

POINT of VIEW

A publication of the Alameda County District Attorney's Office

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- Miranda waivers
- Traffic stops
- Parole searches
- Detentions
- Consent searches
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- Reasonable suspicion
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- Collecting DNA from arrestees
- Identifying router hackers

WINTER
2013



Point of View

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• Volume 41 Number 1 •

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This edition of Point of View
is dedicated to the memory of
Officer Kenyon Youngstrom
of the California Highway Patrol
who was killed in the line of duty
on September 4, 2012

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Miranda Waivers

[W]e are steeped in the culture that knows a person in custody has the right to remain silent. Miranda is practically a household word.

—*Anderson v. Terhune*¹

Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.

—*Dickerson v. United States*²

Now that the *Miranda* rights have achieved the status of cultural icons—like Dr. Phil and Oprah—it seems appropriate to ask: Why must officers still advise suspects of these rights and obtain waivers of them before any interrogation? The question is especially apt in light of the Supreme Court’s observation that anyone who knows he can refuse to answer an officer’s questions (i.e., virtually everybody) “is in a curious posture to later complain that his answers were compelled.”³

Take the case of Ralph Nitschmann. An officer in Santa Barbara had arrested him for felony assault and was just starting to *Mirandize* him when Nitschmann interrupted and said, “I have the right to remain silent, anything I say can and will be used against me in a court of law” and so on. Nitschmann concluded by saying “I know the whole bit” and, to his subsequent chagrin, the court agreed.⁴

Despite the possibility that *Miranda* has outlived its usefulness, the Supreme Court is not expected to scrap it anytime soon. Over the years, however, the Court has made *Miranda* compliance much less burdensome. As it pointed out in 2000, “If anything,

our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement.”⁵ For example, as we will discuss in this article, the Court has ruled that waivers may be implied, that the language of *Miranda* warnings may vary, that waivers need only be reasonably contemporaneous with the subsequent interview, and that pre-waiver conversations with suspects are permissible within fairly broad limits.

We will begin, however, by explaining the most basic requirement: that waivers must be knowing and intelligent.

“Knowing and Intelligent”

Because a waiver is defined as an “intentional relinquishment or abandonment of a known right,”⁶ the United States Supreme Court has ruled that *Miranda* waivers must be both “knowing” and “intelligent.”⁷ While this is a fundamental rule, for various reasons it continues to be a frequent source of litigation.

“Knowing” waivers

A *Miranda* waiver is deemed “knowing” if the suspect was correctly informed of his rights and the consequences of waiving them.⁸ Although the courts are aware that most suspects know their *Miranda* rights, officers are required to enumerate them because prosecutors have the burden of proving such knowledge by means of direct evidence.⁹ Consequently, officers must inform suspects of the following:

¹ (9th Cir. 2008) 516 F.3d 781, 783.

² (2000) 530 U.S. 428, 443.

³ *United States v. Washington* (1977) 431 U.S. 181, 188.

⁴ *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 681.

⁵ *Dickerson v. United States* (2000) 530 U.S. 428, 443. ALSO SEE *Berghuis v. Thompkins* (2010) ___ U.S. ___ [130 S.Ct. 2250, 2262 [*Miranda* “does not impose a formalistic waiver procedure”].

⁶ *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048; *People v. \$241,600* (1998) 67 Cal.App.4th 1100, 1109.

⁷ See *Colorado v. Spring* (1987) 479 U.S. 564, 572.

⁸ *Moran v. Burbine* (1986) 475 U.S. 412, 421.

⁹ See *Miranda v. Arizona* (1966) 384 U.S. 436, 471-72 [“No amount of circumstantial evidence that a person may have been aware of his rights will suffice.”]; *People v. Bennett* (1976) 58 Cal.App.3d 230, 239 [“The prosecution was required to prove that appellant was in fact aware of his rights”].

- (1) **RIGHT TO REMAIN SILENT:** The suspect must be informed of his Fifth Amendment right to refuse to answer questions; e.g., *You have the right to remain silent.*
- (2) “ANYTHING YOU SAY . . .” The suspect must be informed of the consequences of waiving his rights; e.g., *Anything you say may be used against you in court.*
- (3) **RIGHT TO COUNSEL:** The *Miranda* right to counsel can be tricky because it has three components: (a) the right to consult with an attorney before questioning begins, (b) the right to have an attorney present while the questioning is underway, and (c) the right to have an attorney appointed if the suspect cannot afford one; e.g., *You have the right to talk to a lawyer and to have him present while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning.*¹⁰

“ . . . AND WILL BE USED AGAINST YOU”: Officers need not—and should not—tell suspects that anything they say “will” be used against them. That is because it is plainly not true. After all, many of the things that suspects say to officers during custodial interrogation will not be used by prosecutors or would be irrelevant at trial; e.g., “This coffee sucks.” Consequently, it is sufficient to inform suspects that anything they say “may,” “might,” “can,” or “could” be used against them.¹¹

LANGUAGE MAY VARY: Officers are not required to recite the *Miranda* warnings exactly as they were enumerated in the *Miranda* decision or as they appear in a departmental *Miranda* card. Thus, the U.S. Supreme Court explained that, while the warnings required by *Miranda* “are invariable,” the Court “has not dictated the words in which the essential information must be conveyed.”¹² Instead, officers are required only to “reasonably convey” the *Miranda* rights.¹³

USING A MIRANDA CARD: Although the language may vary, it is usually best to read the warnings from a standard *Miranda* card to make sure that none of the essential information is inadvertently omitted,¹⁴ and to help prosecutors prove that the officers did not misstate the *Miranda* rights.¹⁵ As the Justice Department observed in its brief in *Florida v. Powell*, “[L]aw enforcement agencies have little reason to assume the litigation risk of experimenting with novel *Miranda* formulations.” Instead, it is “desirable police practice” and “in law enforcement’s own interest” to state warnings with maximum clarity.¹⁶

Similarly, the Court of Appeal noted, “If officers begin to vary from the standard language, their burden of establishing that defendants have been adequately advised before waiving their rights will increase substantially.”¹⁷ For example, in *Doody v. Ryan* the Ninth Circuit invalidated a waiver because an officer’s improvised *Miranda* warning was con-

¹⁰ See *Miranda v. Arizona* (1966) 384 U.S. 436, 467-72; *Florida v. Powell* (2010) __ U.S. __ [130 S.Ct. 1195, 1203]; *Moran v. Burbine* (1986) 475 U.S. 412, 421.

¹¹ See *Florida v. Powell* (2010) __ U.S. __ [130 S.Ct. 1195, 1203 [“can be used”]; *Dickerson v. United States* (2000) 530 U.S. 428, 435 [“can be used”]; *Colorado v. Spring* (1987) 479 U.S. 564, 577 [“may be used”]; *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 [“could be used”]; *People v. Johnson* (2010) 183 Cal.App.4th 253, 292 [“could be used”]. **NOTE:** Where did the grandiose “will be used” originate? The Court of Appeal explained it as follows: “In the latter part of the *Miranda* opinion the Court employed the overstatement ‘can and will be used.’ But at an earlier point the Court described the warning as being that what is said ‘may be used,’ and this alternative has been consistently approved by the lower courts. The courts have also upheld other formulations, including use of ‘can’ alone, of ‘might,’ and of ‘could.’” *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.

¹² *Florida v. Powell* (2010) __ U.S. __ [130 S.Ct. 1195, 1204]. ALSO SEE *People v. Cruz* (2008) 44 Cal.4th 636, 667 [“A valid waiver need not be of predetermined form”]; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 682 [“A reviewing court need not examine the *Miranda* warnings as if it were construing a will or defining the terms of an easement.”].

¹³ *Duckworth v. Eagan* (1989) 492 U.S. 195, 203; *People v. Wash* (1993) 6 Cal.4th 215, 236-37 [“The essential inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*.”].

¹⁴ See *People v. Bradford* (2008) 169 Cal.App.4th 843, 854.

¹⁵ See *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1091 [the waiver process was “somewhat sloppy”].

¹⁶ (2010) __ U.S. __ [130 S.Ct. 1195, 1206].

¹⁷ *People v. Prysock* (1982) 127 Cal.App.3d 972, 985. ALSO SEE *U.S. v. Warren* (3rd Cir. 2011) 642 F.3d 182, 187 [although the warning was sufficient, it was “disconcerting” that officer did not use a *Miranda* card, especially “considering the resources that have been expended to consider the [suppression] claim”].

verted into a “twelve-page rambling commentary” that was partly “misleading” and partly “unintelligible.”¹⁸

Reading from a *Miranda* card is especially important if the warning-waiver dialogue will not be recorded. This is because officers can usually prove that their warning was accurate by testifying that they recited it from a card, then reading to the court the warning from that card or a duplicate.¹⁹

MINORS: Because minors have the same *Miranda* rights as adults, officers are not required to provide them with any additional information.²⁰ For example, the courts have rejected arguments that minors must be told that they have a right to speak with a parent or probation officer before they are questioned, or that they have a right to have a parent present while they are questioned.²¹

“YOU CAN INVOKE WHENEVER YOU WANT”: Officers will sometimes supplement the basic warning by telling suspects that, if they waive their rights, they can stop answering questions at any time. This is an accurate statement of the law and is not objectionable.²²

NO ADDITIONAL INFORMATION: Officers are not required to furnish suspects with any additional information, even if the suspect might have found it useful in deciding whether to waive or invoke.²³ As the Supreme Court observed in *Colorado v. Spring*, “[A] valid waiver does not require that an individual be informed of all information ‘useful’ in making his decision or all information that might affect his decision to confess.”²⁴ For example, officers need not inform suspects of the topics they planned to discuss during the interview,²⁵ the nature of the crime under investigation,²⁶ the incriminating evidence that they had obtained so far,²⁷ the possible punishment upon conviction,²⁸ and (if not charged with the crime under investigation) that their attorney wants to talk to them.²⁹

INCORRECT MIRANDA WARNINGS: If officers misrepresented the nature of the *Miranda* rights or the consequences of waiving them, a subsequent waiver may be deemed invalid on grounds that it was not knowing and intelligent. For example, in *People v. Russo* an officer’s *Miranda* warning to Russo included the following: “If you didn’t do this, you don’t

¹⁸ (9th Cir. 2011) 649 F.3d 986, 1107.

¹⁹ See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15 [“[The officer] testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad’s responses.”].

²⁰ See *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [“special caution” is not required in determining whether a juvenile waived his *Miranda* rights]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72 [“A presumption that all minors are incapable of a knowing, intelligent waiver of constitutional rights is a form of stereo-typing that does not comport with the realities of everyday living in our urban society. Many minors are far more sophisticated and knowledgeable in these areas than their parents.”]; *U.S. v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074 [“The test for reviewing a juvenile’s waiver of rights is identical to that of an adult’s and is based on the totality of the circumstances.”].

²¹ See *Fare v. Michael C.* (1979) 442 U.S. 707 [no right to talk with probation officer]; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 215 [“There is no requirement that a minor be advised of and waive the opportunity to speak to a parent or to have a parent present during police questioning.”]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [no right to talk with mother]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72 [no right to consult with parents].

²² See *Berghuis v. Thompkins* (2010) __ US __ [130 S.Ct. 2250, 2256] [“[Y]ou have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.”]; *Florida v. Powell* (2010) __ US __ [130 S.Ct. 1195, 1198] [“officers told the suspect that he had ‘the right to use any of his rights at any time he wanted during the interview’”]; *People v. Clark* (1992) 3 Cal.4th 41, 120-21 [“The detectives repeatedly made clear to him that . . . he could stop the interview at any time by merely saying he wanted an attorney.”].

²³ See *Moran v. Burbine* (1986) 475 U.S. 412, 422 [“[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.”]; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 590 [“we do not require that a criminal defendant understand every consequence of waiving his rights or make the decision that is in his best interest”].

²⁴ (1987) 479 U.S. 564, 576.

²⁵ See *Colorado v. Spring* (1987) 479 U.S. 564, 577.

²⁶ See *People v. Wash* (1993) 6 Cal.4th 215, 239; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405; *People v. Boyette* (2002) 29 Cal.4th 381, 411; *People v. Acuna* (1988) 204 Cal.App.3d 602, 611.

²⁷ See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1235.

²⁸ See *People v. Hill* (1992) 3 Cal.4th 959, 982; *People v. Clark* (1993) 5 Cal.4th 950, 987, fn.11; *People v. Jackson* (1996) 13 Cal.4th 1164, 1207, fn.4.

²⁹ See *Moran v. Burbine* (1986) 475 U.S. 412, 422; *People v. Ledesma* (1988) 204 Cal.App.3d 682.

need a lawyer.” This bit of information rendered Russo’s waiver invalid because, said the court, “Russo was left with little choice but to waive the right to counsel in order, in his mind, to maintain the appearance of innocence.”³⁰

UTILIZING DECEPTION: Although officers must correctly explain the *Miranda* rights, a waiver will not be invalidated on grounds that they had lied to him about other matters. As the U.S. Supreme Court observed, “Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*’s concerns.”³¹ For example, waivers have been deemed knowing and intelligent when officers told the suspect that his victim was “hurt” even though she was dead,³² or when FBI agents told the suspect that they wanted to talk to him about “terrorism” when they actually wanted to question him about child molesting.³³

RECORDING WAIVERS: There is no requirement that officers record the waiver process.³⁴ Still, it is usually a good idea because it provides judges with proof of exactly what was said by the officers and the suspect. This was an issue in *People v. Gray* and the recording disposed of it. Said the court, “Thanks to the professionalism of [the officers] in their taping of the statement, there was little room to argue at

trial that the waiver was not complete and unequivocal.”³⁵ In addition, recordings may be helpful in determining whether a suspect waived or invoked because his tone of voice, emphasis on certain words, pauses, and even laughter may “add meaning to the bare words.”³⁶ Note that the waiver process, as well as the subsequent interview, may be recorded covertly.³⁷

“Intelligent” waivers

Suspects must not only know their rights in the abstract, they must have *understood* them. This is what the courts mean when they say that waivers must be “intelligent.”³⁸ As the Court of Appeal put it, “Essentially, ‘intelligent’ connotes knowing and aware.”³⁹ It should be noted that the term “intelligent” is misleading because, as the court pointed out in *People v. Simpson*, “it conjures up the idea that the decision to waive *Miranda* rights must be *wise*. That, of course, is not the idea.”⁴⁰

EXPRESS STATEMENT OF UNDERSTANDING: Technically, officers are not required to obtain an express statement from the suspect that he understood his rights. That is because the courts must consider the totality of circumstances in making this determination.⁴¹ As a practical matter, however, it is dangerous to rely on circumstantial evidence because it

³⁰ (1983) 148 Cal.App.3d 1172, 1177.

