POINT of VIEW

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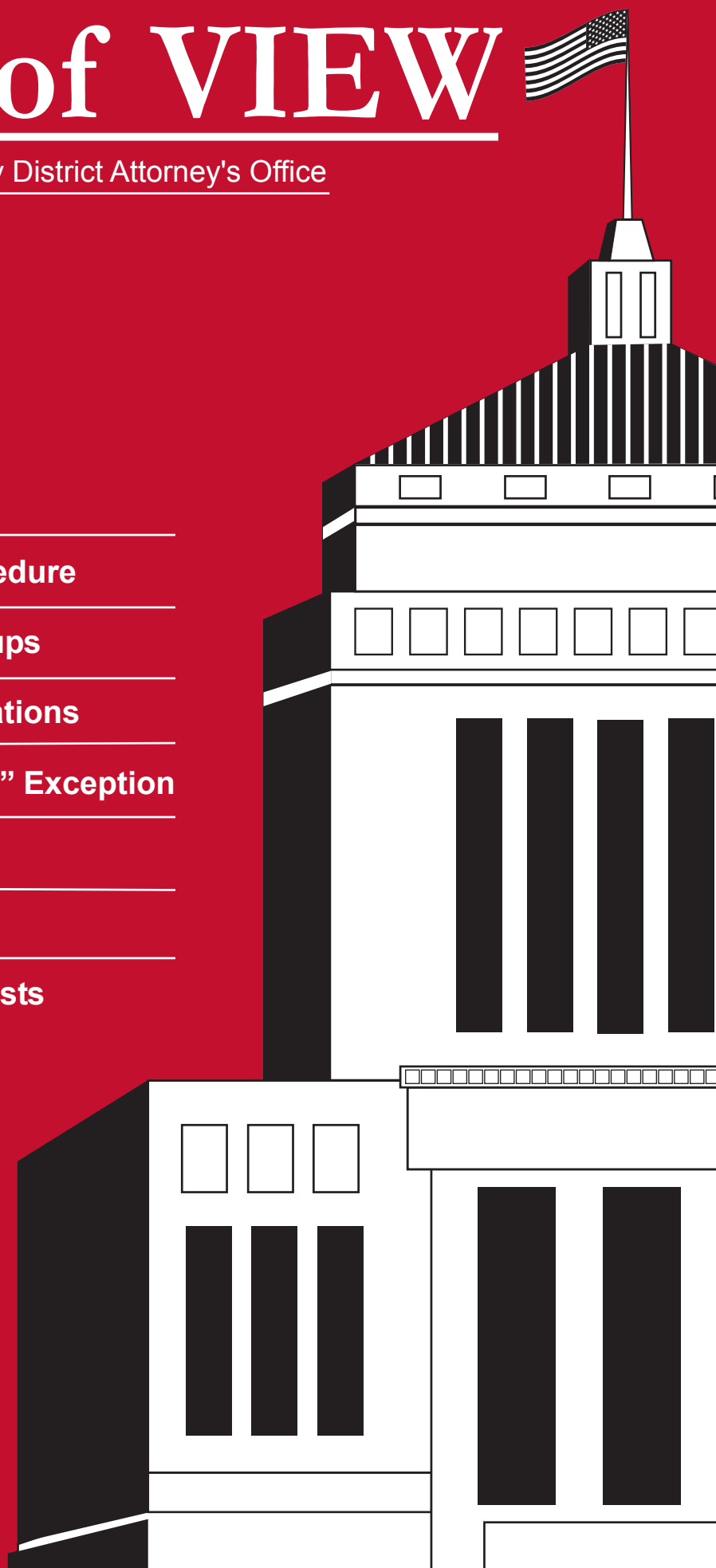
In this issue



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This edition of Point of View
is dedicated to the memory of
Officer Natalie Corona
of the Davis Police Department
who was killed in the line of duty
on January 10, 2019, and
Sergeant Steve Licon
of the California Highway Patrol (Riverside)
who was killed in the line of duty
on April 6, 2019

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Investigative Detentions

It seems evident that temporary detention provides a legally useful procedure which the police should use on appropriate occasion for the benefit of the community.[1]

There is no investigative activity that is as commonplace and productive as investigative detentions. They occur at all hours of the day and night in all kinds of public places, including streets, parks, shopping malls, airports, "nice" neighborhoods, and neighborhoods beset by street gangs. The outcome of detentions will, of course, vary. Some result in arrests. Some provide investigators with useful information. Some are fruitless. All are potentially dangerous.

But detentions are also a "sensitive area of police activity"[2] that can be a "major source of friction"[3] between officers and the public. Much of this friction results from the manner in which these interactions are carried out.[4]

To address both of these issues, the law requires that detentions be "carefully tailored"[5] or "focused"[6] on three objectives: (1) maintaining officer safety, (2) identifying the detainee, and (3) attempting to confirm or dispel the officers' suspicion. And if they stray from these objectives, the detention may be deemed a de facto arrest which, like any arrest, is unlawful unless there was probable cause. As the result, evidence and incriminating statements that are obtained in the course of a detention may be suppressed if it was not conducted in accordance with certain rules. The purpose of this article is to explain those rules.

Before we begin, it should be noted that, in addition to investigative detentions, there are two related police encounters: traffic stops and special needs detentions. Although traffic stops are technically "arrests" when based on probable cause (typically when an officer witnessed the infraction),[7] they are subject to the more restrictive procedural rules that govern investigative detentions.

The other type, known as special needs detentions, are temporary seizures whose objective is to serve a community interest other than conducting a criminal investigation. These interests include securing the scene of police activity and protecting people in need of immediate medical or psychological aid. (We covered this subject in the Fall 2010 *Point of View* which is posted on Point of View Online at le.alcoda.org.)

Using Force to Detain

If officers have grounds to detain a person, but he refuses to comply with a command to stop, officers may use reasonable force to obtain compliance. As the Court of Appeal observed, the right to detain "is meaningless unless officers may, when necessary, *forcibly* detain the suspect."[8] It should be noted, however, that in most cases in which force is reasonably necessary, the officers will have probable cause to arrest the suspect for, at least, resisting, delaying, or obstructing.[9] Consequently, it will seldom matter that these detentions had ripened into de facto arrests.

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[1] *People v. Manis* (1969) 268 Cal.App.2d 653, 665.
[2] *Terry v. Ohio* (1968) 392 U.S. 1, 9.
[3] *Terry v. Ohio* (1968) 392 U.S. 1, 14, fn.11.
[4] *Meredith v. Erath* (9th Cir. 2003) 342 F.3d 1057, 1062 ["the reasonableness of a detention depends not only on if it is made, but also on how it is carried out"].
[5] *Florida v. Royer* (1983) 460 U.S. 491, 500.
[6] *People v. Gentry* (1992) 7 Cal.App.4th 1225, 1267.
[7] See *People v. Hubbard* (1970) 9 Cal.App.3d 827, 833 ["the violator is, during the period immediately preceding his execution of the promise to appear, under arrest"]; *U.S. v. $404,905* (8th Cir. 1999) 182 F.3d 643, 648 [a traffic stop "is a form of arrest, based upon probable cause"].
[8] *People v. Johnson* (1991) 231 Cal.App.3d 1, 13. Also see *Graham v. Connor* (1989) 490 U.S. 386, 396.
[9] See Pen. Code § 148(a)(1); *People v. Johnson* (1991) 231 Cal.App.3d 1, 13, fn. 2.

General Principles

In determining whether a detention had crossed the line into a de facto arrest, the courts apply the following principles:

Totality of the circumstances: The courts will consider the totality of circumstances surrounding the detention, not just those that might warrant criticism.[1]

Common sense: The circumstances will be evaluated by applying common sense, not hypertechnical analysis. In the words of the Supreme Court, "Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria."[2]

Training and experience: The courts may consider the officers' interpretation of the circumstances based on their training and experience.[3] For example, the detainee's movements or speech may indicate to officers that he is about to fight or run.

No "least intrusive means" requirement: A detention will not be deemed a de facto arrest merely because the officers failed to utilize the "least intrusive means" of conducting their investigation or protecting themselves. As the Supreme Court explained, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it."[4]

Duration of detentions: Although the officers must carry out their duties diligently, they are not required to "move at top speed,"[5] nor must they terminate the detention at the earliest possible moment. Again, what matters is whether they were diligent. As the Supreme Court explained, "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect]."[6] We discussed this subject in detail (including the Supreme Court's confusing rulings on this issue) in the article "Duration of Detentions" in the Fall 2018 edition, available online.

Reasonable suspicion *plus*: In close cases, a court may uphold a more intrusive detention if there was a corresponding increase in the level of suspicion that the suspect had committed a crime.[7]

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[1] See *Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991 ["We look at the situation as a whole; we do not isolate each fact in a vacuum."]; *U.S. v. Charley* (9th Cir. 2005) 396 F.3d 1074, 1080 ["[W]e examine the totality of the circumstances in deciding whether an investigative detention has ripened into an arrest."].

[2] *United States v. Sharpe* (1985) 470 U.S. 675, 685. Also see *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 29 ["the requisite objective analysis must be performed in real-world terms"].

[3] See *U.S. v. Ellis* (6th Cir. 2007) 497 F.3d 606, 614 [the officer "was entitled to assess the circumstances and defendants in light of his experience as a police officer and his knowledge of drug courier activity"].

[4] *United States v. Sharpe* (1985) 470 U.S. 675, 686.

[5] See *U.S. v. Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7.

[6] *United States v. Sharpe* (1985) 470 U.S. 675, 686.

[7] See *U.S. v. Tilmon* (7th Cir. 1994) 19 F.3d 1121, 1126 ["[We have] adopted a sliding scale approach to the problems"].

Officer-Safety Precautions

Because detentions are "one of the most perilous duties imposed on law enforcement officers,"[10] officer-safety concerns are "both legitimate and weighty."[11] Thus, the courts "allow intrusive and aggressive police conduct without deeming it an arrest in those circumstances when it is a reasonable response to legitimate safety concerns on the part of the investigating officers."[12] As the Ninth Circuit observed, "It is a difficult exercise at best to predict a criminal suspect's next move, and it is both naive and dangerous to assume that a suspect will not act out desperately."[13]

HIGH-RISK CAR STOPS: If the detainee was an occupant of a vehicle, officers may conduct a high-risk stop (a.k.a. "felony car stop") if they reasonably believed such a precaution was necessary; e.g., the officers were investigating a violent crime. Although the procedure may vary, it may involve "stopping all other traffic and ordering the driver out of the vehicle at gunpoint, throw the keys out, get out, back up with his hands in the air, and get down on his knees."[14]

Officers may also order the passengers to exit even if there was no reason to believe they were involved in the crime under investigation. For instance, in *Allen v. City of Los Angeles* a passenger in a car whose driver led officers on a pursuit claimed that a felony stop was unlawful as to him "because he attempted to persuade [the driver] to pull over and stop." That didn't matter, said the court, because the officers "could not have known the extent of [the passenger's] involvement until after they questioned him."[15]

An example of a high-risk stop based on less than probable cause is found in *People v. Soun* where Oakland police officers pulled over a car occupied by six men who were suspects in a robbery-murder that had occurred the day before in San Jose. Although the officers lacked probable cause to arrest any of the men, the court ruled that the precaution was reasonable because the officers "concluded that to attempt to stop the car by means suitable to a simple traffic infraction—in the prosecutor's words, 'just pull up alongside and flash your lights and ask them to pull over'—would not be technically sound."[16]

KEEP HANDS IN SIGHT: Officers may, as a matter of routine, order the detainee to remove his hands from his pockets and otherwise keep his hands in sight.[17] They may also order the occupants of a stopped vehicle to put their hands on the dash and keep them there.[18]

CONTROLLING THE DETAINEE'S MOVEMENTS: Because officers must take "unquestioned command" of detentions,[19] they may control the movements of the detainee and, in the case of car stops, any other occupants of the vehicle.[20] This also enables the officers to conduct the detention in an orderly manner. Thus, depending on the circumstances, they may order the detainee to stand or sit in a certain place, to exit the vehicle, or remain inside.[21]

ON THE GROUND: Commanding a detainee to lie or sit on the ground is considered much more intrusive than merely ordering him to stand or sit. Consequently, it requires some justification. In many cases, it will be a reasonable alternative to more intrusive precautions.[22]

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[10] *U.S. v. Washington* (D.C. Cir. 2009) 559 F.3d 573, 576.
[11] *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110.
[12] *U.S. v. Meza-Corrales* (9th Cir. 1999) 183 F.3d 116, 1123.
[13] *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 993.
[14] *People v. Saldana* (2002) 101 Cal.App.4th 170, 173. Edited. Also see *People v. Celis* (2004) 33 Cal.4th 667, 675.
[15] (9th Cir. 1995) 66 F.3d 1052.
[16] (1995) 34 Cal.App.4th 1499.
[17] See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239; *People v. Padilla* (1982) 132 Cal.App.3d 555, 558.
[18] See *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505-1506.
[19] *Brendlin v. California* (2007) 551 U.S. 249, 258.
[20] See *Arizona v. Johnson* (2009) 555 U.S. 323, 333; *Brendlin v. California* (2007) 551 U.S. 249, 250.
[21] See *People v. Celis* (2004) 33 Cal.4th 667, 676; *People v. Vibanco* (2007) 151 Cal.App.4th 1, 9-10.
[22] See *U.S. v. Taylor* (9th Cir. 1983) 716 F.2d 701, 709; *U.S. v. Buffington* (9th Cir. 1987) 815 F.2d 1292, 1300.

