unMirandized* statement because he will think (erroneously) that it could be used against him and, thus, he had nothing to lose by repeating it. Delgado argued that the detectives' conduct and the two separate interrogations in this case demonstrated that they were engaging in an illegal two-step interrogation.

The court disagreed. But it did so only because the detectives' conduct demonstrated confusion and miscommunication rather than the implementation of a coherent plan. Said the court, "The record, far from suggesting any deliberate protocol to undermine *Miranda* guided the detectives, instead suggests they acted with little or no method at all." The court added, "The fair administration of justice demands that peace officers be trained in *Miranda* procedures and adhere to their training. The system did not function in several ways in this case." But because the court ruled that the detectives' error was not intentional, it ruled that confession two was admissible. It also ruled that, although confession one should have been suppressed, the error was harmless because it contained virtually nothing that Delgado did not repeat voluntarily during the second interrogation.

Consequently, the court affirmed Delgado's convictions.

Martinez v. Cate

(9th Cir. 2018) 903 F.3d 982

Issue

Did a murder suspect invoke his *Miranda* rights during interrogation?

Facts

Martinez was arrested by Modesto police on charges that he and a companion had murdered a member of a rival street gang over a neighborhood "tagging" infraction. At the police station, a detective advised Martinez of his *Miranda* rights, and Martinez responded by saying "I'm willing to talk to you guys but I would like to have an attorney present. That's it." The detective then told Martinez that "[a]ll I wanted was your side of the story. I guess I don't know another option but to go ahead and book you." A little later, he told Martinez "You're going to be booked for murder because I only got one side of the story."

At this point, Martinez "expressed frustration about the situation" and asked the detective, "[W]hat did you want to talk to me about?" The detective said he wanted to talk about the shooting. He also asked whether Martinez wanted an attorney. Martinez did not respond to the question except to say that he "did not want to go to jail," and that he would tell the truth "if that helped" him to "walk away." According to the court, the detective "continued to interrogate Martinez" who twice said "I have to get hold of [an attorney]." Eventually the detective asked Martinez if he "felt intimidated" by the murder victim. Martinez said no and added that he did not "see a gun." When Martinez's motion to suppress the statement was denied, the case went to trial and he was convicted.

Discussion

Martinez argued that his statement should have been suppressed because it was obtained in viola-

[14] See *Missouri v. Seibert* (2004) 542 U.S. 600; *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973 ["A two-step interrogation involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting a repeated confession."].

tion of *Miranda*. It is settled that officers may not interrogate a suspect in custody, or continue to interrogate him, after he had invoked his right to remain silent or his right to have counsel present. It is also settled that the term "interrogation" means any question or statement that is "reasonably likely to elicit an incriminating response," even if it did not blatantly call for one.[15]

Because it was apparent that Martinez invoked when he said "I would like to have an attorney present," the main issue was whether the detective had nevertheless "interrogated" Martinez when he told him that he would be booked for murder "because I only got one side of the story."

The Attorney General argued that the statement did not constitute interrogation because the detective was merely informing Martinez of what was going to happen at the conclusion of the interview. The court agreed that telling Martinez that he would now be booked "is informative in nature" and "may not be considered as interrogation." But, said the court, "the officer did more here than just inform [Martinez] that he was going to be booked. The officer's statements created the inescapable implication that if [Martinez] was to talk then he might not be booked."

Thus, the court concluded that "the only reasonable interpretation of what occurred between [the detective] and Martinez is that [the detective] continued interrogating Martinez after the suspect had clearly—and repeatedly—invoked his right to counsel, and [the detective] badgered Martinez into waiving that right."

Finally, the court rejected the argument that Martinez had reinitiated questioning when he asked the detective "what did you want to talk to me about?" As the court explained, a suspect cannot "reinitiate" questioning that never really stopped.

People v. Fews

(2018) 27 Cal.App.5th 553

Issues

(1) Did officers have grounds to pat search Fews? (2) Under what circumstances may officers in California search a vehicle for marijuana?

Facts

Two SFPD officers were on patrol in the city's Tenderloin District at about 4 P.M. when the driver of an SUV in front of them pulled "abruptly" to the curb and stopped. Because the registration on the SUV had expired, the officers stopped behind it and turned on their red lights. There were two men in the vehicle, and both immediately started rummaging around the passenger compartment. Specifically, the driver, Lindell Mims, quickly stepped outside then reached back inside and began doing something with his hands. Meanwhile, the passenger, Calvin Fews, "continuously reached around the [passenger] compartment with his hands never rising above the window level."

As the officers approached, they saw that Mims was carrying a half-burnt blunt and there was an odor of marijuana coming from both him and the SUV. At that point, the officers had decided to search the vehicle for marijuana. But before doing so, one of them pat searched Fews because:

(1) his movements were consistent with an attempt to reach for a weapon;
(2) he was wearing baggy clothing that "could conceal a weapon";
(3) the stop occurred in a notoriously high-crime district in San Francisco; and
(4), because one of the officers would be searching the SUV while the other had to watch two suspects, they wanted to make sure they were unarmed.