³¹ *Illinois v. Perkins* (1990) 496 U.S. 292, 297.

³² *People v. Tate* (2010) 49 Cal.4th 635, 683.

³³ *U.S. v. Farley* (11th Cir. 2010) 607 F.3d 1294.

³⁴ See *People v. Thomas* (2012) __ Cal.4th __ [2012 WL 3043901] [“we reject defendant’s contention that the absence of a recording of the *Miranda* advisements and his waiver of his rights precludes the conclusion that his waiver was knowing and voluntary”]; *People v. Lucas* (1995) 12 Cal.4th 415, 443 [“The police had no obligation to make a tape recording of the *Miranda* advisements”]. BUT ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 603 [although recording is not required, “we have no wish to discourage law enforcement officials from recording such interrogations”].

³⁵ (1982) 135 Cal.App.3d 859, 864.

³⁶ *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 526.

³⁷ See *Lopez v. United States* (1963) 373 U.S. 427, 439 [“Stripped to its essentials, petitioner’s argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent’s memory, or to challenge the agent’s credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.”]; *U.S. v. White* (1971) 401 U.S. 745, 751 [“If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant’s constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations”]; *People v. Jackson* (1971) 19 Cal.App.3d 95, 101 [“Admissions and confessions secretly recorded are admissible.”].

³⁸ See *Brady v. United States* (1970) 397 U.S. 749, 748 [“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”]; *People v. Clark* (1993) 5 Cal.4th 950, 985 [“All that is required is that the defendant comprehend all of the information the police are required to convey.”].

³⁹ *People v. Simpson* (1998) 65 Cal.App.4th 854, 859, fn.1.

⁴⁰ (1998) 65 Cal.App.4th 854, 859, fn.1.

⁴¹ See *Moran v. Burbine* (1986) 475 U.S. 412, 421; *Fare v. Michael C.* (1979) 442 U.S. 707, 724-25.

creates uncertainty and generates an additional issue for the trial court to resolve. Furthermore, as we will discuss later, an express statement of understanding may be necessary if the suspect's waiver was implied or if he was mentally impaired. Accordingly, it is best to ask the standard *Miranda*-card question: *Did you understand each of the rights I explained to you?* If he says yes, that should be adequate.⁴²

CIRCUMSTANTIAL EVIDENCE OF UNDERSTANDING: If the suspect said he understood his rights, but claimed in court that he didn't, the court may consider circumstantial evidence of understanding. The circumstances that are most frequently noted are the suspect's age, experience, education, background, and intelligence, prior arrests, and whether he had previously invoked his rights.⁴³

CLARIFYING THE RIGHTS: If the suspect said or indicated that he did not understand his rights, officers must try to clarify them.⁴⁴ For example, when asked if he understood his rights, the defendant in *People v. Cruz* answered "more or less."⁴⁵ So the officer "repeated each *Miranda* admonishment a second time, describing them in less 'formal' terms." The California Supreme Court ruled that such clarification was proper "so as to ensure that defendant

could better understand the rights he was waiving." Note that clarification concerning the right to counsel is frequently necessary because suspects may be confused as to whether a waiver of their right to have counsel present during the interview also constitutes a waiver of their right to be represented by counsel in court.⁴⁶ The answer, of course, is no.

MENTALLY IMPAIRED SUSPECTS: A suspect who tells officers that he understood his rights may later claim that he really didn't because his mental capacity was impaired due to alcohol or drugs, physical injuries, a learning disability, or a mental disorder. In most cases, however, the courts rule that waivers of impaired suspects were sufficiently "intelligent" if their answers to the officers' questions were responsive and coherent. As the California Supreme Court observed in *People v. Clark*, "[T]his court has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where, as in this case, there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him."⁴⁷ For example, in rejecting arguments that impaired suspects were unable to understand their rights, the courts have noted the following:

⁴² See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 ["Yeh"]; *People v. Memro* (1995) 11 Cal.4th 786, 834 ["Defendant said on both occasions that he understood the consequences of speaking, and elected to proceed. We cannot conclude that his waiver was made unknowingly or unintelligently."]; *U.S. v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3d 1252, 1259 [court rejects the argument that suspect who told officers he understood his rights did not really understand them because he was unfamiliar with the criminal justice system].

⁴³ See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 ["A recent high school graduate, Elstad was fully capable of understanding this careful administering of *Miranda* warnings."]; *People v. Samayoa* (1997) 15 Cal.4th 795, 831 [he "was an ex-felon who would have been familiar with the *Miranda* admonitions"]; *People v. Nelson* (2012) 53 Cal.4th 367, 375 [two prior arrests]; *People v. Mickle* (1991) 54 Cal.3d 140, 170 ["[Defendant] was familiar with the criminal justice system and could reasonably be expected to know that any statements made at this time might be used against him in the investigation and any subsequent trial"]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [defendant was a college student and had had "previous experience with law enforcement having been arrested as a juvenile"].

⁴⁴ See *People v. Turnage* (1975) 45 Cal.App.3d 201, 211 [the law "permits clarifying questions with regard to the individual's comprehension of his constitutional rights or the waiver of them"]; *People v. Wash* (1993) 6 Cal.4th 215, 239 ["[W]here a defendant expresses ambiguous remarks falling short of an invocation of his *Miranda* rights, the officers may continue talking for the purpose of obtaining clarification of his intentions."]; *Tolliver v. Sheets* (6th Cir. 2010) 594 F.3d 900, 921 ["The difference between permissible follow-up questions and impermissible interrogation clearly turns on whether the police are seeking clarification of something that the suspect has just said, or whether instead the police are seeking to expand the interview."].

⁴⁵ (2008) 44 Cal.4th 636, 668.

⁴⁶ See *Duckworth v. Egan* (1989) 492 U.S. 195, 204 ["We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel."].

⁴⁷ (1993) 5 Cal.4th 950, 988. **NOTE:** A suspect who was not fluent in English will be deemed to have understood his rights if he expressly said he understood them and his answers to the officers' questions were responsive and coherent. See *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1127-28 ["there was no indication by any of the officers that Mr. Rodriguez had difficulty understanding English nor that the officers had trouble understanding his English"]. ALSO SEE *People v. Gutierrez* (2012) __ Cal.Ap.4th __ [2012 WL 4336239] [waiver by injured suspect].

UNDER THE INFLUENCE OF DRUGS OR ALCOHOL

- Although the suspect had ingested methamphetamine and cocaine, and had not slept “for days,” his answers were “logical and rational.”⁴⁸
- When it was tested two hours after the interview ended, his blood-alcohol content was between .14% and .22%. But he “made meaningful responses to questions asked” and “nothing indicated that [he] was anything but rational.”⁴⁹
- His blood-alcohol content was approximately .21% and the arresting officer testified that his condition was such that he could not safely drive a car but “he otherwise knew what he was doing.”⁵⁰
- He was under the influence of PCP but his answers were “rational and appropriate to those questions.”⁵¹

MENTAL INSTABILITY

- Although the suspect had been diagnosed as a paranoid schizophrenic, he “participated in his conversations with detectives, and indeed was keen enough to change his story when [a detective] revealed that the fire originated from inside the car.”⁵²
- He had been admitted to a hospital because he was suffering from acute psychosis and was under the influence of drugs. In addition, he was “sometimes irrational.” Still, he “was responsive to his questioning.”⁵³

- He claimed to be mentally ill, but “coherently responded to all questioning and acknowledged his understanding of his rights.”⁵⁴
- He had just attempted suicide, but was “alert, and oriented” and “very much aware and awake, and knew what was going on.”⁵⁵

LEARNING DISABILITY

- His IQ was 47, but he testified he “knew what an attorney was, that he could get one, that he did not have to speak to police unless he wanted to, and that they could not force him to talk.”⁵⁶
- He “possessed relatively low intelligence” but was “sufficiently intelligent to pass a driver’s test, and to attempt to deceive officers by [lying to them].”⁵⁷
- His IQ was “below average” and he suffered from “several mental disorders,” but he said he understood his rights and he was “street smart.”⁵⁸
- His IQ was between 79 and 85 but he “completed the eighth grade in school. He is able to read and write and was able to work and function in society.”⁵⁹

It bears repeating that, as some of the courts noted in the above cases, the fact that the suspect attempted to deceive or manipulate officers in the course of an interview is a strong indication that he was sufficiently lucid to appreciate his predicament and formulate a plan (albeit unsuccessful) to outwit them.⁶⁰

⁴⁸ *U.S. v. Burson* (10th Cir. 2008) 531 F.3d 1254, 1260.

⁴⁹ *People v. Conrad* (1974) 31 Cal.App.3d 308, 321.

⁵⁰ *People v. Moore* (1971) 20 Cal.App.3d 444, 450.

⁵¹ *People v. Loftis* (1984) 157 Cal.App.3d 229, 232. ALSO SEE *People v. Markham* (1989) 49 Cal.3d 63, 66 [although the suspect appeared to be under the influence of “some drug,” his answers were “logically consistent”]; *People v. Ventura* (1985) 174 Cal.App.3d 784, 791 [although there was testimony that the suspect was “loaded on alcohol and drugs,” he admitted that he understood his *Miranda* rights].

⁵² *People v. Lewis* (2001) 26 Cal.4th 334, 384. ALSO SEE *People v. Watson* (1977) 75 Cal.App.3d 384, 397 [“A schizophrenic condition does not render a defendant incapable of effectively waiving his rights. Nor does the presence of evidence of subnormality require the automatic exclusion of a confession.”].

⁵³ *People v. Panah* (2005) 35 Cal.4th 395, 472.

⁵⁴ *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405-406. ALSO SEE *People v. Palmer* (1978) 80 Cal.App.3d 239, 257 [the suspect “had a history of emotional instability” but “was able to respond to the questions asked of her coherently”].

⁵⁵ *Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 88.

⁵⁶ *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.

⁵⁷ *People v. Whitson* (1998) 17 Cal.4th 229, 249.

⁵⁸ *U.S. v. Robinson* (4th Cir. 2005) 404 F.3d 850, 861. ALSO SEE *In re Brian W.* (1981) 125 Cal.App.3d 590, 602 [“He had an I.Q. of 81 and the mental age of 11 or 12 but this is only a factor to be considered in determining whether he lacked the ability to understand his rights.”]; *U.S. v. Rosario-Diaz* (1st Cir. 2000) 202 F.3d 54, 69.

⁵⁹ *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1413.

⁶⁰ See *People v. Whitson* (1998) 17 Cal.4th 229, 249.

MINORS: The courts presume that minors are fully capable of understanding their *Miranda* rights.⁶¹ As the Court of Appeal observed in *In re Charles P.*, “A presumption that all minors are incapable of a knowing, intelligent waiver of constitutional rights is a form of stereotyping that does not comport with the realities of every day living in our urban society.”⁶² But because the age, maturity, education, and intelligence of a minor may have a greater affect on understanding than they do on adults, these circumstances may be taken into account.⁶³ It is also relevant that the minor had previous experience with officers and the courts.

For example, in ruling that minors were sufficiently capable of understanding their rights, the courts have noted the following:

- “[H]e was no stranger to the justice system. Defendant had been arrested twice before . . . Both sets of charges led to proceedings in juvenile court, and the second resulted in a commitment to juvenile hall.”⁶⁴
- “Nelson was 15 years old. He had two prior arrests, the most recent resulting in a several month stay in juvenile hall.”⁶⁵
- “The minor was an experienced 15-year old at the time of his arrest [and had been] arrested innumerable times in the last couple of years.”⁶⁶

- “He was a 16 year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years . . . There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be.”⁶⁷
- “Although she was a 16-year-old juvenile, she was streetwise, having run away from home at the ages of 13 and 15, and having traveled and lived on her own in San Francisco and the Southwest. [When questioned about the murder] she lied to the police about her name, age, and family background. She [invoked the right to counsel] when [the investigators] read her her *Miranda* rights which stopped the interrogation process.”⁶⁸

Voluntary Waivers

In addition to being “knowing and intelligent,” *Miranda* waivers must be “voluntary.” This simply means that officers must not have obtained the waiver by means of threats, promises, or any other form of coercion.⁶⁹ Thus, in rejecting arguments that *Miranda* waivers were involuntary, the courts have noted the following:

⁶¹ See *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [“We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.”]; *People v. Lewis* (2001) 26 Cal.4th 334, 384 [“We also reject defendant’s contention that his young age and low intelligence precluded him from making a voluntary, knowing, and intelligent waiver.”]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [“special caution” not required in determining whether a juvenile waived his *Miranda* rights].

⁶² (1982) 134 Cal.App.3d 768, 771-72. ALSO SEE *In re Eduardo G.* (1980) 108 Cal.App.3d 745, 756 [“there is no presumption that a minor is incapable of a knowing, intelligent waiver of his rights”]; *U.S. v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074 [“The test for reviewing a juvenile’s waiver of rights is identical to that of an adult’s and is based on the totality of the circumstances.”].

⁶³ See *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S.Ct. 2394]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169 [“Because defendant is a minor, the required inquiry includes evaluation of the juvenile’s age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings”]; *People v. Nelson* (2012) 53 Cal.4th 367, 378 [“courts must consider a juvenile’s state of mind”].

⁶⁴ *People v. Lessie* (2010) 47 Cal.4th 1152, 1169. ALSO SEE *In re Steven C.* (1970) 9 Cal.App.3d 255, 268, fn.12; *In re Charles P.* (1982) 134 Cal.App.3d 768, 772 [“He was on probation and had been advised of his *Miranda* rights on a prior occasion”]; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 216 [“prior arrest for arson”]; *People v. Lewis* (2001) 26 Cal.4th 334, 386 [minor “had prior experience with the police”].

⁶⁵ *People v. Nelson* (2012) 53 Cal.4th 367, 375.

⁶⁶ *In re Frank C.* (1982) 138 Cal.App.3d 708, 712.

⁶⁷ *Fare v. Michael C.* (1979) 442 U.S. 707, 726.