PAT SEARCHING: Officers may pat search a detainee if they reasonably believed he was armed or otherwise dangerous.[23] The question has arisen: Why can't officers pat search *all* detainees as a matter of routine? It's a legitimate question, especially considering that the restrictions on pat searches were established over 50 years ago when weapons and violence were much less prevalent than they are now. "An officer in today's reality," said the Tenth Circuit, "has an objective, reasonable basis to fear for his or her life every time a motorist is stopped."[24]

Still, some justification is required because pat searches are "annoying, frightening, and perhaps humiliating experiences."[25] As the Supreme Court observed, "[I]t is simply fantastic to urge that [a pat search] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion."[26] Note that some circumstances that will warrant handcuffing (see below) will also constitute grounds to conduct a pat search.

HANDCUFFING: Although handcuffing is closely associated with arrests, it will not convert a detention into a de facto arrest if officers reasonably believed that the restraint was warranted.[27] Thus, the Court of Appeal explained that officers "may handcuff a detainee without converting the detention into an arrest if the handcuffing is brief and reasonably necessary under the circumstances."[28] For example, handcuffing may be warranted based on the violent nature of the crime under investigation or the detainee's behavior.[29] Here are some examples of circumstances that were found to warrant handcuffing:

- Detainee was hostile or agitated.[30]
- Detainee pulled away from officers.[31]
- Detainee attempted to flee.[32]
- Detainee tensed up during pat search.[33]
- Detainee refused to keep hands in sight.[34]
- Detainee tried to reach inside his clothing.[35]
- Multiple detainees.[36]
- Hostile onlookers.[37]

GUNPOINT: Although a detention at gunpoint is a strong indication that the detainee was under arrest, such a precaution might not result in a de facto arrest if (1) the precaution was reasonably necessary, and (2) the weapon was promptly reholstered when it was safe to do so.[38] As the Seventh Circuit put it: "Although we are troubled by the thought of allowing policemen to stop people at the point of a gun when probable cause to arrest is lacking, we are unwilling to hold that an investigative stop is never lawful when it can be effectuated safely only in that manner. It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal, so there is a complex tradeoff involved."[39]

WARRANT CHECKS: See "Conducting the Investigations" (Warrant checks), below.

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[23] See *Terry v. Ohio* (1968) 392 U.S. 1, 28; *Florida v. J.L.* (2000) 529 U.S. 266, 273.
[24] *U.S. v. Rice* (10th Cir. 2007) 483 F.3d 1079, 1083.
[25] *Terry v. Ohio* (1968) 393 U.S. 1, 25.
[26] *Terry v. Ohio* (1968) 393 U.S. 1, 16-17.
[27] See *People v. Rivera* (1992) 8 Cal.App.4th 1000, 1008; *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062.
[28] *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062.
[29] See *People v. Celis* (2004) 33 Cal.4th 667, 676; *People v. Turner* (2013) 219 Cal.App.4th 151, 163.
[30] *People v. Johnson* (1991) 231 Cal.App.3d 1, 14; *U.S. v. Smith* (8th Cir. 2011) 645 F.3d 998, 1002-3.
[31] *U.S. v. Purry* (D.C. Cir. 1976) 545 F.2d 217, 219-20.
[32] *People v. Brown* (1985) 169 Cal.App.3d 159, 167; *U.S. v. Meadows* (1st Cir. 2009) 571 F.3d 131, 142.
[33] *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062.
[34] *U.S. v. Dykes* (D.C. Cir. 2005) 406 F.3d 717, 720.
[35] *U.S. v. Thompson* (9th Cir. 1979) 597 F.2d 187, 190.
[36] *U.S. v. Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123; *U.S. v. Fiseku* (2nd Cir. 2018) 915 F.3d 863.
[37] *U.S. v. Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123.
[38] See *People v. Glaser* (1995) 11 Cal.4th 354, 366; *People v. Celis* (2004) 33 Cal.4th 667, 676.
[39] *U.S. v. Serna-Barreto* (7th Cir. 1988) 842 F.2d 965, 968.

QUESTIONS PERTAINING TO OFFICER SAFETY: Officers may, as a matter of routine, ask questions that are reasonably necessary for their safety, such as asking if he currently possesses a weapon or drugs, if he has been arrested, or if he is on probation or parole.[40] But such questioning must be brief and to the point.

Identifying the Detainee

Officers who have lawfully detained a suspect may take reasonable steps to identify him.[41] This is permitted because knowing the suspect's name "serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."[42]

"SATISFACTORY" IDENTIFICATION: Not only do officers have a right to require that detainees identify themselves, they have a right to require "satisfactory" documentation, such as a valid driver's license.[43] Other documents may be deemed the functional equivalent of a driver's license if they contained all of the following: the detainee's photo, brief physical description, signature, current mailing address, serial numbering, and information establishing that the document is current.[44] While other documents and verbal identification are not sufficient, officers may exercise discretion in accepting them.[45]

REFUSAL TO ID: If the detainee refuses to identify himself, officers may continue to hold him until the matter is resolved and, if it cannot be resolved, arrest him for willfully delaying or obstructing an officer in the performance of his duties.[46] As the Court of Appeal observed, "To accept the contention that the officer can stop the suspect and request identification, but that the suspect can turn right around and refuse to provide it, would reduce the authority of the officer to identify a person lawfully stopped by him to a mere fiction."[47]

In addition, if the detainee denies that he possesses ID, but is carrying a wallet, officers may (1) order him to look through the wallet for ID while they watch, or (2) search it themselves.[48]

Conducting the Investigation

After officers have taken appropriate safety precautions and have identified the detainee, the next step is to try to confirm or dispel their suspicion. While the law gives officers a great deal of discretion in determining how to do this, there are two restrictions. First, they must employ procedures that are reasonably necessary under the circumstances. As the Supreme Court explained in *United States v. Sharpe*, "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it."[49] Second, officers must carry out

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[40] See, for example, *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1377 ["[The officer] asked two standard questions [Do you have any weapons or drugs?] in a short space of time, both relevant to officer safety."]; *People v. Brown* (1998) 62 Cal.App.4th 493, 499 ["questions about defendant's probation status did not constitute a general crime investigation [as they] merely provided the officer with additional pertinent information about the individual he had detained"].

[41] See *Hayes v. Florida* (1985) 470 U.S. 811; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002 ["Without question, an officer conducting a lawful [detention] must have the right to make this limited inquiry, otherwise the officer's right to conduct an investigative detention would be a mere fiction."]; *People v. Rios* (1983) 140 Cal.App.3d 616, 621 ["And where there is such a right to so detain, there is a companion right to request, and obtain, the detainee's identification."].

[42] *Hiibel v. Nevada* (2004) 542 U.S. 177, 186.

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

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

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

[46] See Pen. Code § 148(a); Pen. Code § 853.6(i)(5); Veh. Code § 40302(a) [refusal to ID by traffic violator];

[47] *People v. Long* (1987) 189 Cal.App.3d 77, 87. Edited. Also see *Hiibel v. Nevada* (2004) 542 U.S. 177, 188]"The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity."].

[48] See *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002 ["Having discovered defendant's wallet during a lawful patdown search for weapons, the officer was justified in taking it from defendant's pocket to identify him."].

[49] (1985) 470 U.S. 746, 763.

their investigation diligently. Again quoting from *Sharpe*, "In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."

Unfortunately, it may be difficult to determine when a detention becomes too lengthy. This is because of sloppy language in some opinions by the U.S. Supreme Court. We discussed this problem in the article "Duration of Detentions and Traffic Stops" which can be viewed and downloaded from Point of View Online at le.alcoda.org. Click on "Publications," "Point of View," "2018 Editions," then "Complete Fall 2018 Edition."

Questioning the detainee

In most cases, the most effective way of conducting the investigation is to ask questions. As the Court of Appeal observed, "When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning."[50]

NOT REQUIRED TO ANSWER: A detainee is not required to answer an officer's questions, other than his name. Thus, in *Ganwich v. Knapp* the court ruled that officers acted improperly when they told the detainees that they would not be released unless they cooperated. Said the court, "[I]t was not at all reasonable to condition the [detainees'] release on their submission to interrogation."[51]

MIRANDA COMPLIANCE: Although detainees are not free to leave, a *Miranda* waiver is not ordinarily required because the circumstances surrounding most detentions do not generate the degree of compulsion to speak that the *Miranda* procedure was designed to alleviate.[52] As the California Supreme Court observed, in *People v. Tully*, "While defendant was not free to leave until the citation process was completed, he was under no obligation to answer [the officer's] questions."[53]

A detention will, however, become custodial if the detainee was "subjected to treatment that rendered him 'in custody' for practical purposes"[54]; e.g., the questioning had "ceased to be brief and casual" and had become "sustained and coercive."[55] For example, a waiver may be required before questioning a detainee who is handcuffed because handcuffing is so closely associated with arrest.[56] It is, however, likely that a handcuffed detainee would not be "in custody" for *Miranda* purposes if (1) it was reasonably necessary to restrain him, (2) the officer told him that he was not under arrest and that the handcuffing was merely a temporary safety measure, and (3) there were no other circumstances that reasonably indicated he was under arrest.

A further issue: Is a waiver required if the suspect was initially detained at gunpoint? Possibly not if (1) the precaution was reasonably necessary, (2) the weapon was reholstered before the detainee was questioned, and (3) there were no other coercive circumstances.[57]

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[50] *People v. Manis* (1969) 268 Cal.App.2d 653, 665.

[51] (9th Cir. 2003) 319 F.3d 1115, 1120.

[52] See *Berkemer v. McCarty* (1984) 468 U.S. 420, 439-40 [detentions are "comparatively nonthreatening"]; *People v. Clair* (1992) 2 Cal.4th 629, 679 ["Generally, however, [custody] does not include a temporary detention for investigation."]; *People v. Farnam* (2002) 28 Cal.4th 107, 180 ["the term 'custody' generally does not include a temporary detention"].

[53] (2012) 54 Cal.4th 952, 983.

[54] *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.

[55] *People v. Manis* (1969) 268 Cal.App.2d 653, 669.

[56] See *Dunaway v. New York* (1979) 442 U.S. 200, 215 [handcuffing is one of the "trappings" of an arrest]; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1405; *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 675, 676 ["Handcuffs are generally recognized as a hallmark of a formal arrest."].

[57] See *People v. Taylor* (1986) 178 Cal.App.3d 217, 230 ["Assuming the citizen is subject to no other restraints, the officer's initial display of his reholstered weapon does not require him to give *Miranda* warnings before asking the citizen questions."]; *In re Joseph R.* (1998) 65 Cal.App.4th 954, 960-61 ["Police officers may sufficiently attenuate an initial display of force, used to effect an investigative stop, so that no *Miranda* warnings are required."].

Seeking consent to search

During an investigative detention, officers may seek the detainee's consent to search his person, vehicle, or personal property if (1) a search would assist the officers in confirming or dispelling their suspicions, and (2) the request was brief and to the point.[58] A consent search may, however, be deemed invalid if a court finds that it was obtained after the officers had completed their lawful duties pertaining to the stop, and had continued to detain him without sufficient cause.

Showups

Officers may prolong a detention for the purpose of conducting a showup if the crime under investigation had just occurred, and the detainee would be arrestable if he was identified by the victim or witness. Showups are also permitted if the crime occurred in the past and the victim or witness could be brought to the scene within a reasonable amount of time.[59]

Transporting the detainee

A detention will ordinarily become a de facto arrest if the detainee was transported to the crime scene, police station, or other place. This is because the act of removing the detainee from the scene is much more analogous to an arrest than a temporary detention. Moreover, officers can usually accomplish their objectives by less intrusive means.