[15] *Rhode Island v. Innis* (1980) 446 US 291, 301 ["the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response"]. Also see *P v. Morris* (1987) 192 CA3 380, 389 ["The standard here is not what the police absolutely know; it is what they *should* know is *reasonably* likely to elicit an incriminating response from a suspect."]. Also see *People v. Morris* (1987) 192 Cal.App.3d 380, 389 ["The standard here is not what the police absolutely know; it is what they *should* know is *reasonably* likely to elicit an incriminating response from a suspect."]; *People v. Wader* (1993) 5 Cal.4th 610, 637 ["The standard is whether under all the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect."].

During the pat search of Fews, the officer found a loaded .32-caliber semiautomatic Beretta in Fews' jacket. After Fews was arrested, the officers searched the SUV for more marijuana and, although the search was unproductive, the legality of the search became an issue on appeal.

Discussion

Fews' main contention was that the Beretta should have been suppressed because the officer did not have sufficient reason to believe he was armed or dangerous. This was frivolous because the conduct of both men was indicative of an attempt to retrieve or secrete a weapon. Plus, said the court, "the odor and presence of marijuana in a vehicle being driven in a high-crime area, combined with the evasive and unusual conduct displayed by Fews and Mims, were reasonably suggestive of unlawful drug possession and transport."[16]

Fews' back-up argument was that the pat search was unlawful because the officers did not have probable cause to search the SUV. Fews reasoned that if the officers could not lawfully search the SUV for marijuana, the pat search would have been unlawful because one of the justifications for the pat search was that the officers needed to reduce the risk of harm to them while the search was underway. This, too, was a specious argument because, as noted, there were several other reasons for conducting the patsearch.

Nevertheless, the court addressed the legality of the vehicle search because of its importance in interpreting California's new marijuana laws. (This is why we reported on the case.) The court noted that, although possession of small amounts of marijuana by adults is ordinarily lawful, there are restrictions pertaining to the possession of marijuana in vehicles. Specifically, it is illegal to

(1) possess more than one ounce
(2) possess any amount not in a sealed container
(3) ingest any amount, or
(4) drive under the influence of marijuana.[17]

As the court explained, the new marijuana laws "still permit law enforcement officers to conduct a reasonable search to determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use."

Although the officers probably did not know whether the amount of marijuana in the vehicle exceeded one ounce, they knew or could infer two other things. First, Mims had possessed a blunt in the SUV. And because a blunt hardly qualifies as a sealed container, the search fell within the "open container" rule which meant that the officers could search the SUV for more marijuana in unsealed containers.

Second, because the officers could smell the odor of burnt marijuana coming from Mims and inside the SUV, they could infer that one or both of the men had been smoking it in the vehicle before they were stopped. As the court explained, "[T]he evidence of the smell of recently burned marijuana and the half-burnt cigar containing marijuana supported a reasonable inference that Mims was illegally driving under the influence of marijuana, or, at the very least, driving while in possession of an open container of marijuana. Consequently, the court ruled "there was sufficient probable cause for the warrantless search of the SUV."

Whalen v. McMullen

(9th Cir. 2018) 907 F.3d 1139

Issue

Was an officer's consensual entry into a suspect's home unlawful because the officer lied about the purpose of his visit?

Facts

A Washington state patrol detective was assigned to investigate a report that Kathleen Whalen had lied about the extent of a physical handicap in her application for SSI benefits. The detective went to Whalen's home and told her he was investigating

[16] Also see *Arizona v. Johnson* (2009) 555 U.S. 323, 332.
[17] See Veh. Code §§ 23222(b)(1) [possess a container "which has been opened or has a seal broken, or loose cannabis"], 23222(b) [possess more than one ounce]; Health & Saf. Code §§ 11362.3(a)(7) and (8).

an identity theft ring and that she had possibly been a victim. As the result, Whalen allowed the detective to enter her home to discuss the matter. While inside, the detective activated two hidden video devices which recorded several things that were later used in a decision to deny her application. Whalen later filed a federal civil rights lawsuit against the detective on grounds that his entry into her home violated the Fourth Amendment because he lied about his reasons for wanting to enter the residence and speak with her.

Discussion

It is, of course, accepted police practice for undercover officers (and informants working under their direction) to visit suspects and obtain consent to enter their homes for the ostensible purpose of committing or facilitating a crime, such as the purchase of drugs. Although the suspect is unaware of the visitor's true identity and purpose, the courts have consistently ruled that consent given under these circumstances is valid because a criminal who invites someone into his home or business for an illicit purpose knows he is taking a chance that the person is an officer or informant. For example, in *Lopez v. United States* the Supreme Court ruled that an IRS agent did not violate the Fourth Amendment when he obtained a suspect's consent to enter his office for the purpose of accepting a bribe.[18]

The situation in *Whalen* was different, however, because the ostensible purpose of the detective's visit was to discuss a fictitious identity theft operation, not commit a crime. Did this render Whalen's consent ineffective? Yes, said the court, because her consent was obtained "by invoking the private individual's trust in his government, only to betray that trust." Accordingly, the court ruled that Whalen's consent to enter was ineffective and, as the result, the detective's entry constituted an unreasonable search under the Fourth Amendment.[19]

Comment

The court's ruling is consistent with several cases in California where consensual entries have been invalidated when, for example, an officer gained entry by claiming to be a deliveryman, building inspector, or property manager; or by falsely stating he had received a report that there were bombs on the premises or some other urgent need to enter.[20] Although the courts have not articulated a straightforward legal basis for prohibiting such activities, it is probably because, as the court in Whalen indicated, it is unseemly.