⁶⁸ *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 578.

⁶⁹ See *Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2260] [a waiver “must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception”]; *Colorado v. Connelly* (1986) 479 U.S. 157, 169 [“Of course, a waiver must at a minimum be ‘voluntary’ to be effective against an accused.”]. **NOTE:** While some older cases held that a waiver might be involuntary if it was a result of the “slightest pressure,” this standard was abrogated by the U.S. Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-86. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.10.

- “[T]here is no evidence that Barrett was threatened, tricked, or cajoled into his waiver.”⁷⁰
- “No coercive tactics were employed in order to obtain defendant’s waiver of his rights.”⁷¹
- “[T]he record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements.”⁷²
- “There is no doubt that Spring’s decision to waive his Fifth Amendment privilege was voluntary. He alleges no coercion of a confession by means of physical violence or other deliberate means calculated to break his will.”⁷³

Two other things should be noted. First, the rule that prohibits involuntary *Miranda* waivers is similar to the rule that prohibits involuntary confessions and admissions, as both require the suppression of statements that were obtained by means of police coercion. As the California Supreme Court observed, the voluntariness of a *Miranda* waiver and the voluntariness of a statement are based on “the same inquiry.”⁷⁴ The main difference is that a waiver is involuntary if officers obtained it by pressuring the suspect into waiving his rights; while a statement is involuntary if, after obtaining a waiver, officers coerced the suspect into making it.

Second, because the issue is whether the officers pressured the suspect into waiving, the suspect’s impaired mental state—whether caused by intoxication, low IQ, young age, or such—is relevant only if the officers exploited it to obtain a waiver.⁷⁵

Express and Implied Waivers

Until now, we have been discussing what officers must do to obtain a valid waiver of rights. But there is also something the suspect must do: waive them. As we will now discuss, the courts recognize two types of *Miranda* waivers: (1) express waivers, and (2) waivers implied by conduct.

EXPRESS WAIVERS: An express waiver occurs if the suspect signs a waiver form or if he responds in the affirmative when, after being advised of his rights, he says he is willing to speak with the officers; e.g., “*Having these rights in mind, do you want to talk to us?*” “Yes.” Note that while an affirmative response is technically only a waiver of the right to remain silent (since the suspect said only that he was willing to “talk” with officers), the courts have consistently ruled it also constitutes a waiver of the right to counsel if, thereafter, the suspect freely responded to the officers’ questions.⁷⁶

Three other things should be noted about express waivers. First, they constitute “strong proof” of a valid waiver.⁷⁷ Second, an affirmative response will suffice even if the suspect did not appear to be delighted about waiving his rights. For example, in *People v. Avalos* the California Supreme Court rejected the argument that the defendant did not demonstrate a sufficient willingness to waive when, after being asked if he wanted to talk, he said, “Yeah, whatever; I don’t know. I guess so. Whatever you want to talk about, you just tell me, I’ll answer.”⁷⁸

⁷⁰ *Connecticut v. Barrett* (1987) 479 U.S. 523, 527.

⁷¹ *People v. Saucedo-Contreras* (2012) __ Cal.4th __ [2012 WL 3263996].

⁷² *Moran v. Burbine* (1986) 475 U.S. 412, 421. ALSO SEE *People v. Whitson* (1998) 17 Cal.4th 229, 248-49; *In re Brian W.* (1981) 125 Cal.App.3d 590, 603.

⁷³ *Colorado v. Spring* (1987) 479 U.S. 564, 573-74.

⁷⁴ *People v. Guerra* (2006) 37 Cal.4th 1067, 1093. ALSO SEE *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70 [“There is obviously no reason to require more in the way of a ‘voluntariness’ inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context.”].

⁷⁵ See *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70 [“The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on ‘free choice’ in any broader sense of the word.”]; *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 584 [“The Supreme Court has said that when the police are aware of a suspect’s mental defect but persist in questioning him, such dogged persistence can contribute to a finding that the waiver was involuntary.” Citations omitted.]. COMPARE *Illinois v. Perkins* (1990) 496 U.S. 292, 297 [an otherwise voluntary waiver will not be invalidated merely because officers utilized “[p]loys to mislead” or “lull him into a false sense of security.”].

⁷⁶ See *North Carolina v. Butler* (1979) 441 U.S. 369, 372-73 [Court rejects argument that a suspect who agreed to speak with officers must also expressly waive his right to counsel]; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 406 [“The record shows Mitchell understood his rights, including that of counsel, and waived each by agreeing to answer the officer’s questions.”].

⁷⁷ *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [“An express written or oral statement of waiver ... is usually strong proof of the validity of that waiver but is not inevitably either necessary nor sufficient to establish waiver.”].

⁷⁸ (1984) 37 Cal.3d 216, 230.

Third, if the suspect expressly waived his rights, it is immaterial that he refused to sign a waiver form,⁷⁹ or that he refused to give a written statement.⁸⁰

IMPLIED WAIVERS: In 1969 the California Supreme Court ruled that *Miranda* waivers may be implied under certain circumstances.⁸¹ Ten years later, the U.S. Supreme Court reached the same conclusion.⁸² And yet, because the language in both decisions was somewhat tentative,⁸³ there was some uncertainty as to what was required to obtain an implied waiver. Consequently, officers would often seek express waivers out of an abundance of caution.

In 2010, however, the U.S. Supreme Court ruled unequivocally in *Berghuis v. Thompkins* that a waiver will be implied if the suspect, having “a full understanding of his or her rights,” thereafter answered the officers’ questions. Thus, in ruling that Thompkins had impliedly waived his rights, the Court said, “If Thompkins wanted to remain silent, he could have said nothing in response to [the officer’s] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation.”⁸⁴ But because did neither of these things, the Court ruled he had impliedly waived his rights.

Consequently, a waiver of both the right to remain silent and the right to counsel will be found if the following circumstances existed:

- (1) **CORRECTLY ADVISED:** Officers correctly informed the suspect of his rights.
- (2) **UNDERSTOOD:** The suspect said he understood his rights.
- (3) **NO COERCION:** Officers exerted no pressure on the suspect to waive his rights.⁸⁵

Thus, in ruling that the defendant in the post-*Thompkins* case of *People v. Nelson* had impliedly waived his rights, the California Supreme Court observed, “Although [the defendant] did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights.”⁸⁶

It should be noted that in *People v. Johnson* the California Supreme Court indicated that a waiver might be implied only if the suspect freely and unreservedly answered the officers’ questions.⁸⁷ But the Court in *Thompkins* seemed to reject this idea, as it ruled that Thompkins had impliedly waived his rights even though he was “largely silent during the interrogation which lasted about three hours.”⁸⁸

⁷⁹ See *Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2256] [“Thompkins declined to sign the form.”]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78; *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1315 [“The Seventh and Eighth Circuits, and a number of other circuits, have stated that a refusal to sign a waiver form does not show that subsequent statements are involuntary.” Citations omitted.]; *U.S. v. Brown* (7th Cir. 2011) 664 F.3d 1115, 1118 [“It is immaterial that defendant did not sign a waiver form”]; *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 123; *U.S. v. Binion* (8th Cir. 2009) 570 F.3d 1034, 1041 [“Refusing to sign a written waiver of the privilege against self incrimination does not itself invoke that privilege”].

⁸⁰ See *Connecticut v. Barrett* (1987) 479 U.S. 523, 530, fn.4 [“[T]here may be several strategic reasons why a defendant willing to speak to the police would still refuse to write out his answers to questions”].

⁸¹ See *People v. Johnson* (1969) 70 Cal.2d 541, 558.

⁸² See *North Carolina v. Butler* (1979) 441 U.S. 369, 374-75.

⁸³ See *North Carolina v. Butler* (1979) 441 U.S. 369, 374-75 [“the question of waiver must be determined on “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”]; *People v. Johnson* (1969) 70 Cal.2d 541, 558 [“Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them.” Emphasis added.].

⁸⁴ (2010) __ U.S. __ [130 S.Ct. 2250, 2263].

⁸⁵ **NOTE:** The following pre-*Berghuis* opinions were consistent with *Berghuis*: *People v. Lessie* (2010) 47 Cal.4th 1152, 1169 [“While defendant did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights.”]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 86; *People v. Johnson* (2010) 183 Cal.App.4th 253, 294; *People v. Whitson* (1998) 17 Cal.4th 229, 245 [“the investigating police officers advised defendant of his *Miranda* rights at each of the three interviews. On each one of these occasions, defendant affirmatively told the interviewing officers that he understood those rights [and] his answers were responsive to the questions asked of him.”]; *People v. Riva* (2003) 112 Cal.App.4th 981, 988-89; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1127-28.

⁸⁶ (2012) 53 Cal.4th 367, 380. Citations omitted. ALSO SEE *People v. Gutierrez* (2012) __ Cal.App.4th __ [2012 WL 4336239] [“A defendant, by his words and conduct, may make an implied waiver of his *Miranda* rights by acknowledging that he understands the rights read and answering questions.”].

⁸⁷ (1969) 70 Cal.2d 541, 558 [“mere silence of the accused followed by grudging responses to leading questions will be entitled to very little probative value”].

⁸⁸ (2010) __ U.S. __ [130 S.Ct. 2250, 2259].

Timely Waivers

The final requirement for obtaining a *Miranda* waiver is that the waiver must be timely or, in legal jargon, “reasonably contemporaneous” with the start or resumption of the interview.⁸⁹ This means that officers may be required to obtain a new waiver or at least remind the suspect of his rights if, under the circumstances, there was a reasonable likelihood that he had forgotten his rights or believed they had somehow expired. On the other hand, the California Supreme Court observed that “where a subsequent interrogation is reasonably contemporaneous with a prior knowing and intelligent waiver, a readvisement of *Miranda* rights is unnecessary.”⁹⁰

As a practical matter, there are only two situations in which a new warning or reminder is apt to be required. The first occurs if officers obtained a waiver long before they began to question the suspect. This would happen, for example, if an officer obtained a waiver at the scene of the arrest, but the suspect was not questioned until after he had been driven to the police station. If such cases, the suspect may later claim in court that he had forgotten his rights in the interim. (This is one reason why officers should not *Mirandize* suspects or seek waivers unless they want to begin an interview immediately.) In any event, the most important factor in these cases is simply the number of minutes or hours between the time the suspect waived his rights and the time the interview began.⁹¹

The second situation is more common as it occurs when officers recessed or otherwise interrupted a lengthy interview at some point. This typically happens when officers needed to compare notes, consult with other officers or superiors, interview other suspects or witnesses, conduct a lineup, or provide the suspect with a break. Although the Court of Appeal has said that a new *Miranda* warning “need not precede every twist and turn in the investigatory phase of the criminal proceedings,”⁹² and although these arguments are frequently contrived, officers need to know what circumstances are relevant so they can determine whether a new waiver may be necessary.

CHANGES IN LOCATION, OFFICERS, TOPIC: In addition to the time lapse between the waiver and the resumption of the interview, the courts will consider whether there was a change in circumstances that would have caused the suspect to reasonably believe that his *Miranda* rights did not apply to the new situation. What changed circumstances are important? The following, singly or in combination, are frequently cited:

- **CHANGE IN LOCATION:** The site of the interview had changed during the break.
- **CHANGE IN OFFICERS:** The pre- and post-break interviews were conducted by different officers.
- **CHANGE IN TOPIC:** When the interview resumed after the break, the officers questioned the suspect about a different topic.⁹³

⁸⁹ See *Wyrick v. Fields* (1982) 459 U.S. 42; *People v. Smith* (2007) 40 Cal.4th 483, 504 [“This court repeatedly has held that a *Miranda* readvisement is not necessary before a custodial interrogation is resumed, so long as a proper warning has been given, and the subsequent interrogation is reasonably contemporaneous with the prior knowing and intelligent waiver.”]; *People v. Lewis* (2001) 26 Cal.4th 334, 386. ALSO SEE *Berghuis v. Thompkins* (2010) ___ U.S. ___ [130 S.Ct. 2250, 2263] [officers are “not required to rewarn suspects from time to time”].

⁹⁰ *People v. San Nicolas* (2004) 34 Cal.4th 614, 640.

⁹¹ **NOTE:** There is no set time limit after which a reminder or new waiver will be required. See *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1312 [“The courts have generally rejected a per se rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners.”].

⁹² *People v. Schenk* (1972) 24 Cal.App.3d 233, 236

⁹³ See *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. Also see *People v. Martinez* (2010) 47 Cal.4th 911, 944-50 [overnight, same location, different officers, different topics, reminder given]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [“Both interrogations were conducted by the same officer.”]; *People v. Rich* (1988) 45 Cal.3d 1036, 1077 [new waiver not required merely because the defendant was notified he had failed a polygraph test]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 640 [“*Miranda* does not require a second advisement when a new interviewer steps into the room.”]; *People v. Schenk* (1972) 24 Cal.App.3d 233, 236 [“[A] repeated and continued *Miranda* warning need not precede every twist and turn in the investigatory phase of the criminal proceedings.”]; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1129 [“[T]here were no intervening events which might have given Rodriguez-Preciado the impression that his rights had changed in a material way.”]; *Guam v. Dela Pena* (9th Cir. 1995) 72 F.3d 767, 769 [an arrest does not automatically constitute a sufficient changed circumstance to require a new waiver].