There are, however, two exceptions for this rule. First, officers may transport the detainee if he consented.[60] Second, transporting may be permitted if officers had probable cause to believe that it was reasonably necessary.[61] As the California Supreme Court observed, "[T]he surrounding circumstances may reasonably indicate that it would be less of an intrusion upon the suspect's rights to convey him speedily a few blocks to the crime scene, permitting the suspect's early release rather than prolonging unduly the field detention."[62]

For example, in *People v. Soun*[63] the court ruled it was reasonable for Oakland officers to transport six suspects in a robbery-murder that occurred in San Jose to a parking lot three blocks from the detention site because the officers reasonably believed that they would not be able to resolve the matter quickly given the number of suspects and the need to coordinate their investigation with SJPD detectives. In addition, it was necessary to detain the suspects in separate patrol cars which were impeding traffic. Said the court, "A three-block transportation to an essentially neutral site for these rational purposes did not operate to elevate [the suspects'] custodial status from detention to arrest."

Warrant checks

Officers who have detained a suspect—including people who have been stopped for traffic violations[64]—may run a warrant check and rap sheet if

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[58] See *Florida v. Bostick* (1991) 501 U.S. 429, 434 ["[E]ven when officers have no basis for suspecting a particular individual, they may generally … request consent to search his or her luggage."]; *Florida v. Jimeno* (1991) 500 U.S. 248, 250-1 ["[W]e have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so."].

[59] See *People v. Sandoval* (1977) 70 Cal.App.3d 73, 85; *People v. Nash* (1982) 129 Cal.App.3d 513, 518.

[60] See *U.S. v. Mendenhall* (1980) 446 U.S. 544, 557-58; *In re Gilbert R.* (1994) 25 Cal.App.4th 1121, 1125; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125.

[61] See *Florida v. Royer* (1983) 460 U.S. 491, 504 ["[T]here are undoubtedly reasons of safety and security that would justify moving a suspect from one location to another during an investigatory detention"]; *U.S. v. Bravo* (9th Cir. 2002) 295 F.3d 1002, 1011 [30-40 yard walk to border patrol security office].

[62] *People v. Harris* (1975) 15 Cal.3d 384, 391. Also see *U.S. v. Charley* (9th Cir. 2005) 396 F.3d 1074, 1080 ["[T]he police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detentions given the specific circumstances of the case."].

[63] (1995) 34 Cal.App.4th 1499.

[64] See *People v. Brown* (1998) 62 Cal.App.4th 493, 498; *U.S. v. Holt* (10th Cir. 2001) 264 F.3d 1215, 1221-22 ["By determining whether a detained motorist has a criminal record or outstanding warrants, an officer will be better apprized of whether the detained motorist might engage in violent activity during the stop."]

it does not measurably extend the length of the stop. This is because (1) warrant checks further the public interest in apprehending wanted suspects, and (2) they further officer safety as officers will be better able to determine if the detainee is apt to resist.[65] As the Ninth Circuit observed, a warrant check "could be as important to an officer's safety as knowing that the suspect is carrying a weapon."[66]

Other discretionary procedures

OBTAINING INFORMATION FROM OTHERS: In attempting to confirm or dispel their suspicions, officers may need to speak with victims, witnesses, dispatchers, or other officers by phone or radio; e.g., to verify information furnished by the detainee or to determine whether property in the detainee's possession had been reported stolen. A delay for this purpose is permissible if officers were diligent.[67]

SEARCH FOR DISCARDED EVIDENCE: If officers reasonably believed that the detainee had discarded evidence before he was stopped, they may prolong the detention for a reasonable time to search for it.[68]

FIELD CONTACT CARD: Officers may take a short amount of time to complete a field contact card, also known as a field information card or field interview card.[69]

FINGERPRINTING: Officers may fingerprint the detainee if (1) they reasonably believed that fingerprinting would help confirm or dispel their suspicion, and (2) the procedure was carried out promptly.[70] Furthermore, the Supreme Court has indicated that, if these requirements are satisfied, a judge might issue a warrant—based on reasonable suspicion—that authorized the removal of the detainee to a police station for fingerprinting.[71]

PHOTOGRAPHING THE DETAINEE: The detainee may be photographed if he consented.[72] We are unaware of any cases in which the court ruled on whether a detainee could be photographed if he did not consent. But because taking a photo is less intrusive than taking fingerprints, it ought to be permitted if, as with fingerprinting, the officers reasonably believed that the photograph would help confirm or dispel their suspicion, and the procedure did not unreasonably extend the detention.[73]

NONCONSENSUAL K9 SNIFF: It appears that officers may walk a K9 around the detainee, his vehicle, or containers in his possession if it does not measurably extend the duration of the detention.[74] If, however, the suspect was detained merely for a traffic violation, the courts are more apt to rule that the stop was unduly prolonged.[75] POV

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[65] See *Utah v. Strieff* (2016) 136 U.S. 2056, 2063; *Rodriguez v. United States* (2015) __ US __ [135 S.Ct. 1609, 1615]; *U.S. v. Young* (6th Cir. 2012) 707 F.3d 598, 606 ["the officers here did not exceed the reasonable scope of a *Terry* stop by running a warrant check"]; *Klaucke v. Daly* (1st Cir. 2010) 595 F.3d 20, 26 ["most circuits have held that an officer does not impermissibly expand the scope of a *Terry* stop by performing a background and warrant check, even where that search is unrelated to the circumstances that initially drew the officer's attention."].

[66] *U.S. v. Christian* (9th Cir. 2004) 356 F.3d 1103, 1107.

[67] See *Michigan v. Summers* (1981) 452 U.S. 692, 700, fn.12; *U.S. v. Watts* (8th Cir. 1993) 7 F.3d 122.

[68] *Michigan v. Summers* (1981) 452 U.S. 692, 700, fn.12.

[69] See *People v. Harness* (1983) 139 Cal.App.3d 226, 233.

[70] See *Hayes v. Florida* (1985) 470 U.S. 811, 817; *Davis v. Mississippi* (1969) 394 U.S. 721, 727-28.

[71] *Hayes v. Florida* (1985) 470 U.S. 811, 817; *Virgle v. Superior Court* (2002) 100 Cal.App.4th 572, 574.

[72] See *People v. Marquez* (1992) 1 Cal.4th 553, 578.

[73] See *Hayes v. Florida* (1985) 470 U.S. 811, 816-17; *People v. Rodriguez* (1993) 21 Cal.App.4th 232 [photo taken during illegal detention]; *People v. Thierry* (1998) 64 Cal.App.4th 176, 184.

[74] See *Indianapolis v. Edmond* (2000) 531 U.S. 32, 40 ["The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search."]; *People v. Bell* (1996) 43 Cal.App.4th 754, 769 ["A 'sniff' by a trained drug-sniffing dog in a public place is not a 'search'"]. But also see *United States v. Place* (1983) 462 U.S. 696, 709 [90-minute delay for arrival of dog was unreasonable under the circumstances];

[75] See *Rodriguez v. United States* (2015) __ U.S. __ [135 S.Ct. 1609, 1615] ["a dog sniff is not fairly characterized as part of the officer's traffic mission"].

Lineup Procedure

"That man there is the one. He's the one that shot me."[1]

"That man there" is in trouble. Big trouble. Even if he didn't fire the shot, he might be found guilty at trial because a witness's positive identification of a suspect at a lineup is, in the words of the California Supreme Court, "frequently determinative of an accused's guilt."[2] Or, as the United States Supreme Court put it, "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation."[3]

One reason that a pretrial identification carries so much weight in cases where identity is an issue is that a witness who has picked out a person at a lineup is "not likely to go back on his word later on."[4] In addition, if a witness appears to be credible to the jury, his identification of the defendant is apt to be convincing because a crime victim or witness will seldom have reason to lie about the identity of the perpetrator. Simply put, the combination of the witness's pretrial identification of the defendant and his positive identification in the courtroom generates such convincing force that, from the perspective of the defendant, it is devastating.

It is, therefore, essential that officers who conduct lineups do so in a manner that constitutes a reliable test of the witness's ability to identify the perpetrator. As the Supreme Court observed, "The interest in obtaining convictions of the guilty urges the police to adopt procedures that show the resulting identification to be accurate. Suggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence."[5]

This is an especially important subject because, beginning on January 1, 2020, a new California statute goes into effect that requires all law enforcement and prosecution agencies to have adopted regulations for conducting live and photo lineups so as to "ensure reliable and accurate suspect identifications."[6] The new law—set forth in Penal Code section 859.7—also establishes the minimum requirements for conducting live and photo lineups. (They do not, however affect the manner in which showups are conducted.[7]) While these statutory requirements do not represent a significant change in standard procedure, we have incorporated them into our discussion along with certain recommendations pertaining to lineups which were made by the California Commission on the Fair Administration of Justice (CCFAJ).

Lineup Reliability

A lineup that does not constitute a reliable test of the witness's ability to identify the perpetrator is virtually worthless to prosecutors because juries will ignore or discount the importance of an identification process that seems unfair. Also, as we discuss in the accompanying article "Suppression of Lineup IDs" (beginning on page 21), unreliable lineups will ordinarily be suppressed.

As a general rule, a lineup may be deemed unreliable if it was conducted in a manner that would have communicated to the witness that officers knew or believed that the suspect was the perpetrator. Thus, the reliability of a lineup depends mainly on its composition, whether officers somehow focused the witness's attention on the

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[1] *Colman v. Alabama* (1970) 399 U.S. 1, 5.
[2] *Evans v. Superior Court* (1974) 11 Cal.3d 617, 623.
[3] *United States v. Wade* (1967) 388 U.S. 218, 235.
[4] *United States v. Wade* (1967) 388 U.S. 218, 229.
[5] *Manson v. Brathwaite* (1977) 432 U.S. 98, 112, fn.12.
[6] See Pen. Code § 859.7(a).
[7] Pen. Code § 859.7(b).

Types of Lineups

There are five types of lineups. Although they all serve the purpose of identifying the perpetrator of a crime, they are used in different situations.

Live lineups

In a live lineup, the suspect and the fillers are presented in-person and sequentially, meaning that all of the participants are shown to the witness one-at-a-time instead of in a line. In addition, live lineups are conducted by "blind administration," meaning that the officer who conducts the lineup does not know which participant is the suspect. Beginning January 1, 2020, all live lineups in California must be conducted in this manner, although it has already become fairly standard.

Because live lineups require the presence of the suspect, they are usually used only when the suspect is in custody for the crime under investigation or some other crime. If he is not in custody, the usual procedure is to conduct a photo lineup.

Photo lineups

In a photo lineup, the witnesses are shown a photograph of the suspect (e.g., DMV) along with five or more fillers. The photos are shown sequentially, meaning that the witnesses are shown only one photo at a time as opposed to a "six-pack." Like live lineups, photo lineups are conducted by an officer who does not know which of the photos is that of the suspect. Also like live lineups, photo lineups must be conducted in this manner beginning on January 1, 2020. Photo lineups are used mainly in the following situations:

Suspect not in custody: Officers have a suspect but he is not in custody.

Suspect's appearance changed: The suspect is in custody but his appearance changed after the crime was committed and officers had an earlier photo of him that better reflected his appearance then.

Live lineup impractical: The suspect was in custody but it was not practical or possible to conduct a physical lineup; e.g., suspect was hospitalized.

In lieu of live lineup: Although live lineups are ordinarily utilized when feasible (because they are a better test of the witness's ability to identify the perpetrator), officers are not prohibited from conducting photo lineups in their place.

Video lineups

In a video lineup, officers record a physical lineup but without any witnesses in attendance. The witness later view the recording. Pre-recorded lineups are used mainly in the following situations:

Attorney unavailable: Because a suspect does not have a right to have counsel present when witnesses view a pre-recorded lineup, this procedure may be utilized when officers cannot arrange to have an attorney present.

Witness unavailable: If a witness is unable to attend a live lineup (e.g., witness is hospitalized), officers may record the lineup and play it for him later.

Voice-only lineups

If the witness heard the perpetrator's voice but did not see him, officers may conduct a voice-only lineup in which the witness listens to the voices of the suspect and fillers, but does not see their faces. In most cases, the suspect and fillers will say something that the perpetrator said. Voice-only lineups may be live or pre-recorded.

Photo collections

If officers do not currently have a suspect, but if there is reason to believe the perpetrator belonged to an identifiable group, they might be able to show the witness group photos; e.g., gang books, sexual assault registries, school yearbooks.

suspect, whether they failed to employ the "blind administration" procedure, and whether they failed to present the participants sequentially. Also relevant is whether the officers provided the witness with sufficient cautionary instructions beforehand.