U.S. v. Gardner

(6th Cir. 2018) 887 F.3d 780

Issue

Did a prostitute have apparent authority to consent to a search of a cell phone she shared with her pimp?

Facts

Gardner enticed a 17-year old girl, identified as B.H., to work for him as a prostitute in Detroit. Between tricks, Gardner and B.H. lived together and both used a cellphone to arrange "dates." Thanks to heavy advertising on over 30 websites,

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[18] (1963) 373 U.S. 427, 438 ["[The IRS agent] was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real."].

[19] **NOTE**: The court also ruled the detective was entitled to qualified immunity because the investigation in Whalen was administrative—not criminal—and until now it was unclear whether this rule applied to noncriminal matters.

[20] See *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9 ["Cases holding invalid consent to entry obtained by ruse or trick all involve some positive act of misrepresentation on the part of officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity."]; *People v. Reyes* (2000) 83 Cal.App.4th 7, 10 [officer identified himself as the driver of a car that had just collided with the suspect's car outside his home]; *In re Robert T.* (1970) 8 Cal.App.3d 990, 993-94 [consent invalid when apartment manger and undercover officer obtained consent to enter to "check the apartment"]; *Theofel v. Farley-Jones* (9th Cir. 2004) 359 F.3d 1066, 1073 ["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 … Unlike the phony meter reader, the restaurant critic who poses as an ordinary customer is not liable for trespass"].

business was booming. But, as the result of such blatant advertising, Gardner's enterprise also came to the attention of Detroit's vice squad. Consequently, an undercover officer made calls to the cellphone, spoke with both Gardner and B.H., and eventually arranged for a "date" with B.H. at a nearby motel. When B.H. entered the motel room, she was detained by officers.

On a dresser in the room, officers spotted a cellphone which, according to B.H., was hers. She then agreed to let the officers search the phone and she provided them with the passcode. During the search, officers found pornographic photos of B.H. As the result, Gardner was arrested and charged with producing child pornography and trafficking a minor for sex. When his motion to suppress the photos was denied, the case went to trial and the jury found him guilty of both charges.

Discussion

Gardner argued that the photos should have been suppressed because B.H. did not have the authority to consent to the search of the cellphone. The court disagreed.

It is settled that a suspect's spouse, roommate, girlfriend, parent, or other third party may consent to a search of property owned or controlled by the suspect if the consenting person had actual or apparent "common authority" over it.[21] Although the term "common authority" as never been helpfully defined, it is seldom difficult for the courts to determine whether it exists. And *Gardner* was no exception. In ruling that B.H. had common authority over the phone, the court explained, "B.H. used the phone to speak with the customer. She used it throughout the day to arrange the details of the get-together. She had the phone, and on that phone, in her possession during the date. She knew the phone's password. And she gave it to the officers."

As a backup argument, Gardner urged the court to rule that the "consent exception" to the warrant requirement should not apply to cellphones. In support of this argument, he cited the Supreme Court's decision in *Riley v. California*[22] in which the Court acknowledged that searches of cellphones are generally much more intrusive than searches of other objects. As the Court pointed out, "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" In response, the court in *Gardner* said, "We appreciate that cell phones have become singular instruments with singular importance to many people, maybe most people. But the third-party consent exception to the warrant requirement applies to cell phones all the same, just like other essential 'effects' protected by the Fourth Amendment."

Finally, Gardner argued that B.H.'s consent was not voluntary because she was "too frightened" to freely consent, and because she knew she was "in trouble," and an officer had "threatened to get a warrant if she did not consent." In response, the court said, "But the apprehension of 'getting into trouble' presents itself in *every* consent-to-search investigation into illegal conduct." Consequently, the court affirmed Gardner's conviction.

Comment

After *Riley* was decided in 2014, defendants have argued that the Court's discussion of cellphones and privacy expectations indicated that cellphones are just as "private" as homes—maybe more so. This is preposterous. There is absolutely nothing that is as private as a home, or even nearly as private. As the Supreme Court put it, "[T]he Fourth Amendment draws a firm line at the entrance to the house."[23] POV

[21] See *Illinois v. Rodriguez* (1990) 497 U.S. 177, 179 [consent is sufficient if it was given by "a third party who possesses common authority over the premises"]; *United States v. Matlock* (1974) 415 U.S. 164, 170 ["[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."]; *People v. Jenkins* (2000) 22 Cal.4th 900, 971 [search may be reasonable "if a person other than the defendant with authority over the premises voluntary consents to the search"].

[22] (2014) __ U.S. __ [134 S.Ct. 2473, 2495].

[23] *Kyllo v. United States* (2001) 533 U.S. 27, 40

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