SUSPECT’S STATE OF MIND: The suspect’s impaired mental state or young age are relevant as they might affect his ability to remember his rights as the interview progressed and as circumstances changed. Conversely, his mental alertness would tend to demonstrate an ability to retain this information. Thus, in ruling that a waiver was reasonably contemporaneous with an interview that resumed over 30 hours later, the court in *People v. Mickle* observed that “[n]othing in the record indicates that defendant was mentally impaired or otherwise incapable of remembering the prior advisement.”⁹⁴

MIRANDA REMINDERS: Even if there was some mental impairment or a change in circumstances, the courts usually reject timeliness arguments if the officers reminded the suspect of his *Miranda* rights when the interview began or resumed; e.g., *Do you remember the rights I read to you earlier?* If he says yes, that will usually suffice. For example, in *People v. Viscotti* the court noted that the defendant “was reminded of the rights he had waived earlier in the day . . . [the officer] clearly implied that those rights were still available to defendant.”⁹⁵

Before leaving this subject, here are examples of situations in which the courts rejected arguments that the time lapse between the waiver and the beginning or resumption of an interview rendered the waiver untimely:

<u>Hours</u>	<u>Location</u>	<u>Officers</u>	<u>Topics</u>	<u>Remind</u>
2	Same	Same	Same	Yes ⁹⁶
5	Same	Different	Same	No ⁹⁷
6	Same	Same	Same	No ⁹⁸
9	Different	Same	Same	No ⁹⁹
12	Same	Same	Same	Yes ¹⁰⁰
15	Same	Same	Same	Yes ¹⁰¹
16	Same	Same	Same	Yes ¹⁰²
27	Same	Same	Same	Yes ¹⁰³
36	Same	Same	Same	Yes ¹⁰⁴

Pre-Waiver Communications

Before seeking a waiver, officers will almost always have some conversation with the suspect. Frequently, it will consist of small talk to help relieve the tension that is inherent in any custodial interrogation. This is, of course, permissible so long as it was relatively brief. As the Ninth Circuit observed in *Clark v. Murphy*, “There is nothing inherently wrong with efforts to create a favorable climate for confession.”¹⁰⁵

There are, however, two types of pre-waiver communications that may invalidate a subsequent waiver on grounds that they undermined the suspect’s ability to freely decide whether to waive his *Miranda* rights. They are (1) communications that were part of a so-called “two-step” interrogation process, and (2) communications in which officers trivialized the

⁹⁴ (1991) 54 Cal.3d 140, 170. ALSO SEE *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [court noted that the defendant was a college student and had had “previous experience with law enforcement having been arrested as a juvenile.”]; *People v. Smith* (2007) 40 Cal.4th 483, 504 [we consider “the suspect’s sophistication or past experience with law enforcement”].

⁹⁵ (1992) 2 Cal.4th 1, 55. ALSO SEE *People v. Pearson* (2012) 53 Cal.4th 306, 317 [“defendant was asked if he remembered his *Miranda* rights, and he said he did”]; *People v. Martinez* (2010) 47 Cal.4th 911, 950 [“they did remind him of the admonition given the night before and then specifically asked him if he remembered those rights and whether he still wanted to talk”]; *People v. Smith* (2007) 40 Cal.4th 483, 504 [relevant circumstances include “an official reminder of the prior advisement”]; *People v. McFadden* (1970) 4 Cal.App.3d 672, 687 [reminder after one day lapse OK]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78 [reminder after three day lapse OK].

⁹⁶ *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 944-50.

⁹⁷ *People v. Lewis* (2001) 26 Cal.4th 334, 386-87.

⁹⁸ *People v. Miller* (1996) 46 Cal.App.4th 412, 418.

⁹⁹ *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972.

¹⁰⁰ *People v. Smith* (2007) 40 Cal.4th 483, 504-5.

¹⁰¹ *Guam v. Dela Pena* (9th Cir. 1995) 72 F.3d 767, 770.

¹⁰² *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1088.

¹⁰³ *People v. Pearson* (2012) 53 Cal.4th 306, 316-17.

¹⁰⁴ *People v. Mickle* (1991) 54 Cal.3d 140, 171.

¹⁰⁵ (9th Cir. 2003) 331 F.3d 1062, 1073. ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 559 [“the officers engaged him in some small talk to put him at ease”]; *Mickey v. Ayers* (9th Cir. 2010) 606 F.3d 1223, 1235 [“Casual conversation is generally not the type of behavior that police should know is reasonably likely to elicit an incriminating response.”]; *U.S. v. Tail* (8th Cir. 2006) 459 F.3d 854, 858 [“Polite conversation is not the functional equivalent of interrogation.”].

Miranda protections. Less problematic, but worth discussing, is the subject of “softening up.” Finally, we will cover the common—and usually legal—practice of seeking a waiver after informing the suspect of some or all the evidence that tends to prove he is guilty.

The “Two Step”

In 2004, the U.S. Supreme Court ruled in *Missouri v. Seibert* that the pre-waiver tactic known as the “two step” was illegal.¹⁰⁶ What’s a two step? It was a crafty device in which officers would (step one) blatantly interrogate the suspect before obtaining a *Miranda* waiver. The officers knew, of course, that any statement he made would be suppressed, but they didn’t care because, if he confessed or made a damaging admission, they would go to step two. Here, the officers would seek a waiver and, if the suspect waived, they would try to get him to repeat his previous statement.¹⁰⁷

In most cases, they succeeded because the suspect would think (erroneously) that his first statement could be used against him and, therefore, he had nothing to lose by repeating it. As the Court in *Seibert*

explained, the two step renders *Miranda* warnings ineffective “by waiting for a particularly opportune time to give them, after the suspect has already confessed.”

Although the Court banned two-step interviews, the justices could not agree on a test for determining whether officers had, in fact, engaged in such conduct. So the lower courts were forced to utilize a seldom-used procedure for resolving these issues.¹⁰⁸ And in implementing this procedure, both the California Supreme Court and the Ninth Circuit concluded that the appropriate test focuses on the officers’ intent. Specifically, a two-step violation results if the officers deliberately utilized a two-phase interrogation for the purpose of undermining *Miranda*.¹⁰⁹

How can the courts determine the officers’ intent? It is seldom difficult because they will usually have begun by conducting a systematic, exhaustive, and illegal pre-waiver interrogation of the suspect pertaining to the crime under investigation; and the interrogation will have produced a confession or highly incriminating statement which the suspect essentially repeated after he waived his rights.¹¹⁰

¹⁰⁶ (2004) 542 U.S. 600.

¹⁰⁷ See *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973 [“A two-step interrogation involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting a repeated confession.”].

¹⁰⁸ **NOTE:** Because none of the views in *Seibert* garnered the votes of five Justices, the holding of the Court “may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. U.S.* (1977) 430 U.S. 188, 193. Because Justice Kennedy concurred in the judgment of the plurality on the narrowest grounds (he rejected the plurality’s position that a “fruits” analysis should be applied to unintentional violations), his opinion represents the holding of the Court. And because Justice Kennedy would apply the “fruits” analysis only if the two-step procedure was employed deliberately, a statement will not be suppressed if it was employed inadvertently. See *People v. Camino* (2011) 188 Cal.App.4th 1359, 1370 [“Because Justice Kennedy concurred in the judgment on the narrowest grounds, his concurring opinion [in which the invalidity of a waiver depends on whether the officers intended to circumvent *Miranda*] represents the *Seibert* holding.”]. BUT ALSO SEE *U.S. v. Heron* (7th Cir. 2009) 564 F.3d 879, 885 [court questions whether *Seibert* established an intent-based test].

¹⁰⁹ See *People v. Scott* (2011) 52 Cal.4th 452, 478 [two-step violation occurs if “the officers were following a policy of disregarding the teaching of *Miranda*”]; *U.S. v. Reyes-Bosque* (9th Cir. 2010) 596 F.3d 1017, 1031 [“If the use of the two-step method is not deliberate, the post-warning statements are admissible if they were voluntarily made.”].

¹¹⁰ See *Missouri v. Seibert* (2004) 542 U.S. 600, 616 [the questioning was “systematic, exhaustive, and managed with psychological skill,” adding that when the police were finished “there was little, if anything, of incriminating potential left unsaid.”]; *Bobby v. Dixon* (2011) __ U.S. __ [132 S.Ct. 26, 31 [in discussing *Seibert*, the court noted that a “detective exhaustively questioned Seibert”]; *People v. Camino* (2010) 118 Cal.App.4th 1359, 1376 [court notes “the comprehensiveness of the first interview which left little, if anything, of incriminating potential left unsaid”]; *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 [“[T]he method and timing of the two interrogations establish intentional, calculated conduct by the police”; the unwarned interrogation “lasted approximately ninety minutes”]. COMPARE *People v. San Nicolas* (2005) 34 Cal.4th 614, 639 [“[D]efendant answered a few questions posed by the Nevada police officer concerning the location of his car and his duffel bag. Defendant did not speak about the crime itself.”]; *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [court noted the brevity of the initial questioning]; *U.S. v. Walker* (8th Cir. 2008) 518 F.3d 983, 985 [the pre-waiver interview consisted of a single question]; *U.S. v. Fellers* (8th Cir. 2005) 397 F.3d 1090, 1098 [the pre-waiver conversation “was relatively brief”]. COMPARE: *Bobby v. Dixon* (2011) __ U.S. __ [132 S.Ct. 26, 31] [“But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had ‘nothing whatsoever’ to do with Hammer’s disappearance.”].

Other circumstances that are indicative of a two-step interview include the officers' act of blatantly or subtly reminding the suspect during the post-waiver interrogation that he had already "let the cat out of the bag," the officers' use of interrogation tactics (e.g., good-cop/bad-cop) during the pre-waiver interrogation, and a short time lapse between the pre- and post-waiver statements.¹¹¹

Trivializing Miranda

Although there is not much law on this subject, a court might invalidate a waiver if officers obtained it after trivializing the *Miranda* rights or minimizing the importance of his decision to talk with them. Thus, in *People v. Musselwhite* the California Supreme Court said:

We agree with the proposition that evidence of police efforts to trivialize the rights accorded suspects by the *Miranda* decision—by "playing down," for example, or minimizing their legal significance—may under some circumstances suggest a species of prohibited trickery and weighs against a finding that the suspect's waiver was knowing, informed, and intelligent.¹¹²

The court then ruled, however, that the officer who questioned Musselwhite did not engage in such a practice by merely saying, "[W]hat we'd like to do is just go ahead and advise you of your rights before we even get started and that way there's no problem with any of it." In contrast, in *Doody v. Ryan* the

Ninth Circuit ruled that a juvenile's waiver was invalid because, among other things, the officers had implied that the *Miranda* warnings "were just formalities."¹¹³

"Softening up"

Defendants sometimes argue that, although they were not actually coerced or otherwise pressured into waiving their rights, their waiver was nevertheless involuntary because officers engaged in a pre-waiver process known as "softening up." The term comes from the 1977 case of *People v. Honeycutt*,¹¹⁴ a controversial decision of the California Supreme Court in which a minority of the court opined that a waiver resulting from "softening up" would be invalid. Although the justices neglected to define the term, the conduct they labeled as "softening up" consisted of a lengthy pre-waiver conversation in which the officers suggested to the suspect that it would be advantageous to talk to them because they were on his "side."

For various reasons, however, California courts have not been receptive to "softening up" claims. One reason is, as the Court of Appeal noted, "*Honeycutt* involves a unique factual situation and hence its holding must be read in the particular factual context in which it arose."¹¹⁵ In addition, the *Honeycutt* court's discussion of "softening up" was pure dicta (i.e., it was irrelevant to the resolution of the case¹¹⁶) and it was contained in a plurality

¹¹¹ See *People v. Camino* (2010) 118 Cal.App.4th 1359, 1376 [court notes "the continuity between the two interviews"]; *U.S. v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1159 [relevant circumstances include "the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements."]; *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [court notes the "lack of any reference to the prewarning statements during the more comprehensive postwarning interrogation" and the four-hour delay between the two admissions]; *U.S. v. Heron* (7th Cir. 2009) 564 F.3d 879, 887 ["Here, the lengthy temporal separation between Heron's first and second encounters persuades us that the district court did not err when it found that the later warnings served their intended purpose."]; *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 [the pre-waiver interrogation "included some good cop/bad cop questioning tactics"].

¹¹² (1998) 17 Cal.4th 1216, 1237.

¹¹³ (9th Cir. 2011) 649 F.3d 986, 1002. BUT ALSO SEE *People v. Johnson* (2010) 183 Cal.App.4th 253, 294 ["Referring to the process as clearing a 'technicality' and encouraging Holmes to talk and ask questions did not minimize the significance of her rights or the risks of her speaking with detectives."].

¹¹⁴ (1977) 20 Cal.3d 150.

¹¹⁵ *People v. Patterson* (1979) 88 Cal.App.3d 742, 751. ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 602 ["But unlike in *Honeycutt*, neither [of the officers] discussed the victim. Nor is there any other evidence suggesting that the manner in which [the officers] engaged in small talk overbore defendant's free will." *Honeycutt* is thus distinguishable.]; *People v. Scott* (2011) 52 Cal.4th 452, 478 [no softening up as the officers "had no prior relationship with defendant [and] did not seek to ingratiate themselves with him by discussing unrelated past events and former acquaintances. Nor did they disparage his victims.]; *People v. Michaels* (2002) 28 Cal.4th 486, 511 ["the facts here are not at all like *Honeycutt*"]; *People v. Posten* (1980) 108 Cal.App.3d 633, 647 ["*Honeycutt* is distinguishable on its facts"].

¹¹⁶ See *People v. Mendoza* (2000) 23 Cal.4th 896, 915 ["A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided."].

decision (i.e., a majority of the justices did not endorse it¹¹⁷). In addition, *Honeycutt* was based on the premise that softening-up renders a waiver “involuntary.” But nine years later the United States Supreme Court rejected the idea that involuntariness can result from anything other than *coercive* police conduct.¹¹⁸ And because it is hardly “coercive” for officers to pretend to be sympathetic to the suspect’s plight, there is reason to believe that *Honeycutt* is a dead letter.

Putting your cards on the table

Before seeking a waiver, officers may make a tactical decision to disclose to the suspect some or all of the evidence of his guilt they had obtained to date. In many cases, the officers think that the suspect will be more likely to waive his rights if he realized there was abundant evidence of his guilt, or if he thought he could explain it away.

It is, of course, possible that the suspect will respond to such a disclosure by making an incriminating statement. But the courts have consistently ruled that it does not constitute pre-waiver “interrogation,” nor is it otherwise impermissible if the officers did so in a brief, factual, and dispassionate manner.

For example, in *People v. Gray*¹¹⁹ the officers sought a waiver from a murder suspect after telling him about “considerable evidence pointing to his involvement in the death.” In rejecting an argument that such a tactic had somehow invalidated his subsequent waiver, the court noted that the officer’s recitation of the facts was “accurate, dispassionate and not remotely threatening.”