Lineup composition

Effective January 1, 2020, California law will require that "[a]n identification procedure shall be composed so that the fillers generally fit the eyewitness' description of the perpetrator. In the case of a photo lineup, the photograph of the person suspected as the perpetrator should, if practicable, resemble his or her appearance at the time of the offense and not unduly stand out."[8] This does not constitute a change in the law.

While the suspect and the fillers should be of similar age and general appearance, "there is no requirement that [the suspect] be surrounded by people nearly identical in appearance."[9] As the California Supreme Court pointed out, "Because human beings do not look exactly alike, differences are inevitable."[10] For example, in ruling that the composition of live and photo lineups was sufficient, the courts have noted the following:

- "The lineup was composed of six men each similarly dressed, of the same general height and of approximately the same age. The facial contour of four of the men was essentially similar and three of them [like the perpetrator] had mustaches."[11]
- "[D]efendant does not appear to be significantly taller, heavier, or older than the other participants."[12]
- "[T]he men in the lineup were dressed in street clothes consisting of sport shirts and slacks of varying designs and colors. All were black men of similar height and physical build."[13]
- "[A]ll of the men in the array were of a similar age; there was no striking difference in the amount of head hair each had; and the skin color of the members of the array was not strikingly different."[14]
- "All of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other…. Minor differences in facial hair among the participants did not make the lineup suggestive."[15]
- "The photographic display here shows six dark-haired Latin males approximately the same age with mustaches."[16]

Two other things should be noted. First, the number of fillers is sometimes noted by the courts but is seldom a significant circumstance because physical and photo lineups almost always include at least five fillers. (CCFAJ recommends a "minimum" of five.) If officers have no suspect but there is reason to believe that the perpetrator belonged to an identifiable group, they may show the witness photos of members of that group; e.g., gang books, sexual assault registries, school yearbooks.[17] This is usually permitted because any suggestiveness is offset by the large number of fillers.

Second, per California's new lineup law, if there were two or more perpetrators and suspects, the suspects must be presented to the witness in separate lineups.[18]

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[8] Pen. Code § 859.7(a)(5).
[9] *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.
[10] *People v. Carpenter* (1997) 15 Cal.4th 312, 367.
[11] *People v. Blum* (1973) 35 Cal.App.3d 515, 520.
[12] *People v. Blair* (1979) 25 Cal.3d 640, 661.
[13] *People v. O'Roy* (1972) 29 Cal.App.3d 656, 662.
[14] *U.S. v. Burnett* (3rd Cir. 2015) 773 F.3d 122, 133.
[15] *People v. Johnson* (1992) 3 Cal.4th 1183, 1217.
[16] *People v. Bracamonte* (1981) 119 Cal.App.3d 644, 656.
[17] See *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 [school yearbook]; *People v. Pervoe* (1984) 161 Cal.App.3d 342, 357 [scrapbook]; *People v. Posten* (1980) 108 Cal.App.3d 633, 647 ["mug" book]; *People v. Wells* (1971) 14 Cal.App.3d 348, 355 [book of parolees].
[18] Pen. Code § 859.7(a)(7).

Did the suspect "stand out"?

If the suspect and the fillers were similar in appearance, it is ordinarily immaterial that there was something about the suspect that caused him to stand out from the others.[19] This is because there is usually something about everyone in a lineup that stands out; e.g., the tallest, heaviest, scariest. Consequently, so long as the suspect was not "marked for identification" (discussed below), the fact that there was something distinctive about him will seldom affect the reliability of an ID.

EXAMPLES: For example, in rejecting arguments that the defendant stood out, the courts have noted the following:

- "[D]efendant's tattoo did not make the live lineup impermissibly suggestive. None of the witnesses observed a tattoo on the gunman's head."[20]
- While the defendant was the shortest person in the lineup, he was not "significantly" shorter than the others.[21]
- "Although the other men may have been darker in complexion and not as thin, the men in the lineup were sufficiently similar in appearance."[22]
- "[A]ppellant notes that he was wearing a bright white sweatshirt or sweater. However, so long as the defendant is not alone dressed in a striking manner, there is no need for the police to match outfits of everyone in the lineup."[23]
- "While defendant's profile is facing the opposite direction from the other five pictures, the point of concern to the witness is the person's features, not the direction he is facing."[24]
- "[A]ny discoloration in defendant's photograph would not suggest it should be selected."[25]

While a suspect will certainly stand out if he did something that drew attention to himself, this will not result in suppression because a suspect may not challenge a lineup "when his own conduct has caused the procedure to be suggestive."[26] For example, in *People v. Boyd*, a defendant argued that he stood out because he refused to enter the lineup stage "in proper order" and he "hung his head" during the lineup. This did not matter, said the Court of Appeal, because "a defendant may not base his claim of deprivation of due process in a lineup on his own behavior."[27]

Similarly, in *People v. Wimberly*,[28] a robbery case, the suspect and the fillers in a live lineup were asked to say certain words that the robber had said. Because Wimberly spoke too softly to be heard clearly, an officer asked him to repeat the words. On appeal, Wimberly contended that the officer's request rendered the subsequent ID suggestive, but the court disagreed because "the police made this request only because appellant had spoken too softly and did not put the glasses on properly. Thus, the request did not render the identification improper."

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[19] See *People v. Carpenter* (1997) 15 Cal.4th 312, 367; *People v. Faulkner* (1972) 28 Cal.App.3d 384, 391 ["[T]he crucial issue is whether appellant has been singled out and his identification made a foregone conclusion"].

[20] *People v. Gonzalez* (2006) 38 Cal.4th 932, 944.

[21] *People v. Cook* (2007) 40 Cal.4th 1334, 1355. Also see *People v. Rist* (1976) 16 Cal.3d 211, 218 ["Aside from the fact that defendant may have been the shortest member of the lineup there is no evidence that he differed in appearance from the other members."]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1243 ["[A]lthough defendant was the tallest, all the others were tall as well."].

[22] *People v. Floyd* (1970) 1 Cal.3d 694, 712.

[23] *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.

[24] *People v. West* (1984) 154 Cal.App.3d 100, 105. Compare *People v. Carlos* (2006) 138 Cal.App.4th 907, 912 [photo lineup was suggestive because the suspect's name and ID number were printed below his photo].

[25] *People v. Gonzalez* (2006) 38 Cal.4th 932, 943. Also see *People v. Hicks* (1971) 4 Cal.3d 757, 764 [court rejects argument that photo lineup unreliable because his photo "had a gray background while the others had a white background"].

[26] *People v. Wimberly* (1992) 5 CalApp.4th 773, 790. Also see *People v. Yeoman* (2003) 31 Cal.4th 93, 125 [the rule prohibiting suggestive lineups and showups "speaks only to suggestive identification procedures employed by the People."].

[27] (1990) 222 Cal.App.3d 541, 574.

[28] 5 Cal.App.4th 773.

LINEUP POSITION: The suspect's position in the lineup—whether first, center, or last—is irrelevant.[29] As the California Supreme Court observed, "[N]o matter where in the array a defendant's photograph is placed, he can argue that its position is suggestive."[30]

USING BOOKING PHOTOGRAPHS: Pursuant to the new lineup law, officers must not show the witness a photo of the suspect that contains information pertaining to any previous arrest, such as a booking photo.[31]

MULTIPLE LINEUP OR PHOTO APPEARANCES: A suspect who appears in a lineup may stand out because the witness had previously seen his picture in a photo lineup or had seen him at a showup. Nevertheless, so long as there was a need for multiple pretrial identification procedures, this will not render an ID unduly suggestive or otherwise unreliable.[32]

Was the suspect "marked for identification"

A lineup identification will almost always be suppressed if the suspect was "marked for identification." This occurs if (1) the witness provided officers with a description of the perpetrator that included one or more prominent characteristics or features, and (2) the suspect was the only person in the lineup who had such characteristics of features. For example, in *People v. Caruso*[33] two robbery victims described the driver of the getaway car as "big, with dark wavy hair and a dark complexion." Caruso was arrested and placed in a lineup with four other men. But while he was big, dark, "of Italian descent," with wavy hair, the other four "were not his size, not one had his dark complexion, and none had dark wavy hair." Thus, in ruling that the lineup ID was unreliable, the court pointed out that the witnesses had "noted the driver's large size and dark complexion, and if they were to choose anyone in the lineup, defendant was singularly marked for identification."

Similarly, in *Torres v. City of Los Angeles*[34] the court ruled that the defendant was marked for identification in a photo lineup because "only one other photo in the six-pack besides the photo of [the suspect] was of a visibly overweight individual and thus of a person who fit [the perpetrator's] description." Finally, in *Foster v. California* the Supreme Court invalidated a lineup ID because "the perpetrator stood out from the other two men by the fact that he was wearing a leather jacket similar to that worn by the robber."[35]

On the other hand, if the feature was not particularly distinctive, or if it was shared by one or more fillers, the courts will usually admit the ID and let the jury decide its weight. Thus, in ruling that the defendant was not marked for identification, the courts have noted the following:

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[29] See *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 ["[T]he contention of 'strategically' placing defendant's photo toward the center of the display fails of merit. No matter where placed, a like complaint could be made."]; *People v. Davis* (1969) 2 Cal.App.3d 230, 237-38 [immaterial that defendant was at the end of the line]. Also see *People v. Faulkner* (1972) 28 Cal.App.3d 384, 392 ["the positions of the lineup participants were allotted by chance drawing"].

[30] *People v. Johnson* (1992) 3 Cal.4th 1183, 1217.

[31] Pen. Code § 859.7(a)(6).

[32] See *Simmons v. United States* (1968) 390 U.S. 377, 384, 386, fn.6; *People v. Alexander* (2010) 49 Cal.4th 846, [prosecutors showed the witness the photos of defendant and others the night before trial to learn what he would say about them before asking him in front of the jury. "This was not an unduly suggestive and unnecessary procedure under the facts of this case"]; *People v. Johnson* (2010) 183 Cal.App.4th 253, 272 ["California and federal courts have rejected [the argument] that identification procedures are impermissibly suggestive if the defendant is the only person appearing in both a display of photographs and a subsequent lineup."]; *People v. Cook* (2007) 40 Cal.4th 1334, 1355 ["[T]he fact that the defendant alone appeared in both a photo lineup and a subsequent live lineup does not per se violate due process."]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1224 ["The fact that defendant was the only person common to both lineups did not per se violate his due process rights."].

[33] (1968) 68 Cal.2d 183. Also see *U.S. v. Ford* (7th Cir. 2012 683 F.3d 761, 765-66 ["The only description that the manager had given the police was that the robber was very fair and had freckles, and only Ford's photo matches that description."].

[34] (9th Cir. 2008) 548 F.3d 1197.

[35] (1969) 394 U.S. 440, 442-43.

- "While it is true that defendant's photograph has a mustache with the most pronounced gap in the center [the perpetrator had a gapped mustache], others in photographs have mustaches with at least slight gaps."[36]
- "The mere fact that defendant was wearing the same color pants worn by the robber did not make the lineup unfair."[37]
- Although the perpetrator wore a bandana, and although the defendant was the only person in the photo lineup who wore a bandana, "two of the other photos showed persons with different headgear."[38]

Note that it is sometimes possible to reduce or eliminate suggestiveness resulting from a prominent feature by covering it up; e.g. covering a scar with a bandage.[39] If this is done, all fillers should be covered in the same manner.[40]

Separating witnesses

Whenever two or more witnesses will view a lineup or showup together, officers should—and *must* beginning in 2020[41]—separate them before the viewing occurs, and they should question them separately afterward.[42] This is because if one witness hears another witness make a positive or tentative identification of the suspect, the other witness may be more inclined to do so. In addition, a witness who hears another witness identify someone might become unduly confident of his identification of that person due to "mutual reinforcement."[43] As the court explained in *People v. Ingle*, "It has been recognized that permitting one eyewitness to a crime the opportunity to observe another eyewitness make a photo lineup identification before he himself is asked to make his own identification is unnecessarily suggestive and fraught with the potential for irreparable misidentification."[44]

"Blind administration" lineups

It is now standard procedure—and it will also become mandatory in 2020[45]—for officers to utilize the "blind administration" procedure when conducting live or photo lineups. The term "blind administration" means a lineup that is conducted by an officer who does not know which person in the lineup was the suspect.[46] The purpose of this procedure is to make sure the lineup administrator will not inadvertently say or do something that would cause the witness to identify the suspect.