In addition, having such information may be helpful to the suspect in determining whether or not to waive his rights. Thus, the Ninth Circuit ruled that “*Miranda* does not preclude officers, after a defendant has invoked his *Miranda* rights, from informing the defendant of evidence against him or of other circumstances which might contribute to an intelligent exercise of his judgment.”¹²⁰

For these reasons the courts have ruled that officers did not violate *Miranda* when, before seeking a waiver, they provided the suspect with the following information:

YOU WERE ID’D: Officers told the suspect that a victim or witness had identified him as the perpetrator.¹²¹

WE FOUND THE GUN: An FBI agent told a convicted felon, “We found a gun in your house.”¹²²

WE FOUND THE DOPE: A Border Patrol agent told the suspect that “agents had seized approximately 600 pounds of cocaine and that [he] was in serious trouble.”¹²³

PLAYING WIRETAPPED CONVERSATIONS: Officers played a recording of a wiretapped conversation that incriminated the suspect.¹²⁴

CHECK OUT THIS PHOTO: An FBI agent showed the suspect a surveillance photo of the suspect as he was robbing a bank.¹²⁵

YOUR ACCOMPLICE CONFESSED: An officer told the suspect that his accomplice had made a statement and, as the result, the case against the suspect was looking “pretty good.”¹²⁶

POV

In the next edition: Miranda invocations and post-invocation communications.

¹¹⁷ See *People v. Gray* (1982) 135 Cal.App.3d 859, 863 [“the entire ‘softening up’ issue in *Honeycutt* was *dicta* joined in by at most four justices.”]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829 [plurality decisions do not constitute binding authority].

¹¹⁸ *Colorado v. Connelly* (1986) 479 U.S. 157, 170. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 988.

¹¹⁹ (1982) 135 Cal.App.3d 8593. ALSO SEE *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411; *U.S. v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1134 [“even when a defendant has invoked his *Miranda* rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case”].

¹²⁰ *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169.

¹²¹ *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192.

¹²² *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203. ALSO SEE *U.S. v. McGlothen* (8th Cir. 2009) 556 F.3d 698, 702 [an officer showed an arrested drug dealer a gun he had found during a search of his home].

¹²³ *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169. ALSO SEE *U.S. v. Lopez* (1st Cir. 2004) 380 F.3d 538, 545-46 [an officer told an arrested drug dealer that he has found “the stuff” in his van]; *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677.

¹²⁴ *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285.

¹²⁵ *U.S. v. Davis* (9th Cir. 1976) 527 F.2d 1110.

¹²⁶ *People v. Patterson* (1979) 88 Cal.App.3d 742, 752 [“It is well established that the practice of confronting a suspect with the confession of an accomplice is entirely lawful and does not vitiate the voluntariness of a *Miranda* waiver.”].

Recent Cases

People v. Tully

(2012) 54 Cal.4th 952

Issues

(1) Was a traffic stop unduly prolonged? (2) Did an officer exceed the permissible scope of a consent search? (3) Did officers violate *Miranda* when they obtained statements from the driver that later linked him to a murder?

Facts

Late one night, Richard Tully broke into the home of Sandy Olsson in Livermore. He then raped and murdered her. Later that day, Livermore police officers found the murder weapon—a Buck 110 knife—on a nearby golf course. There were two identifiable prints on it.

While interviewing neighbors, officers spoke with a man who lived two doors from Olsson's home. He mentioned that Richard Tully occasionally stayed with him and that Tully had purchased a Buck 110 knife about ten months earlier.

Investigators subsequently sent the prints from the knife to the Department of Justice (DOJ) in Sacramento and requested a comparison with Tully's prints and those of some other suspects. The result was negative and the investigation stalled.

About a year later, Livermore police officer Scott Trudeau happened to be conducting surveillance on the house of a suspected drug dealer when he saw Tully drive up, enter the house and leave about 25 minutes later. Trudeau decided to conduct a traffic stop after learning that Tully's driver's license had been suspended. While Trudeau was writing a ticket, backup officer Tim Painter spoke with Tully. Painter knew that Tully was a drug user, that he "liked to use a knife," and that he was a suspect in a recent vandalism incident that resulted from a drug deal "gone sour." Painter informed Tully that he knew he was using drugs and that he was often armed with a knife. He then asked Tully if he could search him. Tully consented and Painter found a bindle of methamphetamine in Tully's coin pocket.

After Tully was arrested for possessing drugs and driven to the police station, Trudeau *Mirandized* him but Tully invoked his right to remain silent. A few minutes later, however, he spontaneously said that he didn't want to go to jail and indicated he might be interested in becoming an informant. So Trudeau phoned a narcotics officer and asked him to come to the station to discuss the matter.

While they waited, Trudeau and Tully engaged in some small talk during which Tully commented that he supported his meth habit by burglarizing houses and cars, and that he had been treated for stomach problems at the local Veterans Administration (VA) hospital. After Tully spoke with the narcotics officer, he was released.

A few days later, Trudeau drove to Tully's house to return his driver's license. As he pulled up, five things occurred to him: (1) Tully's house was just two houses away from Sandy Olsson's home, (2) Tully had mentioned that he was treated at the local VA hospital, (3) Sandy Olsson had been a nurse at that hospital, (4) an FBI profiler concluded that Olsson's murderer was a neighbor and drug user, and (5) Tully was a neighbor and drug user.

Trudeau immediately contacted the lead investigator on the case, Sgt. Scott Robertson, and suggested that he ask DOJ to reexamine Tully's prints. Robertson agreed and hand-delivered the fingerprint card to Sacramento. This time there was a match. (The court explained that the reason for the initial no-match was that the analyst "had looked only at the right middle finger for each print card; the match that was eventually made was to defendant's right ring finger.")

Based on this evidence, Sgt. Robertson arrested Tully and drove him to the police station for questioning. As the interview progressed, and as Tully continued to deny any involvement in the crimes, Robertson asked if he would be willing to take a polygraph test. Tully responded by saying "it would behoove me to consult a lawyer . . . [b]efore submitting to any questions I wouldn't want to answer." He added that he did not know how polygraphs

worked “so that’s why I’d like to talk to somebody who does.” The interview was then terminated and Robertson turned off the tape recorder. But a few minutes later he turned it back on, and the recording began with Robertson saying to Tully, “When we last left this tape, we were talking about polygraph and you mentioned talking to a lawyer. Do you want a lawyer now?” Tully said no. Nothing of interest occurred during the subsequent interview. Tully remained in jail.

Two days later, Tully’s wife notified Sgt. Robertson that Tully had told her that he was present when the murder occurred, but that the killer was a man known as “Doubting Thomas” who was a member of the Hells Angels. When Robertson confronted Tully with this information, Tully admitted that he had gone to Sandy Olsson’s house with “Doubting Thomas” but that Thomas had killed her. Tully did, however, confess that he had raped her.

Tully’s statements and the fingerprint evidence were admitted against him at trial. He was convicted and sentenced to death.

Discussion

The main issues on appeal were whether the trial court should have suppressed the evidence of the fingerprint match and Tully’s incriminating statements. Because everything flowed from the traffic stop, that is where we begin.

The traffic stop

Tully contended that the fingerprint match should have been suppressed because the decision to resubmit his prints to DOJ for a comparison with the prints on the knife was the fruit of the traffic stop, and that the stop was illegal. Specifically, he argued that the stop had been unduly prolonged when Painter questioned him about the vandalism report, a subject that was unrelated to the traffic violation. And, according to Tully, if the stop had been unduly prolonged, his consent to search would have been given during an illegal detention, in which case the drugs in his coin pocket should have been suppressed along with everything that flowed from the

arrest for possession of drugs. And this, said Tully, would include the fingerprint match because the decision to resubmit the prints resulted mainly from his post-arrest admission that he supported his drug habit by burglarizing houses and that he was an outpatient at the VA hospital. Tully also contended that if his arrest was unlawful, his subsequent admission that he was present when Sandy Olsson was murdered and his confession that he had raped her should also have been suppressed.

Apart from the fact that the link between Painter’s questions about the vandalism and the decision to retest was tenuous (See “Comment,” below), the U.S. Supreme Court has ruled that officers may question traffic violators about subjects unrelated to the traffic violation if the questioning did not “measurably extend” the duration of the stop.¹ The question, then, was whether Painter’s questions resulted in such a measurable extension.

The court pointed out that, not only did the questioning not measurably extend the stop, it did not extend it at all because it occurred while Trudeau was writing the traffic citation. Consequently, it ruled the evidence resulting from the stop was obtained lawfully and, therefore, Robertson’s decision to resubmit the fingerprint evidence was not the fruit of an illegal detention.

The consent search

Tully had a backup argument: Even if the traffic stop was lawful, the fingerprint match should have been suppressed because the decision to retest his prints resulted from an illegal consent search. The search was unlawful, he said, because he had consented only to a search for weapons, but that Painter had searched a place (his coin pocket) that was unlikely to hold a weapon. It follows, said Tully, that because the illegal search resulted in his arrest, and because this rendered the arrest illegal, and because his admissions that he was a burglar and drug user were made during an illegal arrest, and because these admissions were instrumental in Robertson’s decision to retest his fingerprints, the fingerprint match should have been suppressed.

¹ See *Arizona v. Johnson* (2009) 555 U.S. 323, 325 [“An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”].

The court pointed out, however, that in determining the permissible scope of a consent search the courts apply a “reasonable officer” test; i.e., officers may search any place or thing they reasonably believed the consenting person had authorized them to search.² It then ruled that, even if Painter had not expressly sought consent to search for drugs (as well as weapons), Tully had impliedly consented to a search for drugs. That was because “Painter testified that he told defendant about his information that defendant used drugs and carried a knife. When he asked defendant if he could search him, defendant said, ‘Sure, I don’t have anything on me.’” It therefore appeared that Tully “understood Painter was asking to search for both drugs and weapons,” which meant the search of the coin pocket was lawful because it could have held drugs.

Miranda

As a second backup argument, Tully asserted that the fingerprint match should have been suppressed because his admission (i.e., that he burglarized houses and cars to support his meth habit and that he had been an outpatient at the local VA hospital) was instrumental in the decision to retest his prints, and that the statement was obtained in violation of *Miranda*. Furthermore, he claimed that his admission and subsequent confession should have been suppressed because both were obtained in violation of *Miranda*.

FIRST STATEMENT: As noted, after Tully invoked his right to remain silent at the police station, he said he was interested in becoming an informant. So, while Tully and Trudeau waited for a narcotics officer to arrive, they had a short conversation, during which Tully spontaneously admitted that he supported his meth habit by burglarizing houses and cars, and that he had been treated for stomach problems at the local VA hospital. Because this occurred after he invoked, Tully contended his admission was obtained in violation of *Miranda*. The court ruled,

however, there was no *Miranda* violation because “it was defendant who reinitiated the conversation of his own volition after Trudeau had acceded to his initial invocation of his right to remain silent.”

SECOND STATEMENT: Finally, Tully argued that his admission that he was present when Sandy Olsson was murdered, and his confession that he had raped her, should have been suppressed because he had previously invoked his *Miranda* right to counsel. As noted, when Robertson asked Tully if he would be willing to take a polygraph test, he replied “it would behoove me to consult a lawyer” because he didn’t know how polygraphs worked, and that “I’d like to talk to somebody who does.”

In the past the courts would sometimes rule that an invocation occurred if the suspect expressed any reluctance to discuss his case “freely and completely.” Now, however, the courts recognize that a suspect’s act of placing limits or conditions on an interview demonstrates a willingness to speak with officers if they agree to his conditions.³

Consequently, the court ruled that Tully’s comment about an attorney demonstrated a desire to have an attorney present during a polygraph test, not to have an attorney present during further questioning. “The context in which defendant referred to an attorney,” said the court, “was not a request for counsel for purpose of the interrogation then occurring, but an indication that, if required to submit to a polygraph test, he would first want to consult with a lawyer.”

For these reasons the court ruled that Tully’s statements and the fingerprint match were obtained lawfully, and it affirmed his conviction and death sentence.

People v. Schmitz

(2012) __ Cal.4th __

Just before we went to press, the California Supreme Court ruled that officers who are conducting

² See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 [“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?”].

³ See *Michigan v. Mosley* (1975) 423 U.S. 96, 103-4 [“Through the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person’s exercise of that option counteracts the coercive pressures of the custodial setting.”]; *People v. Johnson* (1993) 6 Cal.4th 1, 25-26 [a suspect does not automatically invoke his rights “by imposing conditions governing the conduct of the interview”].

a parole search of a vehicle based on the parole status of a passenger may search “those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity.” In doing so, it rejected the defendant’s argument that such searches must be restricted to areas that are “immediately accessible” to the parolee.

Thus, the court in *Schmitz* ruled that, because an officer was aware that the front seat passenger was on parole, he could lawfully search a pair of shoes and a bag of potato chips in the backseat area. Said the court, “[I]t was objectively reasonable for the officer to expect that this parolee could have stowed his personal property in the backseat, tossed items behind him, or reached back to place them in accessible areas upon encountering police.” The court declined to discuss whether the scope of such searches could include closed compartments in the vehicle, such as the glove box or console.

People v. Rodriguez

(2012) 207 Cal.App.4th 1540

Issue

Did an officer have grounds to detain a suspect because he ran from him? If not, were there sufficient additional circumstances to warrant the stop?

Facts

A police officer in Santa Paula (Ventura County) attempted to make a traffic stop but the driver took off. There were two men in the car and, at some point during the pursuit, the driver slowed down and the passenger bailed out and ran. The officer continued to chase the driver but broadcast a description of the passenger to the backup officers. About a minute later, Officer Joash Rothermel saw a man walking about a half block away, and the man matched the description of the bailing passenger. The court did not say whether the description was general or specific. In any event, Rothermel stopped, shined his spotlight on the man, and stepped out of his car. As he did so, the man sprinted across

the street and continued to run. During the chase, he threw something over a fence.

Officer Rothermel eventually grabbed him, at which point the man “tugged” at his gun holster and attempted to remove the weapon. He did not succeed and was eventually taken into custody. It turned out the item he had tossed was a digital scale with methamphetamine residue.

The man, later identified as Jose Rodriguez, was convicted of violently resisting an officer in the lawful performance of his duties;⁴ and because he had served two previous prison terms, he was sentenced to four years in prison.

Discussion

On appeal, Rodriguez argued that he could not be found guilty of resisting an officer in the lawful performance of his duties because Officer Rothermel did not have grounds to detain him and, thus, he was acting unlawfully. As the court explained, “The crime of deterring, preventing, or resisting an officer by force and violence requires that the officer be engaged in the lawful performance of his duties.” Consequently, said the court, “it was necessary to prove that Officer Rothermel had legal cause, i.e., a reasonable suspicion to detain appellant.”

At the outset it should be noted that, even though Rothermel apparently had probable cause to believe that Rodriguez was the passenger in the car, he did not initially have probable cause to arrest him as the result of the pursuit. That was because the only person who had committed a crime at that point was the driver. This meant that Rothermel would have been acting in the lawful performance of his duties only if he had some independent reason to detain Rodriguez.

One such reason, or so it would seem, was that Rodriguez ran from the officer after he shined his spotlight on him and stepped from his patrol car. However, the United States Supreme Court has ruled that such flight, while very suspicious, will not automatically provide grounds to detain. Said the Court, “Headlong flight—wherever it occurs—is the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly sugges-

⁴ Pen. Code § 69.

tive of such.”⁵ The Court also ruled, however, that while flight will not automatically justify a detention, not much more is required. In fact, the courts have coined the term “flight plus” to express the rule that grounds to detain will exist if, in addition to flight, there was some additional suspicious circumstance. As the California Supreme Court explained, “[A]n inference of guilt from flight” may be found “only in those instances in which there is other indication of criminality, such as evidence that the defendant fled from a crime scene or after being accused of a crime. To put it succinctly, these authorities rely on ‘flight plus.’”⁶

Was Officer Rothermel aware of an additional suspicious circumstance? Actually, he was aware of three: (1) Rodriguez had bailed out of a vehicle that was being pursued by police; (2) after he bailed, he continued to run; and (3), as he ran, he tossed something away. Said the court, “Officer Rothermel did not know why appellant fled from the first officer or why he took flight again. It was his job to find out why. He would have been derelict in his duties had he not attempted to detain appellant.”

Accordingly, the court ruled that Rodriguez’s “penchant for flight, coupled with the toss of an item during a police pursuit [was] certainly suggestive of wrongdoing. It supports the reasonable suspicion requirement for a lawful detention.” The court also made the following point:

The movies glorify instances of suspected criminals attempting to avoid detention and arrest. In the movies, they often succeed in the wake of inept police officers. But in real life, the suspects rarely succeed. Their conduct poses a danger to the police, the suspect, and innocent bystanders. Here, appellant’s attempt to avoid apprehension did not succeed and resulted in injury to the officer. It could have easily been worse. Any attempt by a suspect to gain control of an officer’s firearm is the acme of foolishness. Had appellant succeeded, responding officers would have had justifiable concern for their own safety and a gun battle could have easily erupted.

People v. Robinson

(2012) 208 Cal.App.4th 232

Issues

Did an officer’s insertion of a key into the lock of a home constitute a “search”? If so, was the search lawful?

Facts

At about 10 A.M. Richmond police officer Amy Bublak was responding to a report of a burglary when she heard about 15 gunshots nearby. The shots seemed to be coming from the 300 block of Sanford Avenue. Just as she reached Sanford, she saw a Volkswagen heading away from the 300 block. There were two men in the car, and her suspicions that they were involved in the gunfire were confirmed when, as the Volkswagen neared the patrol car, the passenger leaned out the window and pointed an assault rifle at her. The driver of the Volkswagen then sped down Sanford with Bublak in pursuit. After traveling only about a block, the driver and passenger bailed out and ran. At one point, however, the passenger briefly stopped and again pointed his rifle at Bublak. Officers saturated the area but the men got away.

Officers found expended cartridges in front of several homes in the 300 block of Sanford, including 321 Sanford. Meanwhile, Bublak recovered a set of keys from the Volkswagen’s ignition. Thinking that one of the men in the Volkswagen might be connected to one of the houses on the block, Bublak started checking the homes to see if any of the keys unlocked the front door. As she inserted a key into the lock at 321 Sanford, the door opened and officers entered. Inside, they found heroin, drug packaging materials, and ammunition. They also found photographs of the passenger, later identified as Carlos Robinson.

Officers then secured the premises and applied for a search warrant based on the circumstances surrounding the shooting and escape, the insertion of the key, and the contraband the officers observed

⁵ *Illinois v. Wardlow* (2000) 528 U.S. 119, 124. ALSO SEE *California v. Hodari* (1991) 499 U.S. 621, 623, fn.1 [“The wicked flee when no man pursueth.” Quoting Proverbs 28:1].

⁶ *People v. Souza* (1994) 9 Cal.4th 224, 235-36. ALSO SEE *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [flight plus “presence in an area of heavy narcotics trafficking”]; *People v. Britton* (2001) 91 Cal.App.4th 1112, 1118 [“More than simple unprovoked flight occurred here. Rather, Lipton testified to what might be dubbed ‘flight plus.’”]; *U.S. v. Smith* (9th Cir. 2011) 633 F.3d 889, 894 [flight in “high-crime neighborhood”].

after they entered. A judge signed the warrant and, during the search, the officers seized the evidence they had seen earlier. Robinson was subsequently arrested and, after his motion to suppress the evidence was denied, he was found guilty of multiple felonies and sentenced to 30 years in prison.

(As for the gunshots, officers learned that Robinson and some men had been arguing over a drug deal when Robinson ran into his house, returned with his assault rifle, and opened fire. When the men returned fire with handguns, Robinson and the driver fled in the VW.)

Discussion

Robinson argued that the officers' warrantless entry into his house was unlawful, and thus the evidence they saw as they looked around was obtained illegally. And because that information was used to establish probable cause for the warrant, he contended the warrant was invalid.

Prosecutors responded that it was unnecessary for the court to determine whether the warrantless entry was lawful. That was because, under the "independent source" rule, probable cause for the warrant would have existed even if the information obtained during the warrantless entry was deleted from the affidavit. True, said the court, but only if inserting the key and turning it was lawful, as the information it provided was critical in establishing probable cause. Thus, the court had to decide whether inserting a key into a lock constitutes a "search" and, if so, whether it was a lawful one.

Was it a "search?"

It might seem strange to think that a "search" occurs if officers put a key into a lock and turn the key to determine if it fits the lock. But, as the Seventh Circuit observed, "A keyhole contains information—information about who has access to the space beyond."⁷ Until recently, however, most courts would rule it was not a search or that it was such a minimal intrusion as to constitute a reasonable search if there was some justification for it.⁸

But earlier this year, the United States Supreme Court upended the law of search and seizure when it ruled in *United States v. Jones*⁹ that a "search" had occurred when officers attached an electronic tracking device to the undercarriage of the defendant's vehicle. To justify its ruling, the Court expanded the definition of the term "search" to include any trespass upon personal or real property for the purpose of obtaining information. Taking note of this change in the law, the court in *Robinson* observed that it is now possible that inserting a key into a lock constitutes a search because, like attaching a tracking device to a vehicle, the insertion of a key is technically a trespass and its purpose is to obtain information. The court did not, however, need to decide the issue because it ruled that, even if it was a search, it was a legal one.

Why the search was legal:

The "minimally intrusive" test

In a ruling that breaks new legal ground in California, the court concluded that neither a warrant nor probable cause is necessary to conduct a search if all of the following circumstances existed: (1) the search was "minimally intrusive," (2) it was supported by reasonable suspicion, and (3) it was justified by a compelling public interest.

Although no California court had addressed the issue of "minimally intrusive" searches, there is supporting federal precedent, including a decision by the United States Supreme Court. Specifically, in *Illinois v. McArthur* the Court said:

When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.¹⁰

In addition, in *United States v. Flores-Lopez* the Seventh Circuit recently ruled that an officer's act of turning on a suspect's cell phone to determine its assigned number was a reasonable search (even though there were no exigent circumstances) be-

⁷ *U.S. v. Concepcion* (7th Cir. 1991) 942 F.2d 1170, 1172.

⁸ See, for example, *U.S. v. Salgado* (6th Cir. 2001) 250 F.3d 438, 456; *U.S. v. Hawkins* (1st Cir. 1998) 139 F.3d 29, 33, fn.1; *U.S. v. Concepcion* (7th Cir. 1991) 942 F.2d 1170, 1172-73.

⁹ (2012) __U.S.__ [132 S.Ct. 945].

¹⁰ (2001) 531 U.S. 326, 330.

cause “that bit of information might be so trivial that its seizure would not infringe the Fourth Amendment.”¹¹ There is also a pre-*Jones* case, *United States v. Concepcion*,¹² that was factually identical to *Robinson*. In *Concepcion*, the court ruled that DEA agents did not need a warrant or probable cause to insert a key into the lock of the defendant’s apartment because “the privacy interest is so small.”

After examining these and other rulings, the court in *Robinson* pointed out the following:

Although the United States Supreme Court has not clearly articulated the parameters of the [minimal intrusion] exception, federal authorities provide sufficient support for concluding that, in appropriate circumstances, the minimal intrusion exception to the warrant requirement may be applied to uphold warrantless searches based on less than probable cause.

The court then examined the facts in *Robinson* to determine whether all three requirements were met, and it reached the following conclusions:

A MINIMAL INTRUSION? Inserting Robinson’s key into the lock was a minimal intrusion because the only information it provided was that Robinson had access to the house, a bit of information that was readily available to anyone in the neighborhood.

REASONABLE SUSPICION? Based on a shell casings outside the house, the officers had reasonable suspicion to believe the residence “was connected” to the shooting.

OVERRIDING PUBLIC INTEREST? There was an overriding public interest in conducting an immediate search because the insertion “served the discrete investigative purpose of confirming that the shooter had access to 321 Sanford” and that it “strongly promoted the legitimate governmental interest in quickly identifying the still-armed individual who shortly before had used an assault rifle in a firefight, in the daytime, in a residential neighborhood and then used it to commit an assault on a police officer.” Accordingly, the court ruled that insertion of the key was a lawful search, and it affirmed Robinson’s conviction.

Comment

The court’s decision in *Robinson* may have helped pave the way for a rational conclusion to the Supreme Court’s decision in *Jones*. As we discussed in our report on *Jones*, the Court ruled only that attaching a tracking device under a vehicle constituted a “search.” It expressly did not rule that a warrant would be required to conduct such a search. Consequently, it might be argued that such a search falls into the category of “minimally intrusive” and, therefore, it may be conducted if officers have reasonable suspicion.

People v. Fernandez

(2012) 208 Cal.App.4th 100

Issue

If a resident of a house consents to a search, is the search unlawful if officers had just arrested another resident who, had he not been arrested and removed from the scene, would have objected to the search?

Facts

At about 11 A.M., a man robbed and stabbed a young man in a high-gang area of Los Angeles. As LAPD officers arrived, a man approached them, pointed to a certain apartment, and said, “The guy is in the apartment.” Just then, a man ran into that apartment, and he matched a general physical and clothing description of the robber. Shortly after that, the officers heard a woman in the apartment scream, followed by the sounds of fighting.

When backup arrived, officers knocked on the door. A woman named Roxanne Rojas answered the door and she had a “fresh” injury to her face. When officers asked her to step outside so they could search for the robber, a man stepped from behind her and said, “You don’t have any right to come in here. I know my rights.” Because the man matched the description of the robber, the officers arrested him and removed him from the apartment. The man was Walter Fernandez.

¹¹ (7th Cir. 2012) 670 F.3d 803, 806-807. ALSO SEE *U.S. v. \$109,179* (9th Cir. 2000) 228 F.3d 1080, 1088 [“At most Maggio had a minimal expectation of privacy in the lock of his car door.”].

¹² (7th Cir. 1991) 942 F.2d 1170, 1173.

After the robbery victim identified Fernandez at a field showup, officers returned to the apartment and obtained Ms. Rojas's consent to search the premises. The search netted, among other things, gang indicia that prosecutors used in court to prove the robbery was gang-related. When officers asked Ms. Rojas about the screaming from the apartment, she said that Fernandez had hit her. After the trial court denied Fernandez's motion to suppress the evidence, the case went to trial and Fernandez was found guilty of, among other things, robbery with a gang enhancement and inflicting corporal injury on a cohabitant.

Discussion

Fernandez argued that the evidence obtained as the result of the consent search should have been suppressed because the search violated the rule announced by the United States Supreme Court in the case of *Georgia v. Randolph*.¹³ In *Randolph*, the Court ruled that if a person consents to a search of his home, but if a cohabitant objects to the search, officers may not conduct a search if the following three circumstances existed:

- (1) **SEARCH TO OBTAIN EVIDENCE:** The officers' purpose in seeking consent must have been to obtain evidence that would incriminate the objecting cohabitant.
- (2) **EXPRESS OBJECTION:** The objection by the cohabitant must have been stated affirmatively.
- (3) **OBJECTION IN OFFICERS' PRESENCE:** The objecting cohabitant must have voiced his objection in the officers' presence when they sought to enter or search.

Although the first two requirements were met here, the third was not. That was because Fernandez was not present when officers sought consent from Ms. Rojas—he had been arrested and was presumably locked in a patrol car down the street. But Fernandez argued that this didn't matter because the Supreme Court in *Randolph* also ruled that officers may not remove a suspect from his home for the purpose of preventing him from objecting.¹⁴ This

was, of course, irrelevant because the officers had removed Fernandez from the apartment, not to prevent an objection to a search, but because he had been arrested and would be booked into jail.

Undaunted, Fernandez urged the court to rule that, regardless of the officer's purpose in removing a nonconsenting cohabitant, a consent search is unlawful under *Randolph* if he was unable to object to the search in the officers' presence because he had been arrested and removed from the residence before the officers sought consent. Although there is nothing in *Randolph* that would support such an interpretation (and much that would refute it), that is exactly what a panel of the Ninth Circuit ruled in 2008 in the controversial (read: nonsensical) case of *U.S. v. Murphy*.¹⁵

Fernandez urged the court to adopt the *Murphy* court's reasoning but it declined because *Murphy* was an imprudent decision. After pointing out that "[f]our federal circuit courts and at least two state Supreme Courts" had also rejected the *Murphy* court's analysis [to our knowledge, no circuit court has agreed with it] the court in *Fernandez* joined the majority and ruled that if the objecting cohabitant was not present when officers obtained consent, the search will not be invalidated under *Randolph* on grounds that the reason he was not present was that the officers had arrested him and removed him from the scene. Said the court, "As in *Randolph*, the line we draw is a clear one, distinguishing between cases in which a defendant is present and objecting to a search, and those in which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence." Thus, the court ruled that Ms. Rojas's consent was valid, and that the evidence discovered during the search was properly admitted.