Sequential lineups

A live lineup is "sequential" if the witnesses viewed the suspect and the fillers one after the other. Specifically, in a live lineup each participant walks onto the stage alone, then exits before the next participant is presented. In a photo lineup, the photos are presented separately. It is somewhat

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[36] *People v. Dontanville* (1970) 10 Cal.App.3d 783, 792.
[37] *People v. Harris* (1971) 18 Cal.App.3d 1, 6.
[38] *In re Charles B.* (1980) 104 Cal.App.3d 541, 544-45.
[39] *People v. DeSantis* (1992) 2 Cal.4th 1198, 1223 [short suspect stood on books that were concealed from the witnesses]; *People v. Adams* (1982) 137 Cal.App.3d 346 [bandage covered up]; *People v. De Angelis* (1979) 97 Cal.App.3d 837 [all the photos of comparable fillers were in black and white, and the only photo of the suspect was in color, so officers reproduced the color photo in black and white].
[40] See *People v. Slutts* (1968) 259 Cal.App.2d 886 [the investigator "should have sketched beards on all the photographs"].
[41] See Pen. Code § 859.7(a)(8).
[42] See *People v. Sequeira* (1981) 126 Cal.App.3d 1, 16 ["The witnesses were separated, told not to talk with each other, and to designate their identifications by writing the suspect's number on a card provided them."]; *People v. Dontanville* (1970) 10 Cal.App.3d 783, 793 ["Each child was called in separately to view the photographs and admonished not to discuss what transpired with the others."]. Compare: *United States v. Wade* (1967) 388 U.S. 218, 234 [the witnesses "made wholesale identifications of Gilbert as the robber in each other's presence"].
[43] *People v. Nation* (1980) 26 Cal.3d 169, 180.
[44] (1986) 178 CA3 505, 513
[45] See Pen. Code § 859.7(a)(2).
[46] See Pen. Code § 859.7(c)(1).

noteworthy that, because most lineups are sequential, the term "lineup" may eventually become obsolete because suspects no longer stand in a "line." But because the term is so ingrained, it will probably be around for a while.

Obtaining pre-lineup description

Beginning on January 1, 2020, officers must, prior to the lineup, ask the witness to describe the perpetrator, even though the witness had done so previously.[47]

Pre-lineup conversations with witnesses

Officers who conduct lineups will necessarily speak with the witness beforehand to, among other things, explain the lineup procedure and answer any questions. For various reasons, they may also seek feedback from the witnesses after the lineup has been completed. As we will now discuss, the nature of these communications can have a bearing on the reliability of the lineup and on future identifications by the witnesses.[48]

IMPLYING THAT THE PERPETRATOR IS IN THE LINEUP: Officers should not indicate to the witness that a suspect is included in the lineup; e.g., "Which one of these guys did it?"[49] In most cases, however, this is not a significant issue because witnesses who are asked to view a lineup will naturally assume that officers did not pick six people at random in hopes that one of them might have been the perpetrator.[50] As the California Supreme Court observed, "Anyone asked to view a lineup would naturally assume the police had a suspect."[51] Still, it's better to avoid this issue.

IMPLYING THAT AN IDENTIFICATION IS EXPECTED: Officers must not say anything that would imply that they expect the witness to identify someone in the lineup. As the Supreme Court observed, "Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they suspect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification."[52]

ANOTHER WITNESS MADE AN ID: If another witness had previously identified someone in a lineup, officers must not mention it as it may be viewed as pressuring the witness to make an ID.[53]

DIRECTING ATTENTION TO THE SUSPECT: Officers must say nothing to the witness that could be reasonably interpreted as directing attention to the suspect.[54] In the words of the Court of Appeal, "Suggestive comments or conduct that single out

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[47] See Pen. Code § 859.7(a)(1) ["Prior to conducting the identification procedure, and as close in time to the incident as possible, the eyewitness shall provide the description of the perpetrator of the offense."].

[48] Also see Pen. Code § 859.7(a)(9) ["Nothing shall be said to the eyewitness that might influence the eyewitness' identification of the person suspected as the perpetrator."].

[49] See *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 400; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359 ["We've caught the guys."]. Also see *Simmons v. United States* (1968) 390 U.S. 377, 383 ["The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime."].

[50] See *Coleman v. Alabama* (1970) 399 U.S. 1, 6 ["[The witness] testified that when the police asked him to go to the city jail he 'took it for granted' that the police had caught his assailants. But the record is utterly devoid of evidence that anything the police said or did prompted [the identification]."]; *People v. Contreras* (1993) 17 Cal.App.4th 813, 820 ["Telling a witness suspects are in custody … is not impermissible."].

[51] *People v. Carpenter* (1997) 15 Cal.4th 312, 368.

[52] *Moore v. Illinois* (1977) 434 U.S. 220, 224-25.

[53] See *People v. Vanbuskirk* (1976) 61 Cal.App.3d 402, fn.4 [even if officer had told a witness that another witness had identified the defendant, "[t]here is no evidence that [the officer] suggested that it was defendant's picture which had been selected by [the other witness]"].

[54] See *Moore v. Illinois* (1977) 434 U.S. 220, 230, fn.4 [as the defendant was led into the lineup, a prosecutor identified him as the suspect and told her that evidence pertaining to the crime had been found in his apartment]; *People v. Arias* (1996) 13 Cal.4th 92, 167 [DA's process server told a witness that the suspect "had already been convicted of murder and rape"]. Compare *Simmons v. United States* (1968) 390 U.S. 377, 385.

certain suspects or otherwise focus a witness's attention on a certain person in a lineup can cause such unfairness as to deprive a defendant of due process of law."[55]

Cautionary instructions

It is considered standard procedure for officers to help reduce any inherent suggestiveness by giving the witness certain information and instructions. Beginning January 1, 2020, officers must inform witnesses of the following;

- The perpetrator may or may not be among the persons in the identification procedure.
- The witness should not feel compelled to make an identification.
- The investigation into the crime will continue regardless of whether the witness makes an identification.[56]

In addition to the above, the following instructions are commonly given and may be required pursuant to departmental policy:

- Keep in mind that things such as hairstyles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs.
- It is just as important to exclude an innocent person as it is to identify the perpetrator.
- Take as much time as you need.
- Do not say anything to anyone until I talk to you after the procedure is completed.

Post-Lineup Communications

After a live or photo lineup, officers may want to talk to the witness about his identification of a suspect or his failure to make an identification. As we will now discuss, some types of communications are ordinarily appropriate, while others may affect the reliability of an in-court ID.

HOW CONFIDENT: If the witness identified someone, officers may inquire as to his degree of confidence. In discussing the purpose of this inquiry, the Seventh Circuit noted that obtaining "immediate" estimates of confidence reduced the chances of error because witnesses "often profess greater confidence after the fact; their memories realign to their earlier statements, so that trial testimony may reflect more confidence than is warranted."[57] Note that, effective on January 1, 2020, officers *must* make this inquiry.[58]

"ANYONE CLOSELY RESEMBLE": If the witness did not identify anyone, or if he made only a tentative ID, it is not suggestive to ask whether anyone in the lineup closely resembled the perpetrator.[59] Such a question is necessary to make sure that officers are on the right track.[60]

WITNESS REACTS TO SEEING SOMEONE: If the witness did not make an ID, but said something or reacted in a manner that indicated he recognized someone in the lineup, it is appropriate to question him about this.[61]

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[55] See *People v. Perkins* (1986) 184 Cal.App.3d 583, 588; *People v. Garcia* (2016) 244 Cal.App.4th 1349 1362 ["each victim was admonished that they did not have to identify anyone in the lineup and that they should not assume that anyone whose picture was in the lineup was in custody"]; *People v. Cunningham* (2001) 25 Cal.4th 926, 990 [the witness "was instructed that he was not to assume the person who committed the crime was pictured therein, that it was equally important to exonerate the innocent, and that he had no obligation to identify anyone."].

[56] Penal Code § 859.7(a)(4).

[57] *U.S. v. Williams* (7th Cir. 2008) 522 F.3d 809, 812.

[58] Penal Code § 859.7(a)(4)

[59] See *People v. Ochoa* (1998) 19 Cal.4th 353, 413 ["Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything."].

[60] See *People v. Perkins* (1986) 184 Cal.App.3d 583, 590 [such a question "was a logical one for an investigator to ask after the chief witness had apparently failed to identify a suspect. In order to continue the investigation and make certain he was on the right track, [the officer] needed to explore Maria's recollection and description of the robber"].

[61] See *People v. Perkins* (1986) 184 Cal.App.3d 583, 590 ["It is not impermissible or unduly suggestive for a police officer to question witnesses further if the officer believes the witnesses may actually recognize someone in the lineup."]; *People v. Contreras* (1993) 17 Cal.App.4th 813, 819.

WITNESS REQUESTS INFORMATION: Officers at a lineup may provide information about the suspect to a witness if (1) the witness made a positive or tentative identification of the suspect, and (2) the witness requested it. For example, in *People v. Ochoa*[62] a rape victim picked the suspect's photo but added that, to be sure, she would need to see a profile photo; so the officer showed her one. In rejecting the argument that this rendered the procedure unreliable, the California Supreme Court said, "Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything."

Similarly, in *People v. Perkins*[63] the victim of a robbery noticed that one of the robbers had a tattoo of a lightning bolt on his neck. During the lineup, the victim identified Perkins as the robber but said she "could not be sure" until she knew whether he had such a tattoo; the officer then confirmed that he did. On appeal, the court ruled that the officer's confirmation did not render the lineup unduly suggestive because the victim had recognized Perkins as the robber before she learned about the tattoo, and that the purpose of her question was only to confirm a "key detail."

YOU PICKED THE "RIGHT" ONE: Officers must never inform a witness that he picked the "right" person or otherwise confirm that he selected the suspect.[64] This is because it may have a "corrupting effect" on his subsequent identifications.[65] This is especially important if the witness made only a tentative ID. For example, in *People v. Gordon*[66] police arrested Gordon for the robbery-murder of an armored car guard. At a live lineup, a witness told officers that Gordon "looks familiar, but I'm not certain." Later that day, an officer phoned the witness to inquire about her comment. In the course of the conversation, the officer essentially told her that she had "picked the right person." As the result, all subsequent identifications by the witness were suppressed. Similarly, in *People v. Shutts,*[67] after two witnesses to an indecent exposure tentatively identified Shutts, an officer told them that Shutts "had committed a prior similar offense" and needed psychiatric help. The court explained that this statement "was made apparently to persuade the girls to hold to their identification of defendant." Although it did not result in the suppression of the ID, it was a legitimate issue on appeal.

Other Lineup Issues

AUDIO AND VIDEO RECORDING OF LINEUP: Effective January 1, 2020, officers must electronically record the lineup procedure.[68] This should not cause problems as this is already standard procedure. If video recording is not feasible, officers must make an audio recording.

REFUSAL TO STAND IN A LINEUP: A suspect does not have a right to refuse to participate in a lineup, refuse to speak during a voice lineup, or refuse to wear clothing for identification purposes.[69] If he does any of these things, prosecutors may be permitted to disclose it to the jury at trial to demonstrate the suspect's consciousness of guilt.[70] To help ensure the admissibility of a refusal at trial, officers

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[62] (1998) 19 Cal.4th 353.
[63] (1986) 184 Cal.App.3d 583.
[64] **NOTE**: Effective January 1, 2020, officers are prohibited from "validating" a witness's ID. Penal Code § 859.7(a)(10)(C).
[65] *People v. Gordon* (1990) 50 Cal.3d 1223, 1242. Also see *People v. Slutts* (1968) 259 Cal.App.2d 886, 893 [officer told witnesses that the person they identified "had committed a prior similar offense and was in need of psychiatric help"].
[66] (1990) 50 Cal.3d 1223.
[67] (1968) 259 Cal.App.2d 886.
[68] See Penal Code § 859.7(a)(11).
[69] See *People v. Hart* (1999) 20 Cal.4th 546, 625 ["a defendant generally has no right to refrain from participating in a lineup"]; *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 221.
[70] See *People v. Alexander* (2010) 49 Cal.4th 846, 905 ["The jury reasonably might question why, if he were not involved in the shooting, defendant would not want to appear in the lineup to clear his name despite his attorney's advice."]; *People v. Smith* (1970) 13 Cal.App.3d 897, 910; *People v. Johnson* (1992) 3 Cal.4th 1183, 1222.

should notify the suspect that his refusal to participate may be used against him in court.[71]

If the suspect refuses to speak at a lineup, and if he was previously *Mirandized*, officers must notify him that the *Miranda* right to remain silent does not give him a right to refuse to participate in a voice lineup.[72] A suspect's refusal to participate is admissible at trial as demonstrating consciousness of guilt even if he did so on the advice of counsel.[73]

COMPELLING A SUSPECT TO APPEAR: If a suspect refuses to appear in a lineup, another option is to seek a court order that authorizes officers to use reasonable force if, after he is was served with a copy of the order, he still refused.[74] As the Seventh Circuit observed in *In re Maguire*, "While it may not enhance the image of justice to force a [suspect] kicking and screaming into a lineup, the choice has been made by the [suspect], not the court."[75]

In terms of form and procedure, it appears that such an order would be virtually the same as a search warrant. First, an officer would submit to the judge an affidavit containing the following: (1) the name of the suspect and any identifying number, (2) the name of the jail in which the suspect is currently being held, (3) the crime for which the suspect was arrested, and (4) the names of the affiant and his agency. The affidavit must then demonstrate probable cause to believe (1) that the suspect committed the crime under investigation, (2) that the results of the lineup would be relevant to the issue of his guilt, (3) that the suspect notified officers that he would not voluntarily participate.

OUT-OF COUNTY APPEARANCE ORDERS: If the suspect is in custody in another county in California, officers may seek an "Appearance Order" authorizing them to transport the suspect to the county in which the lineup will occur. Such an order may be issued upon an *ex parte* declaration that establishes "sufficient cause" to believe the suspect committed the crime under investigation, and that a live lineup is reasonably necessary.[76] If the suspect is out of custody, there is currently no procedure for compelling him to appear in a live lineup.[77]

SUSPECT'S MOTION FOR A LINEUP: A suspect may file a motion to require officers to place him in a lineup if (1) the witness's ID will be a material issue in the case, (2) there is a reasonable likelihood of a mistaken identification which a lineup would tend to alleviate, and (3) the motion was made in a timely manner.[78] POV

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[71] See *People v. Huston* (1989) 210 Cal.App.3d 192, 217. Example: The following is an example of a refusal admonition: *You do not have a right to refuse to participate in a lineup. But if you refuse, your decision to do so may be used in court as proof that you are, in fact, guilty of the crime for which you have been arrested and that you knew that any witnesses at the lineup would positively identify you as the perpetrator. Having these consequences in mind, do you still refuse to participate in the lineup?*

[72] See *People v. Johnson* (1992) 3 Cal.4th 1183, 1223, fn.9; *People v. Ellis* (1966) 65 Cal.2d 529, 539.

[73] See *People v. Alexander* (2010) 49 Cal.4th 846, 905-906.

[74] See *United States v. Wade* (1967) 388 U.S. 218, 222 ["We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance."]; *Schmerber v. California* (1966) 384 U.S. 757, 770-71 [Court notes that a search warrant may authorize the use of force to obtain a blood sample].

[75] (1st Cir. 1978) 571 F.2d 675, 677.

[76] See *People v. Sequeira* (1981) 126 Cal.App.3d 1, 13-15; Pen. Code § 4004.

[77] See *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 226 ["There is wisdom in a procedure authorizing an ex parte order, on an adequate showing and before criminal proceedings are brought, compelling a suspect who is out of custody to attend a lineup. Further, there is no constitutional impediment to such a procedure. However, despite the best intentions of the Sheriff and respondent court, that procedure does not currently exist in California law. The court therefore lacked jurisdiction to grant the order at issue."].

[78] See *People v. Mena* (2012) 54 Cal.4th 146, 164; *People v. Abel* (2012) 53 Cal.4th 891, 912 [motion untimely when filed one year after preliminary hearing]; *People v. Redd* (2010) 48 Cal.4th 691, 725 [no reasonable likelihood of misidentification]; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 560 ["[Defendant] failed to make the prima facie showing required by *Evans*."]; *People v. Farnam* (2002) 28 Cal.4th 107, 183-84; *People v. Vallez* (1978) 80 Cal.App.3d 46, 56 ["Motions made shortly before trial will generally be denied unless good cause is shown for the delay."].

The Right to Counsel at Lineups

[T]he attorney plays a vital role in the administration of criminal justice under our Constitution.[1]

Under certain circumstances a suspect has a right to have counsel present for the purpose of observing the manner in which the lineup was conducted. As we will now discuss, there are essentially three legal issues pertaining to this right: (1) When does a suspect have a right to counsel? (2) What is the attorney permitted to do? (3) How can officers obtain a waiver of the right?

When the right attaches: A suspect has a right to have counsel present at a live lineup if he has been arraigned on the crime under investigation.[2] A suspect does not have a right to have counsel present at a photo or video lineup because his trial attorney and the court will ordinarily be able to detect any suggestiveness in the procedure by reviewing the photo or video. This means, of course, that officers or prosecutors must make sure that photos and videos are not deleted and are availble for review.

Consequences of violations: If officers or prosecutors violate this right, the prosecution may be prohibited from introducing testimony that the witness had identified the defendant at the lineup.[3] The witness will also be prohibited from identifying the defendant at trial unless prosecutors prove, by clear and convincing evidence, that the in-court ID was independent of the unlawful lineup.[4]

Attorney's role at lineup: The attorney's role at a live lineup is limited to that of a silent observer, taking note of any suggestiveness in the procedure so that he can later assist trial counsel in challenging the reliability of the lineup.[5] A good explanation of the attorney's function was provided by Justice Mosk in *People v. Williams*:

> [D]efense counsel has no affirmative right to be active during the course of the lineup. He cannot rearrange the personnel, cross-examine, ask those in the lineup to say anything or to don any particular clothing or to make any specific gestures. Counsel may not insist law enforcement officers hear his objection to procedures employed, nor may he compel them to adjust their lineup to his views of what is appropriate.[6]

Right to be present when ID made: Because the attorney serves as an observer of the identification process, he has a right to be present when the witness is asked if anyone in the lineup was the perpetrator.[7] This is because any suggestiveness at that point is just as likely to result in misidentification as suggestiveness that occurs during the viewing.[8]

Pre- and post-lineup interviews: The suspect's attorney does not have a right to be present when officers interview a witness before the lineup begins or after he made the ID. For example, in *People v. Perkins* the defendant's attorney left the lineup after the witness failed to identify Perkins as the man who robbed her. A few minutes later, an

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[1] *Miranda v. Arizona* (1966) 384 US 436,

[2] See *Rothgery v. Gillespie County* (2008) 554 U.S. 191, 213.

[3] See *Moore v. Illinois* (1977) 434 U.S. 220, 231; *U.S. v. Wade* (1967) 388 U.S. 218, 239-41; *Gilbert v. California* (1967) 388 U.S. 263, 272-73; *People v. Diggs* (1980) 112 Cal.App.3d 522, 528.

[4] See *United States v. Wade* (1967) 388 U.S. 218, 242; *People v. George* (1972) 23 Cal.App.3d 767, 774.

[5] See *Perry v. New Hampshire* (2012) 565 U.S. 228, 246 [the attorney "can expose the flaws in the eyewitness' testimony"]; *People v. Bustamante* (1981) 30 Cal.3d 88, 99 ["At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination or to act in the capacity of a witness"]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046 ["defense counsel must not be allowed to interfere with a police investigation."].

[6] (1971) 3 Cal.3d 853, 860 [dis. opn. of Mosk, J.).

[7] See *People v. Harmon* (1989) 215 Cal.App.3d 552, 566; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046; *People v. Malich* (1971) 15 Cal.App.3d 253, 261.

[7] See *People v. Williams* (1971) 3 Cal.3d 853, 856.

officer asked the witness if there was anyone in the lineup who resembled the robber. She replied that one of the men was, in fact, the robber: Perkins. On appeal, Perkins contended that the post-ID interview violated his right to counsel, but the court disagreed, saying, "[S]ince the identification process had been completed, Perkins' counsel had no more right to be present at the interview than he would at any nonconfrontational identification by a victim."[9]

Similarly, in *People v. Mitcham*[10] a robbery victim in Oakland who was viewing a live lineup placed a question mark on the lineup card next to Mitcham's number. The robbery investigator did not immediately ask her to explain the question mark because it was "standard practice in his office not to discuss lineup details in the presence of defense counsel." About a week later, the officer met with the victim and asked her about the question mark, and she said she was "95% sure" that Mitcham was the robber.

On appeal, Mitcham contended that the victim's identification of him should have been suppressed, urging the California Supreme Court to rule that a lineup is not "over" until the post-lineup interview is completed. But the court refused, ruling instead that the lineup was complete when the victim "filled out and signed the identification card, indicating her identification of defendant, qualified by a question mark."

ATTORNEY UNAVAILABLE OR WON'T PARTICIPATE: If the suspect requests a certain attorney who cannot attend the lineup within a reasonable time, or who refuses to participate, officers may conduct the lineup in any of the following ways:

Substitute counsel: Obtain "substitute counsel," such as a public defender.[11]

Convert to photo procedure: Officers can photograph or otherwise record the lineup without the witnesses present, then show the photos or videotape to the witnesses without counsel being present. There is no right to counsel under these circumstances because the procedure is the equivalent of a photo lineup.

Proceed with lineup after refusal: If the suspect's attorney appears but refuses to participate, officers may proceed without him.[12] If this is done, officers should videotape or photograph the lineup to help prove that it was reliable.

WAIVER OF RIGHT TO COUNSEL: A suspect may waive the right to counsel, even if he has an attorney. To obtain a waiver, the suspect must be advised of, and waive, the following:[13]

(1) Right to counsel: You have a right to have counsel present at the lineup.
(2) Not required to participate: You will not be required to participate in the lineup without the presence of counsel.
(3) Appointed counsel: If you want to have an attorney present but cannot afford one, an attorney will be appointed at no charge to you.[14]

Furthermore, like other waivers, the waiver of the right to counsel at a lineup must be made freely, meaning that officers must not pressure the suspect to waive. Because there are significant differences between the right to counsel and a lineup and the *Miranda* right to have counsel present during interrogation, a *Miranda* waiver does not constitute a waiver of counsel's presence at a lineup.[15] POV

[8] *People v. Perkins* (1986) 184 Cal.App.3d 583, 591.
[9] (1992) 1 Cal.4th 1027.
[10] See *People v. Wimberly* (1992) 5 Cal.App.4th 773; *People v. Nichols* (1969) 272 Cal.App.2d 59, 64.
[11] *People v. Hart* (1999) 20 Cal.4th 546, 625.
[12] See *United States v. Wade* (1967) 388 U.S. 218, 237; *People v. Wells* (1971) 14 Cal.App.3d 348, 354; *People v. Banks* (1970) 2 Cal.3d 127, 134. Note that a *Miranda* waiver does not constitute a waiver of counsel's presence at the lineup]; *People v. Schafer* (1970) 4 Cal.App.3d 554, 560.
[13] See *People v. Thomas* (1970) 5 Cal.App.3d 889, 897; *People v. Banks* (1970) 2 Cal.3d127, 136; *P v. Wells* (1971) 14 CA3 348, 354.
[15] See *People v. Banks* (1970) 2 Cal.3d 127, 134-36; *People v. Schafer* (1970) 4 Cal.App.3d 554, 560.

Suppression of Lineup IDs

If officers fail to conduct a lineup in the required manner (covered in the article "Lineup Procedure" beginning on page nine), two things may happen. First, the trial court may prohibit prosecutors from presenting testimony that the witness had identified the defendant as the perpetrator. This will occur if the court rules that the lineup was "unduly suggestive," meaning it was conducted in a manner that would have resulted in a "very substantial likelihood of misidentification."[1] Any lesser suggestiveness goes to the weight of the ID, not its admissibility.[2]

Second, prosecutors at trial may be prohibited from asking the witness if the perpetrator is in the courtroom. This will occur if the lineup procedure was so suggestive that it resulted in a "very substantial likelihood of *irreparable* misidentification."[3] The added word "irreparable" means that the likelihood of misidentification could not have been sufficiently reduced by means of appropriate jury instructions.[4]

Prosecutors may, however, avoid suppression if they can prove that, despite any suggestiveness in the lineup procedure, the witness's identification of the defendant was reliable. As the Supreme Court explained, "An identification infected by improper police influence is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial," and "if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth."[5]

The question, then, is how can prosecutors prove that a witness's identification of the defendant was reliable despite some suggestiveness. Although the courts will consider the totality of circumstances,[6] the following are especially significant:

Opportunity to see perpetrator: The reliability of a witness's ID will often depend on the length of time he observed the perpetrator, the distance between them, whether the witness's view was obstructed, and the lighting conditions. As the Supreme Court explained, the likelihood of misidentification is "particularly grave" when the witness's "opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."[7] For example, in ruling that a witness's identification of a defendant was sufficiently reliable, the courts have noted the following:

- A stabbing victim "turned around and faced [the assailant] from a distance of only 10 feet and asked him to put the knife down."[8]
- "The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks."[9]
- "[W]ell-lit bedroom for a couple of minutes."[10]
- About 30 seconds "with lighting provided by the headlights of both cars and a streetlight."[11]

Attentive: Also significant is the extent to which the witness directed his attention to the perpetrator.