Comment

Fernandez did not challenge the officers' warrantless entry into the house. This was probably because (1) the entry was plainly lawful as the officers were in "fresh" pursuit of a fleeing felon; (2)

¹³ See (2006) 547 U.S. 103.

¹⁴ *Georgia v. Randolph* (2006) 547 U.S. 103, 120 ["So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding possible objection"].

¹⁵ (9th Cir. 2008) 516 F.3d 1117.

Fernandez was apparently standing in the doorway which, according to the U.S. Supreme Court, is a “public place”; and (3) the officers obtained no evidence as the result of the entry.

Maxwell v. County of San Diego

(9th Cir. 2012) 697 F.3d 941

Issue

Did sheriff’s deputies violate clearly established law when, at the scene of a fatal shooting, they (1) detained the victim’s mother and father for more than five hours; and (2) used pepper spray, baton blows, and handcuffs to detain the victim’s father?

Facts

At about 10:50 P.M., off-duty San Diego County sheriff’s deputy Lowell Bruce shot his wife Kristin in the jaw. The shooting occurred during an argument in the home of Kristin’s parents, Jim and Kay Maxwell, in a rural area of San Diego County. One of the first responders, an EMT, requested an air ambulance after determining that Kristin’s airway had been obstructed and that she needed to get to a trauma center “quickly.” In the meantime, Bruce was arrested and placed in a patrol car, his gun was secured, and the house was evacuated.

Sgt. Michael Knobbe, who had assumed command of the incident, decided to keep Kristin’s mother and father separated until investigators arrived. So he ordered that Kay Maxwell and her children be confined in a motor home that was parked on the driveway, and that Jim Maxwell be kept near the front of the driveway. Although the Maxwells told deputies that they “had not seen or heard anything involving the shooting,” and although they “repeatedly asked to be allowed to stay together and follow their daughter to the hospital,” they were told they “had to stay and wait separately for investigators to interview them.”

A few minutes later, a fire department ambulance arrived. Just as paramedics were about to place Kristin in the ambulance, she “began exhibiting signs of distress, expelling blood from her mouth.” The paramedics were unable to stop it and were

about to leave for the landing area when Sgt. Knobbe intervened and “refused to let the ambulance leave immediately because he viewed the area as a crime scene and thought that Kristin had to be interviewed.” This resulted in a delay of between 5-12 minutes.¹⁶ By the time the ambulance reached the landing zone, 11 minutes later, Kristin was dead. The cause of death was blood loss.

About 90 minutes later, Jim Maxwell, who was still being detained in the driveway, was told by Sgt. Knobbe that his daughter had died. The sergeant then assigned another deputy to “monitor” him. A few minutes later, Maxwell told the deputy he wanted to notify his wife that Kristin had died, but the deputy told him he “had to stay put at the end of the driveway.” Maxwell responded, “You are gonna have to shoot me, I’m going to see my wife.” As he started to walk toward the mobile home, the deputy squirted him with pepper spray (three times) and “struck him on the leg with his baton.” The deputy and Sgt. Knobbe then forcibly handcuffed him. Although the handcuffs were removed about a half hour later, Mr. and Ms. Maxwell were detained for another four hours during which time they were interviewed and their home was searched pursuant to a search warrant.

The Maxwells filed a federal civil rights lawsuit against San Diego County, Sgt. Knobbe and other deputies. When the trial judge ruled that the deputies were not entitled to qualified immunity, they appealed to the Ninth Circuit.

Discussion

The main issue on appeal, or at least the one that is pertinent to this report, was whether the deputies violated “clearly established” Fourth Amendment law by (1) detaining Jim and Kay Maxwell for over five hours; and (2) pepper spraying Jim Maxwell, striking him with a baton, and handcuffing him.

Officers may, of course, detain a person if they have “reasonable suspicion” to believe he has committed a crime. But it was apparent from the outset that the Maxwells were not involved in the shooting and, thus, could not be detained on the basis of reasonable suspicion. There is, however, another

¹⁶ NOTE: In her dissenting opinion, Judge Ikuta said the delay lasted seven minutes at the most.

kind of detention—known as a “special needs detention”—which is permitted if the public interest in detaining the person outweighed the intrusiveness of the seizure. As the U.S. Supreme Court observed, “[W]e look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”¹⁷ Consequently, to determine the legality of the detentions, it was necessary for the court to weigh the need for them against their intrusiveness.

As for need, the court ruled it was weak since Lowell Bruce had already confessed and “the crime was solved,” the gun had been recovered, and the crime scene had been secured. While it might have been necessary to keep the Maxwells separated for a while to help ensure that they gave independent accounts, the court ruled that this need was outweighed by the intrusiveness of the detentions. For one thing, said the court, any detention lasting five hours would almost always be deemed excessive and would therefore be deemed a *de facto* arrest requiring probable cause.

As for the intrusiveness of the detentions, it was apparent that the use of pepper spray and a baton, plus the handcuffing, were all highly intrusive in the abstract. And under the circumstances here, they were excessive.

Nevertheless, the deputies argued that such force was reasonable because Mr. Maxwell had refused to comply with their command and was therefore arrestable for violating Penal Code section 148. The court, however, rejected this argument for two reasons. First, a 148 violation does not result if a person refuses to comply with an unlawful command. And because the detention of Mr. Maxwell had effectively become an illegal *de facto* arrest at that point, his refusal to comply with the deputy’s command was not a crime. Second, even if Maxwell was arrestable for 148, the use of such force was plainly excessive. Said the court, “If Jim did not resist arrest—and the Sheriff’s officers point to no evidence that he did—the use of pepper spray alone would constitute excessive force.”

Having determined that the intensity of the detentions far exceeded the need to keep the Maxwells separated, the court ruled that the deputies’ conduct violated “clearly established” Fourth Amendment law and, consequently, they were not entitled to qualified immunity.

Comment

Four other things should be noted. First, as noted, the medical examiner determined that the cause of Kristin’s death was blood loss. He also concluded that she might not have died if she had gotten to a hospital sooner. Consequently, the court ruled that because “delaying a bleeding gun shot victim’s ambulance increased the risk of death,” the sergeant’s refusal to let the ambulance leave immediately rendered him liable under due process for “deliberate indifference to known or obvious dangers.”

Second, at one point, the court gratuitously said it thought that any detention of a witness would be considered “minimally intrusive” and that such detentions are “of relatively low value.” But most people, including judges, would probably disagree with the idea that solving crimes and bringing criminals to justice (which almost always requires witnesses) is of “relatively low value.” Although the court’s language is categorical in nature, it was probably thinking (we hope) only about crimes for which information from witnesses was not urgently needed.

Third, in determining what had happened at the crime scene, the court was required by law to interpret the evidence in the light most favorable to the Maxwells. Fourth, Lowell Bruce pled guilty to voluntary manslaughter and was sentenced to 15 years in prison.

U.S. v. Seiver

(7th Cir. 2012) 692 F.3d 774

Issue

Does probable cause to search a computer for data or graphics become “stale” if officers waited several months before seeking a warrant?

¹⁷ *Illinois v. Lidster* (2004) 540 U.S. 419, 427.

Facts

Officers developed probable cause to believe that Seiver had uploaded child pornography from his computer to a file-sharing website. For some reason, however, they waited seven months before seeking a warrant to search the computer. When they executed the warrant, the officers recovered child pornography and, as a result, Seiver was charged with distribution and possession. When his motion to suppress the evidence was denied, he pled guilty to possession.

Discussion

Seiver argued that probable cause for the search warrant did not exist because the seven-month delay between the upload and the issuance of the warrant rendered the probable cause “stale.” Consequently, because probable cause to search a place or thing can exist only if there is a fair probability that the sought-after evidence will be there when the search occurs,¹⁸ the issue in *Seiver* was whether it was reasonable to believe that data would remain stored on a computer for seven months.

In what appears to be the first ruling on this subject, the Seventh Circuit concluded that if officers have probable cause to believe that evidence of a crime had been stored on a computer, it is unlikely that a delay of several months in seeking a warrant will render the probable cause “stale.” There are two reasons for this. First, unlike drugs, computer data is “not the type of evidence that rapidly dissipates or degrades.” Second, even though a user can easily “delete” data on his computer, he cannot easily destroy it. As the court explained:

When you delete a file, it goes into a “trash” folder, and when you direct the computer to “empty” the trash folder the contents of the folder, including the deleted file, disappear. But the file hasn’t left the computer. . . . The file *seems* to have vanished only because the computer has removed it from the user interface and so the user can’t “see” it any more. But it’s still there, and normally is recoverable by computer experts until it is overwritten because there is no longer unused space in the computer’s hard drive.

The court added that, although people can now purchase software that overwrites the data stored on a computer’s hard drive, “the use of such software is surprisingly rare.”

Still, at some point probable cause will cease to exist. But the court ruled that that did not happen here because “seven months is too short a period to reduce the possibility that a computer search will be fruitful to a level at which probable cause has evaporated.” Accordingly, the court ruled that Seiver’s motion to suppress was properly denied.

People v. Walker

(2012) 210 Cal.App.4th 165

Issue

Was the physical description of a perpetrator of a sexual battery sufficiently similar to that of the defendant to warrant a detention?

Facts

Santa Clara County sheriff’s deputies were notified to be on the lookout for two men who were wanted for committing a sexual battery about one week earlier at a Valley Transportation Authority (VTA) train station in downtown San Jose. The perpetrators were described as follows (heights and weights were approximate):

Perpetrator number one: Black male, 20’s, 6’ 1”, 195 pounds, short afro, clean shaven, light complected, appeared unkempt.

Perpetrator number two: Black male, 30’s, 5’ 5”, 195 pounds, unkempt, wearing a black sweatshirt jacket with a hood and black pants.

Deputies were also provided with several surveillance photos of the perpetrators, but the quality of the photos was poor.

A few hours after receiving the notification, a deputy who was patrolling the same train station noticed that a passenger who had just disembarked from a train “resembled” one of the perpetrators in “height, weight, age, hairline from the photographs and the shape of his nose.” So the deputy approached him and asked for his identification and proof that he had paid his fare. The man said he wasn’t carrying

¹⁸ See *Illinois v. Gates* (1983) 462 U.S. 213, 238; *People v. Frank* (1985) 38 Cal.3d 711, 727. **NOTE:** If the warrant was executed within ten days after it was issued, the law presumes that probable cause continued to exist. See Pen. Code § 1534(a); *People v. Cleland* (1990) 225 Cal.App.3d 388, 394; *People v. Hernandez* (1974) 43 Cal.App.3d 581, 589.

any. Because the man kept looking around, the deputy was thinking he might run, so he told him to sit on a bench and he complied. Once again, the deputy asked for some ID, but this time the man handed him a San Jose State University student ID card in the name of Aalim Moor.

The deputy handed the card to another deputy and asked him to run a records check on Moor. The records check revealed that the real Aalim Moor was about four inches taller than the man and he had a different date of birth. Consequently, the deputy arrested him for providing false identification. During a search incident to the arrest, the deputy found a California driver's license that showed the passenger was actually Everett Walker.

Walker was charged with falsely representing his identity to a peace officer.¹⁹ He filed a motion to suppress the deputy's observations, contending that the deputy lacked grounds to detain him. The trial court ruled, however, that the similarity between Walker and perpetrator number one was sufficient to justify the detention. Walker then pled guilty and later appealed.

Discussion

Officers may, of course, detain a suspect if they reasonably believed the suspect had committed or was committing a crime; i.e., "reasonable suspicion."²⁰ In cases such as this, where the detention was based mainly on a similarity between the physical characteristics of the detainee and the perpetrator, the most important circumstances are the number of shared characteristics and whether any of them were distinctive or unusual.²¹

Here, however, there were no distinctive or unusual characteristics, and the only similarity between Walker and perpetrator number one was that both were black males whose ages and weights were

not too dissimilar. Moreover, there were several conflicts. Specifically, while perpetrator number one was described as "clean shaven, light complected, and appeared unkempt," Walker was of "medium to dark complexion and, at the time of the detention, was well-groomed and had a mustache and slight goatee." In addition, Walker was "significantly shorter" than perpetrator number one.

As noted, the detention was also based on a similarity between Walker and the surveillance photo of perpetrator number one. But the court concluded that the photographs were of such "poor quality" that they were virtually useless.

The court acknowledged that, while detentions are frequently upheld when the suspect matched a general description of the perpetrator, and was detained at or near the crime scene shortly after the crime occurred,²² Walker was detained for a crime that had occurred one week earlier. It also pointed out that, because the crime scene was "an area in which one would expect a high volume of foot traffic and ridership, the fact that defendant, among other people, was seen at the station is inconsequential."

Finally, the court rejected the argument that the deputy had lawfully detained Walker to make sure he had paid the fare. It is true, said that court, (although it cited no authority), that "an authorized officer may randomly check passengers to determine whether they have paid their fare without evidence supporting a reasonable suspicion of fare evasion." But the court ruled Walker was not stopped at random but because the officer "wanted to investigate whether defendant had been involved in a one-week-old sexual battery."

Consequently, the court ruled that, because the detention was unlawful, the evidence resulting from the detention (i.e., Walker's act of falsely identifying himself) should have been suppressed.²³

¹⁹ Pen. Code § 148.9.

²⁰ See *Terry v. Ohio* (1968) 392 U.S. 1; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.

²¹ See *In re Brian A.*, (1985) 173 Cal.App.3d 1168, 1174 ["Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others."]; *U.S. v. Jackson* (2nd Cir. 2004) 368 F.3d 59, 64 ["[W]hen the points of similarity are less unique or distinctive, more similarities are required before the probability of identity between the two becomes convincing."].

²² See, for example, *People v. Fry* (1969) 271 Cal.App.2d 350, 354-55; *People v. Atmore* (1970) 13 Cal.App.3d 244, 246; *People v. Lindsey* (2007) 148 Cal.App.4th 1390.

²³ **NOTE:** Although the court in *Walker* closely examined the various circumstances upon which the detention was based, it does not seem that its analysis was inconsistent with the rule that courts must evaluate the circumstances in light of common sense, not hypertechnical analysis. See *Illinois v. Gates* (1983) 462 U.S. 213, 231; *Illinois v. Rodriguez* (1990) 497 U.S. 177, 184.