- Rape victim "was no casual observer."[12]
- She "kept reminding herself to study the fact of the robber because she knew she would be called upon later to identify him."[13]

[1] *Neil v. Biggers* (1972) 409 U.S. 188. Also see *People v. Virgil* (2011) 51 Cal.4th 1210, 1256.
[2] See *Manson v. Brathwaite* (1977) 432 U.S. 98, 116; *U.S. v. Henderson* (1st Cir. 2003) 320 F.3d 92, 101.
[3] *Neil v. Biggers* (1972) 409 U.S. 188, 198 [emphasis added].
[4] See *U.S. v. Correa-Osorio* (1st Cir. 2015) 784 F.3d 11, 19.
[5] *Perry v. New Hampshire* (2012) 565 U.S. 228, 232.
[6] See *Stovall v. Denno* (1967) 388 U.S. 293, 302; *People v. Cook* (2007) 40 Cal.4th 1334, 1354.
[7] See *United States v. Wade* (1967) 388 U.S. 218, 229; *Sexton v. Beaudreaux* (2018) __ U.S. __ [138 S.Ct. 2555, 2560].
[8] *People v. Chavez* (2018) 22 Cal.App.5th 663, 677.
[9] *Simmons v. United States* (1968) 390 U.S. 377, 385.
[10] *People v. Fortier* (1970) 10 Cal.App.3d 760, 764.
[11] *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220.
[12] *Neil v. Biggers* (1972) 409 U.S. 188, 200.
[13] *People v. Gomez* (1976) 63 Cal.App.3d 328, 336.

- "Her degree of attention was high: she kept fighting off defendant, who was trying to remove her clothes."[14]

DETAILED DESCRIPTION: How much descriptive detail did the witness provide?

- The description included "the assailant's approximate age, height, weight, complexion, skin texture, build, and voice."[15]
- "[The witness] described his age, facial appearance and his wearing apparel, as well, in some detail."[16]
- The description included "clothing, hair, complexion, facial hair, height, weight, and condition of intoxication."[17]

ACCURACY OF INITIAL DESCRIPTION: To what extent did the witness's initial description of the perpetrator correspond with the description of the suspect?[18]

SOMETHING DISTINCTIVE: Did the perpetrator have a distinctive or unusual feature?[19]

LEVEL OF CERTAINTY: To what extent did the witness express certainty as to his identification of the defendant?[20]

IMMEDIATE ID: Although it is relevant that the witness had identified the defendant immediately when he appeared at the lineup,[21] a witness's failure to make an immediate ID is seldom a significant circumstance because witnesses will ordinarily take their time in making such an important decision. In addition, officers will usually instruct witnesses to take their time.[22]

OTHER CIRCUMSTANCES: The following are also indications that a lineup ID was reliable:

- WITNESS WAS TRAINED TO PAY ATTENTION: The witness had been trained to pay special attention; e.g., bank tellers, convenience store clerks, security officers.[23]
- WITNESS SAW PERPETRATOR BEFORE: The witness was acquainted with the perpetrator or, at least, had seen him under different circumstances before the crime occurred.[24]
- IDENTIFICATION BASED ON MULTIPLE FACTORS: The witness based his ID on two or more circumstances, such as the perpetrator's clothing, posture, build, hairstyle, and race.[25]
- TIME LAPSE BETWEEN CRIME AND LINEUP: Because memories fade, the length of time between the crime and the lineup is relevant.[26]
- ACCURACY IN PREVIOUS LINEUPS: It is significant that the witness did not identify anyone in an earlier lineup in which the defendant did not appear.[27]
- INACCURACY IN PREVIOUS LINEUPS: Did the witness identify a filler in a previous lineup?[28]
- INDEPENDENT EVIDENCE OF GUILT: Finally, a witness's identification of the defendant may be deemed more reliable if there was additional evidence of his guilt; e.g., the defendant had confessed to the crime, his fingerprints were found at the crime scene, or he was identified by other witnesses.[29]

POV

[14] *People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072.
[15] *Neil v. Biggers* (1972) 409 U.S. 188, 200.
[16] *People v. Rodriguez* (1970) 10 Cal.App.3d 18, 32.
[17] *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1220.
[18] See *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 557; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 731.
[19] See *People v. LeBlanc* (1972) 23 Cal.App.3d 902, 906; *People v. Arias* (1996) 13 Cal.4th 92, 169-70.
[20] See *Manson v. Brathwaite* (1977) 432 U.S. 98, 115. Also see *People v. Kennedy* (2005) 36 Cal.4th 595, 611.
[21] See *People v. Chavez* (2018) 22 Cal.App.5th 663, 676; *People v. Wells* (1971) 14 Cal.App.3d 348, 355.
[22] See *People v. Arias* (1996) 13 Cal.4th 92, 169.
[23] See *Manson v. Brathwaite* (1977) 432 U.S. 98, 115 ["as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail"]; *People v. Fortier* (1970) 10 Cal.App.3d 760, 765.
[24] See *People v. LeBlanc* (1972) 23 Cal.App.3d 902, 906; *People v. Nash* (1982) 129 Cal.App.3d 513, 515.
[25] See *People v. Flint* (1986) 180 Cal.App.3d 13, 18; *Neil v. Biggers* (1972) 409 U.S. 188, 200.
[26] See *Neil v. Biggers* (1972) 409 U.S. 188, 201; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387.
[27] See *People v. Ware* (1978) 78 Cal.App.3d 822, 839; *People v. Nash* (1982) 129 Cal.App.3d 513, 518.
[28] See *United States v. Wade* (1967) 388 U.S. 218, 241; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197.
[29] See *Simmons v. United States* (1968) 390 U.S. 377, 385; *People v. Farham* (2002) 28 Cal.4th 107, 184.

Recent Cases

People v. Orozco

(2019) 32 Cal.App.5th 802

Issue

Did officers violate *Miranda* when, after a murder suspect invoked, they placed him in a room with his girlfriend and asked her to talk to him about the crime?

Facts

While babysitting his six-month old daughter—her name was Mia—Orozco phoned Mia's mother and said the child had stopped breathing. Mia's mother, Nathaly Martinez, immediately returned home and found that Mia was dead. Los Angeles County sheriff's detectives responded and saw that Mia had been beaten. They would later learn that she suffered 29 bruises, seven rib fractures, a punctured right lung, and a lacerated liver.

At the scene, Orozco claimed he did not know how Mia had been injured, but he agreed to accompany the detectives to their office for further questioning. Although he had not been arrested, a detective *Mirandized* him when they arrived, apparently because of the likelihood that the interview would become contentious. And it did. Orozco continued to deny knowing anything about Mia's injuries, and because this was highly unlikely, the detectives continued to press. He eventually invoked his right to counsel and was arrested.

Before he was taken to jail, however, he asked to speak alone with Ms. Martinez. The detectives granted this request. But before she entered the interview room, one of them asked her to try to get a "full explanation" from him. He added, "You are the mother of Mia and you have a right to know [everything]."

At first, Ms. Martinez was unsuccessful. So, one of the detectives entered the room and said he had just received a copy of the autopsy report and it showed that Mia had been beaten to death. (This was probably a ploy as autopsies are not conducted this quickly.) The detective then left the room and Ms. Martinez continued to press Orozco for an explanation, saying "If you love me, you need to tell me the truth." He then confessed.

Prior to trial, Orozco filed a motion to suppress his confession on grounds that it was obtained in violation of *Miranda*. The motion was denied, Orozco was found guilty and sentenced to life.

Discussion

It is settled that officers must obtain a *Miranda* waiver from a suspect in custody before asking any questions that were reasonably likely to elicit an incriminating response.[1] It is also settled that officers must promptly stop questioning a suspect who has invoked.

There are, however, exceptions to these rules. And one of them, the so-called "undercover agent" exception, provides that subsequent questioning is permitted if the person asking the questions was an undercover officer or civilian police agent, and if the officer or agent did not pressure the suspect.[2] As the California Supreme Court explained, *Miranda* does not apply "when the suspect is in the process of a custodial interrogation" and he makes "voluntary statements to someone the suspect does not believe is a police officer or agent, in a conversation the suspect assumes is private."[3]

In the seminal "undercover agent" case, *Illinois v. Perkins,*[4] the defendant and a fellow prison inmate, Donald Charlton, were talking one day and Perkins mentioned that he had committed a murder in East

[1] See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.
[2] See *Illinois v. Perkins* (1990) 496 U.S. 292, 296; *Arizona v. Mauro* (1987) 481 U.S. 520, 526 [questioning by suspect's wife].
[3] *People v. Tate* (2010) 49 Cal.4th 635, 686. Also see *People v. Gonzales* (2011) 52 Cal.4th 254, 284 [*Miranda* does not prohibit "mere strategic deception by taking advantage of a suspect's misplaced trust" in a fellow prisoner].
[4] (1990) 496 U.S. 292.

St. Louis, Illinois for which he had not been arrested. Charlton notified the investigating officers who devised a plan whereby an undercover officer, John Parisi, would pose as a fellow inmate and engage Perkins "in a casual conversation and report anything he said about the murder." During one such conversation, Parisi broached the subject of the murder and Perkins proceeded to describe it "at length." Perkins was later charged with the crime and his statements were used against him at trial. He was convicted.

On appeal to the Supreme Court, Perkins argued that his statement should have been suppressed because Parisi had not *Mirandized* him. But the court ruled that a waiver was not required because "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate."

Applying *Perkins* to the facts in *Orozco,* the court ruled that, even though Orozco had previously invoked his right to counsel, and even though the detective had asked Ms. Martinez to try to obtain incriminating information from him, this did not violate *Miranda* because (1) Orozco was unaware of the ploy, and (2) Martinez did not utilize any form of coercion.

Finally, Orozco contended that the detective effectively interrogated him when he interrupted the interview and reported that the coroner determined that Mia had been beaten to death. This was a valid argument because the court indicated that the detective's comment was reasonably likely to elicit an incriminating response. But, ultimately, it didn't matter because Orozco did not respond. As the court pointed out, "Had defendant answered the officer's question with an incriminating statement, he would have been interrogated. But he did not. Instead, defendant said nothing, and the officer left. At that point, defendant resumed his one-on-one conversation with Martinez, completely unaware she was an agent of the police." Orozco's conviction was affirmed.

People v. Anthony

(2019) 32 Cal.App.5th 1102

Issue

After a suspect in a gang-related murder invoked his right to counsel, did a detective violate *Miranda* by questioning him about a related murder?

Facts

One evening, Stephon Anthony and three other members of an Oakland street gang known as NSO loaded up Anthony's gold Cadillac with assault weapons and headed to Berkeley for the purpose of killing Jermaine Davis. They wanted to kill Jermaine because he was a member of a rival gang that was responsible for the murder, three weeks earlier, of an NSO member named Nguyen Ngo. Anthony was an eyewitness to that murder and a possible target.

While looking for Jermaine, the men spotted his brother, Charles, who happened to be walking to the store to buy a cigar. Although Charles was not a gang member, one of the men got out and shot Charles "from head to foot" with a semiautomatic assault rifle. As this was happening, the driver started doing celebratory "donuts," while another passenger jubilantly waved a rifle out the window, and Anthony began yelling "yahoo" out the window. The fun didn't last long.

A few minutes later, a Berkeley officer spotted their distinctive getaway car and chased them into Oakland where they sped through a busy intersection and crashed into a Mazda which then hit a pedestrian. The pedestrian and the driver of the Mazda were killed. Two of the gang members fled on foot and were arrested weeks later. Anthony and the fourth gang member were arrested at the scene.

The next morning, a Berkeley police detective sought to interview Anthony about the murder but he invoked his right to counsel. Later that day, Anthony notified another Berkeley detective that he wanted to talk to Oakland police detectives, but he didn't say why. When they arrived, Anthony said he would talk to them about the murder of Mr. Ngo but he did not want to talk about the murder of Charles Davis. The detectives agreed to this condition. Because Anthony was only a witness to the

murder of Mr. Ngo, the detectives did not seek a *Miranda* waiver. Much of the subsequent interview consisted of a detailed discussion of the animosity between the two gangs.

Before trial, prosecutors notified the court that they planned to present the recordings to establish the motive for the murder of Charles Davis, and to prove that the murders were gang related. Anthony filed a motion to suppress but the motion was denied. The four defendants were convicted, the gang enhancements were affirmed, and all were sentenced to life without the possibility of parole.

Discussion

On appeal, Anthony argued that his statements should have been suppressed because they were obtained in violation of *Miranda*. The court agreed.

As a general rule, officers may not question a suspect in custody who has invoked the right to remain silent or the right to counsel. But there are exceptions. And one of them provides that post-invocation questioning is permitted if (1) the suspect freely initiated it, and (2) he waived his *Miranda* rights before the questioning began or resumed.

Although the first requirement was satisfied, the second was not. And while the OPD detectives had a reason for not seeking a waiver from Anthony (he was only a witness to the murder of Mr. Ngo), the court ruled it didn't matter because the detectives knew, or should have known, that anything he said about gang animosity would help establish the motive for the murder of Mr. Ngo; i.e., gang retaliation. Said the court:

> [The detectives] had reason to believe Anthony was involved in the [murder of Charles Davis that was] committed in gang-retaliation for the [murder of Ngo]. Yet they did not advise Anthony of his *Miranda* rights and pursued lines of questioning that called for Anthony to give responses that bore directly on his motive and intent and were thus incriminating.

The court also ruled that, even if the detectives had obtained a waiver, Anthony's statement should have been suppressed because they had assured him that they would restrict their interview to the murder of Mr. Ngo. But, again, that was a promise they could not keep because of the close connection between the murders.[5]

The court also ruled, however, that the trial court's error in admitting the recordings was harmless because the motive for the murders was adequately proven by testimony from other witnesses. Consequently, the convictions of Anthony and the other three were affirmed.

People v. Westerfield

(2019) 6 Cal.5th 632

Issue

In the investigation into the abduction and murder of a seven-year old girl, did the affidavits in support of five search warrants establish probable cause?

Facts

On a Saturday morning at about 9:30 A.M., the parents of seven-year old Danielle Van Dam discovered that she was missing from their home in San Diego. It appeared that someone had entered through a door in the garage. The ensuing investigation was intensive and it quickly focused on 49-year old David Westerfield who lived alone in a house two doors away. Ms. Van Dam informed investigators that she and some friends had gone to a local bar on Friday night and that Westerfield was there also. She said she remembered speaking with him and that she left at about 2 A.M. According to one of her friends, Westerfield had left at least 90 minutes earlier.

While canvassing the area, officers spoke with all of the neighbors except Westerfield who was not at home. He returned, however, on Monday morning and was met by investigators who wanted to know

[5] Compare *People v. Wader* (1993) 5 Cal.4th 610 ["[The sergeant's] inquiry regarding the whereabouts of Hillhouse was designed to elicit information about Hillhouse, not defendant."]; *People v. Moore* (2011) 51 Cal.4th 386, 395 [the interview "focused on information defendant had indicated he possessed rather than on defendant's potential responsibility for the crimes"].

why he had left on Saturday and what he had been doing for the past two days. His explanation was bizarre. For brevity we have omitted some suspicious circumstances, discrepancies, and plain lies. But the gist of his story was as follows:

He awoke at about 6:30 on Saturday morning and had a sudden desire to spend the weekend exploring the desert. So he drove his SUV to a storage lot where he kept his motorhome, drove the motorhome back to his house, loaded it with groceries, and headed off. On the way to the desert, however, he realized he had forgotten his wallet at home and did not have enough cash for such a long trip, so he decided to visit a state park near Coronado instead. When he arrived, he paid for a three-night stay but almost immediately decided it was "too cold," so he drove back home to retrieve his wallet. He arrived at about 3:30 P.M. and noticed a lot of police activity on the street, including a mobile command post and several news vans. He then remembered that he had left his wallet in his SUV, so he drove off and headed back to the storage lot. After retrieving his wallet, he decided to visit a "sand dune area" located about 160 miles away.

On Monday morning—at around 4 A.M.—Westerfield decided to drive home to San Diego. He arrived at about 7:00 A.M., and the first thing he did was drive to his dry cleaners where he dropped off a jacket, two comforters, and some other bedding. The proprietor later told officers that, although it was a cold morning, Westerfield was wearing a thin T-shirt, thin shorts, no shoes, and no socks. Later that day, Westerfield returned to the dry cleaners and dropped off a sweater, pants, and a T-shirt. He requested same day service.

After hearing Westerfield's story, a detective obtained his consent to search his home and vehicles. As the detective entered the house, he noticed that the comforter on Westerfield's bed was missing, the house was "immaculately clean," and there was an odor of bleach in the garage. A cadaver dog later "displayed an interest" in Westerfield's garage door. Officers then searched Westerfield's motorhome and, among other things, noticed that this bed also lacked a comforter. In addition, the K9 "alerted" to a storage compartment and showed "interest" in a shovel.

When they returned to the police station, Westerfield said he had stopped at a certain place during his trip. But, as he recounted it, he accidentally referred to it as "this little place that *we*, where *we* were…." When the detective asked why he used the term "we" when he was supposedly alone, he said it was "just a slip." Later that night, investigators arrested Westerfield for abduction.

At about 2 A.M. on Tuesday, a detective obtained a search warrant based mainly on the above information. The warrant authorized the seizure of DNA samples from Westerfield and further searches of his home, SUV, and motorhome. While officers were searching the motorhome, the cadaver dog "alerted" or "showed an interest" in certain places and things. On Wednesday and Thursday, the detectives obtained two additional search warrants based primarily on the information contained in the first affidavit. One of the warrants was for cell phone records, and these records indicated that Westerfield "had not been truthful to investigators concerning his activities during the weekend in question."

On the following Monday, a detective obtained a fourth warrant to conduct a forensic search of the clothing that Westerfield had dropped off at the dry cleaners. The following week, a detective obtained a fifth warrant for a more extensive search of trace evidence found in Westerfield's home.

On February 27, searchers found Danielle's nude and partially decomposed body near a trail in an unincorporated town east of San Diego. The searchers had gone to this area because it was a possible route that Westerfield might have taken on his trip. Because of the condition of the body, the coroner was unable to determine a cause of death or whether she had been sexually assaulted.

As noted, investigators had seized several items that were submitted for forensic analysis. Among other things, it was determined that clothing Westerfield dropped off at the dry cleaners contained bloodstains and DNA linked to Danielle, along with her fingerprints and hair.

Before trial, Westerfield filed a motion to suppress most of this evidence, but the motion was denied and the case went to trial. Westerfield was found guilty and was sentenced to death.

Discussion

Westerfield argued that all of the evidence obtained pursuant to the five search warrants should have been suppressed because the affidavits for the first warrant failed to establish probable cause, and that probable cause for the others was based on the information contained in the first one.

While it was true that the first warrant was based mainly on circumstantial evidence, "it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence."[6] Furthermore probable cause is "a flexible, commonsense standard, which requires only that the facts available to the officer would warrant a person of reasonable caution in believing that the item may be contraband or stolen property or evidence of a crime."[7]

Consequently, the court ruled that all the searches were lawful and it affirmed Westerfield's conviction and death sentence. (On March 13, 2019, Governor Gavin Newsome nullified Westerfield's death sentence on grounds that he believes the death penalty "has discriminated against defendants who are mentally ill, black and brown, or can't afford expensive legal representation.").

U.S. v. Korte

(9th Cir. 2019) 918 F.3d 750

Issues

Did officers violate the Fourth Amendment by conducting a warrantless search of the defendant's car and by installing a GPS tracking device?

Facts

In August of 2016, Kyle Korte was paroled from state prison after serving time for bank robbery. Within weeks, he resumed his bank robbery activities by robbing banks in Playa Vista, Torrance, and Seal Beach. Korte quickly became a suspect because of similarities between the new robberies and the one that resulted in his prison sentence. Consequently, a Los Angeles County sheriff's deputy reviewed the banks' surveillance recordings and noticed that the robber did resemble Korte. In addition, deputies checked the surveillance recordings of street traffic in the areas surrounding the banks and spotted Korte's car shortly before or after one of the robberies.

Next, investigators placed a GPS tracking device on Korte's car and, at times, conducted physical surveillance. During such physical surveillance, they followed Korte as he left his home, drove to a bank, parked nearby, opened the trunk of the car, and placed something inside. Having already obtained a warrant for Korte's arrest, they pulled up and arrested him. They searched the trunk and found a toy gun that had been used in some of the robberies.

Korte was charged with three counts of bank robbery and one count of attempted bank robbery. He filed a motion to suppress the data that the deputies has obtained via the GPS device, and also the toy gun that they found in the trunk. The motion was denied, the case went to trial. He was convicted.

Discussion

On appeal, Korte argued that (1) the search of the trunk of his car was unlawful because the deputies did not have a warrant, and (2) the warrantless installation of a GPS monitor on his car constituted a illegal search because electronic surveillance is so intrusive. The court rejected both arguments.

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[6] *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 345. Also see *U.S. v. Diaz* (9th Cir. 2007) 491 F.3d 1074, 1078 ["[A] probable cause determination can be supported entirely by circumstantial evidence."].

[7] *People v. Stokes* (1990) 224 Cal.App.3d 715, 719.

SEARCH OF THE TRUNK: As noted, Korte was on parole when his car was searched. And in California, all parolees are subject to warrantless searches of, among other things, property under their control. Thus, the court ruled the search was lawful because Korte was the driver of the car and therefore had control over the trunk.

INSTALLATION OF GPS TRACKER: The Supreme Court has ruled that the installation of a GPS tracker on a vehicle constitutes a "search."[8] Although it is unsettled whether a warrant is required to conduct such a search, the court in *Korte* said "we are hard-put to say that the warrantless placement of a GPS tracker on a parolee's car is impermissible." After all, "[i]f an officer can conduct a warrantless search of a parolee's cell phone—an object that is the sum of an individual's private life—placing a GPS device on a parolee's car cannot logically demand more constitutional protection."[9]

People v. Pride

(2019) 31 Cal.App.5th 133

Issue

Must officers obtain a warrant before they download photos or videos that a suspect posted on social media?

Facts

One night, a man identified as D.C. was robbed by five men in a parking lot in San Diego. During the holdup, one of the men yelled "This is West Coast," which was apparently intended to notify D.C. that he had wandered into territory claimed by the West Coast Crips. The men then beat D.C. and took his shoes, iPad, watches, and a gold chain.

Based on D.C.'s description of the perpetrators, a gang officer thought that one of them was Chaz Pride. So he checked Pride's social media site and saw that Pride had just posted a video of himself wearing a gold chain around his neck and saying "Oh, check out the new chain, dog. Ya feel me? All on this thang."

The next day, the detective showed D.C. two photographs. One of them was a photo of the chain, the other was a photo of Pride without the chain. D.C. identified both. A few days later, officers obtained a warrant to search Pride's home, and they found the chain and other items that had been taken during the robbery.

Before trial, Pride filed a motion to suppress the evidence obtained as the result of the download. The motion was denied and Pride was convicted.

Discussion

On appeal, Pride urged the court to rule that officers must obtain a warrant in order to visit social media sites, pose as friends, and download photos or other contents. Specifically, he claimed that he "had an expectation of privacy in the [video] because the social media platform he used was intended for private messages, rather than messages open to the public."

The court rejected the argument, ruling that people who post videos, photos, or other messages on their social media sites cannot reasonably expect that a friend, a false friend, or police officer will not visit the site and download content that is readily available. As the court pointed out, "Pride voluntarily shared with his social media 'friends' a video of himself wearing the chain stolen from D.C. The fact he chose a social media platform where posts disappear after a period of time did not raise his expectation of privacy. Rather, in posting the video message, Pride assumed the risk that the account for one of his 'friends' could be an undercover profile for a police detective or that any other 'friend' could save and share the information with government officials." Thus, Pride's conviction was affirmed. POV

[8] See *United States v. Jones* (2012) 565 U.S. 400.

[9] **NOTE**: One other issue. The investigators obtained a court order that authorized the disclosure of cell site location information (CSLI), and this information showed that Korte was near three of the banks when they were robbed. At that time, CSLI could be obtained by means of a simple court order based on an officer's declaration that the data was relevant to a criminal investigation. While this case was pending, however, the Supreme Court ruled that a search warrant was required. The court in *Korte*, however, ruled that suppression of the CSLI information was unwarranted under the good faith rule.

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