Also Noteworthy

NEW VEHICLE TRACKING SEARCH WARRANTS: On January 1, 2013, a new law went into effect in California that authorizes judges to issue search warrants for the installation and monitoring of vehicle tracking devices.²⁴ The law also permits judges to authorize tracking for 30-day periods which may be extended for additional 30-day periods if probable cause continues to exist. We have now added the following to our forms library:

- Vehicle Tracking Search Warrant
- Extension of Vehicle Tracking Search Warrant
- Return of Vehicle Tracking Search Warrant

These forms can be viewed in the “Forms” section of Point of View Online at le.alcoda.org. Click on “Publications.” The new tracking warrant is shown on the next page. To receive copies of these forms in Microsoft Word format (which can be edited), send a request from a departmental email address to POV@acgov.org.

COLLECTING AND ANALYZING DNA FROM ARRESTEES: On November 9, 2012 the United States Supreme Court announced it would review a Maryland law that authorizes the taking of DNA samples from people who have been arrested for certain crimes. The case is *Maryland v. King*. California has a similar statute in Penal Code § 296 except that it permits DNA collection and analysis of all felony arrestees. The constitutionality of California's law is currently under review by the California Supreme Court. The case is *People v. Buza*. Pending a ruling by either the United States Supreme Court or the California Supreme Court that Penal Code § 296 is unconstitutional, it remains in force.²⁵

WARRANTLESS DETECTION OF ROUTER HACKERS: In *U.S. v. Stanley*,²⁶ a federal district court in Pennsylvania ruled that Stanley could not reasonably expect privacy in the data signals his computer was sending to a neighbor's internet router. The facts are as follows: Stanley wanted to obtain child pornography over the internet but, for obvious reasons, he didn't want to use his own computer. So, having

detected that a neighbor named Kozikowski was using an internet router that was not password protected, and having learned that he, Stanley, lived sufficiently close to Kozikowski's router that he could hack in to his wireless network and use it to access the internet, that's what he did, thereby acquiring a “safe” way to obtain his child pornography.

Eventually, a state police investigator determined that Kozikowski's computer was being used to send or receive child pornography, so he obtained a warrant to search it. When he executed the warrant and determined that Kozikowski was innocent, he obtained Kozikowski's consent to view the settings on his router. This revealed that someone using a computer with a certain IP address was hacking into Kozikowski's wireless network.

Because it was likely that the hacker lived nearby, the investigator, by using a directional antenna and software program known as Moocherhunter, determined that the hacker lived in an apartment across the street—Stanley's apartment. He then obtained a warrant to search Stanley's computer and, as the result, Stanley was charged with possession of child pornography.

Stanley argued that the interception of the signals from his home computer to Kozikowski's router constituted a search, and because the investigator had not obtained a warrant, the search was unlawful. The court disagreed, ruling that a person who voluntarily sends signals from his computer to a device that he does not own or control cannot reasonably expect that those signals will be private. Said the court, “By connecting to Kozikowski's wireless router, Stanley exposed his wireless signal to a third party and assumed the risk that the signal would be revealed to the authorities.”

Although the court's ruling does not constitute binding authority in California, its analysis seems logical and is consistent with U.S. Supreme Court precedent.²⁷ One other thing: The opinion contains a lot of technical information that may be of interest to officers who work in this field.

POV

²⁴ See Pen. Code §§ 1524(a)(12), 1534(b)(6).

²⁵ See *People v. Superior Court (Clark)* (1994) 22 Cal.Ap.4th 1541, 1547; Cal. Rules of Court, Rule 976(d).

²⁶ (W.D. Penn. 2012) 2012 WL 5512987

²⁷ See *Smith v. Maryland* (1979) 442 U.S. 735.

SUPERIOR COURT OF CALIFORNIA
County of _____



Search Warrant
Vehicle Tracking
Installation and Monitoring

The People of the State of California
To Any Peace Officer in _____ County

Warrant No. _____

The affidavit filed herewith by _____ *[Insert affiant's name]* _____, sworn to and subscribed before me on this date, has established probable cause for this warrant as follows:

“Target vehicle” defined: As used herein, the term “target vehicle” means one or both of the following:

- A particular vehicle:** The following vehicle is the target vehicle: *[Insert description]*
- A vehicle occupied by a certain person:** The target vehicle [is] [is also] any vehicle in which there is probable cause to believe the following person will be an occupant when it departs: *[Identify the person to be tracked with reasonable specificity]*

“Tracking device” defined: As used herein, the term “tracking device” means any electronic or mechanical device that permits the tracking of the movement of a person or object. Pen. Code § 1534(b)(6).

Evidence type: Pursuant to Pen. Code § 1524(a)(12) there is probable cause to believe that the tracking device will provide information that establishes the following: *[Check one or more]*

- That a particular person committed a felony or is committing one.
- That a particular felony was committed or is being committed.
- That a misdemeanor violation of the Fish and Game Code or the Public Resources Code was committed or is being committing, or that a particular person committed such violation.

Orders

Installation: You shall install a tracking device to any place inside or outside the target vehicle(s) as follows:

When installation must occur: Installation must occur within ten days after this warrant is issued.

Entering private property: If the target vehicle(s) [is] [are] parked on a private driveway or carport, you may enter the driveway or carport to install, remove, or repair the tracking device.

Night Service (*Delete if not applicable*): Good cause having been established in the affidavit filed herewith, officers may install the tracking device(s) at any hour of the day or night.

Monitoring: You shall utilize the tracking device to monitor the whereabouts and movements of the target vehicle(s) in any public or private place for 30 days after this warrant is issued.

Service of warrant: Pending further order of this court, you are not required to serve a copy of this warrant on the person who was tracked or any other person.

Return of warrant: You shall return this warrant to this court no later than ten calendar days after the conclusion of tracking pursuant to this warrant or any extensions of this warrant.

Sealing Order: Good cause having been established in the affidavit in support of this warrant, this search warrant and the supporting affidavit are ordered sealed pending further order of the court and shall be delivered into the custody of the Clerk of the Court. **Grounds for sealing:** Official information (Evid. Code § 1040)

Informant protection (Evid. Code § 1041) *[Check one or both]*

Date and time warrant issued

Judge of the Superior Court

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Deputy DA **Eric Swalwell** was elected to the U.S. House of Representatives. Deputy DA **Scott Patton** was appointed Judge of the Superior Court. Lieutenants **Mark Scarlett** and **Bob Conner** were promoted to captain. Inspector IIIs **Kim Tejada** and **Craig Chew** were promoted to lieutenant. Inspectors **Frank Moschetti** and **J.P. Williams** were promoted to Inspector III. The following Inspectors retired or have announced their retirement: Capt. **Joe Chan**, who joined the office in 1990 from U.C. Berkeley PD; Capt. **Jay Patel**, who joined the office in 1994 from Berkeley PD; **Kathy Boyovich**, who joined the office in 1994 from ACSO; **Hansen Pang**, who joined the office in 1994 from U.C. Berkeley PD; **Tom Gandsey**, who joined the office in 1996 from ACSO, and **Rick Monge** who joined the office in 2001 from San Leandro PD.

The following officers have joined the Inspectors Division: **Jeff Israel** (Oakland PD), **Brian Medeiros** (Oakland PD), **George Phillips** (Oakland PD), **Malary Hathcox** (East Bay Regional Parks PD), and **Tom Milner** (Newark PD). New prosecutors: **Emily Tienken** and **Nicholas Homer**. The following officers were honored at this year's prosecutors' muster: Sgt. **Eric Tang** (Fremont PD), **Todd Young** (Fremont PD), **Patrick Brower** (Fremont PD), Sgt. **Robert Nolan** (Oakland PD), Sgt. **David Lee** (Newark PD), **John Koven** (CHP), and **Matthew Kroutil** (Pleasanton PD).

ALAMEDA COUNTY NARCOTICS TASK FORCE

Transferring out: **Shaun O'Connor** (BART PD) and **Chris Crabtree** (Oakland PD). Transferring in: **Daniel Gil** (Oakland PD) and **Giorgio Chevez** (East Bay Regional Parks PD).

ALAMEDA COUNTY SAFE TASK FORCE

Transferring in: Dep. **Dave Kozicki** (ACSO).

ALAMEDA COUNTY SHERIFF'S OFFICE

Lt. **Garrett Holmes** was promoted to captain. Sgt. **Michael Denobriga** was promoted to lieutenant. Dep. **Scott Sylvester** was promoted to sergeant. The following deputies have retired: Capt. **R. Casey Quinn** (24 years), Sgt. **Mark Foster** (26 years), **Floyd Gill**

(26 years), **Terence Jones** (25 years), **John Pearson III** (25 years), **Mark Turnquist** (23 years), **Robert Arbitter** (22 years), **Allan Starosciak** (12 years), **Donald Hurst** (17 years), and **Xue Vang** (17 years). Alameda County SO also reports that it has hired 14 deputy sheriff POST graduates and 22 deputy sheriff recruits.

ALAMEDA POLICE DEPARTMENT

Acting Sgt. **Michael Abreu** was promoted to sergeant. **Richard Soto** was promoted to acting sergeant. Motor officer **Glen Anderson** retired after a total of almost 15 years of service (including five years with Contra Costa SO).

Lateral appointments: **Brian Clark** (Fort Bragg PD), **Viet Pham** (Oakland PD), **Kevin Ferreira** (East Palo Alto PD), **Michael Palmer** (Contra Costa SO), and **Brendan Woulfe** (ACSO). New recruits: **Shannon Yunck**, **Michael Tangataevaha** and **Dustin Lorensen**.

New officers: **Joshua Ramirez** and **Paul Castro**. **Michael Gandara** was selected as the School Resource Officer for Alameda High. Retired officer **Don Ulricksen** passed away. He was hired in 1956 and retired in 1984. Retired officer **Joseph Totorica** passed away. He was hired in 1955 and retired in 1979.

ALBANY POLICE DEPARTMENT

Don Maiden resigned to accept a position with Napa County SO. **Bill Boehm** resigned to accept a position with Solano County SO. Reserve officer **Sal Ahmed** was appointed as a police officer trainee. **Brian Anthony** has taken a disability retirement.

BART POLICE DEPARTMENT

The following officers have retired: Lt. **Frank Lucarelli** (22 years plus 5 years with ACSO), Sgt. **Forest Tietz** (34 years), Sgt. **Gerald Dominguez** (24 years), **Michael Rawski** (9 years), **Michael Pon** (22 years plus 10 years with Southern Pacific PD). Other retirements: Dispatcher **Janet Strange** (35 years), and Revenue Protection Guard **Robert Ornellas** (35 years), and Administrative Specialist **Susie Tom** (15 years). **Michael Williamson** was promoted to sergeant. New officers: **Jason Scott**, **Phi Le**, **Wilson Velasquez-Ochoa**, **Reynaldo Carrasco**, and **Jan Ruiz**. Sgt. **Gil**

Lopez will be a field training sergeant. **Shaunte Barnes** is the new Training Officer/Specialist. **Stewart Lehman** is a new protection/explosive detection canine handler.

BERKELEY POLICE DEPARTMENT

Andrew Greenwood was promoted to captain. **Edward Spiller** was promoted to lieutenant. Officers **Jeffrey Chu**, **Amber Phillips**, and **Van Nguyen** were promoted to sergeant.

Rayna Johnson was promoted to dispatch supervisor. Sgt. **Michael Dougherty** retired after 28 years of service. **Andre Bell-Watkins** and **Ryan Fernandez** resigned after four years of service. **Timothy Gardner** was reappointed back to the department after serving with BPD from 1995 to 2001. Lateral appointments: **Aron Belveal** (California DOJ), **Christopher Inami** (Oakland PD), **Matthew Valle** (Sacramento PD), **Derek Radey** (California State Assembly Sergeant at Arms), **Essex Combong** (Pinole PD), **Jason Tillberg** (U.C. Berkeley PD), **Jeremy Snyder** (Woodland PD). New officers: **Jason Muniz**, **Andres Bejarano** and **Ashley Goergen**. **Noel Pinto** was appointed parking enforcement manager. Retired officer **Ronald Kihara** passed away. Officer Kihara served BPD for 32 years from 1971 to 2003.

EAST BAY REGIONAL PARKS POLICE DEPARTMENT

David Greaney and **Joe Scott** were promoted to patrol sergeants. Det. **Malary Hathcox** retired after 25 years of service. Sgt. **Scott McCaughin** took a disability retirement after 14 years of service. **Brian Hagebusch** was promoted to dispatch supervisor.

EMERYVILLE POLICE DEPARTMENT

Sgt. **Doug Sylvester** retired after 25 years of service with EPD and Alameda County SO. **Jason Thompson** accepted a position with Vallejo PD. New Police Service Technician: **Glenda Lockhart**.

FREMONT POLICE DEPARTMENT

Lorie Oklulove retired after 23 years of service. **Robyn Boersma** retired after 12 years of service. Newly appointed officers: **Ralph Meredith** and **Jamil Roberts**.

HAYWARD POLICE DEPARTMENT

James (Mike) Coltrell retired after 28 years of service. New officers: **Matthew Harden**, **Todd**

Shaheen, **Bradley Rossmiller**, **Ricardo Flores**, **Andrew Dapice**, **Daniel Morgan**, **John Denning**, and **Alan Reynaga**.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Sgt. **Paul Malech** was named acting lieutenant and assigned to Administration and Support. **Casey Mooningham** was promoted to sergeant. **Michael Morris** was named acting sergeant and assigned to Investigations. **Ramon Jacobo** was assigned to the ATF task force. **Ricardo Flores** resigned to join Hayward PD. New Officers: **Matthew Carroll**, **Adam Newell**, **Tyler Walstrum**, **Robert Tinoco**, **Bradley Philips**, **Leonides Navarro**, and **Brian Quon**.

OAKLAND POLICE DEPARTMENT

The following sergeants were promoted to lieutenant: **Sharon Williams**, **Robert Chan**, and **Eric Lewis**. The following officers were promoted to sergeant: **William Griffin Jr.**, **Wilson Lau**, **Angelica Menoza**, **Seth Neri**, **Haman Nguyen**, **Charles O'Connor**, **Mildred Oliver**, **Mark Rhoden**, **Frederick Shavies**, **Tyman Small**, **John Haney**, **Byron Reed**, and **Jeffrey Tom**.

The following officers retired: Lt. **Kenneth Parris** (20 years), Sgt. **Rebecca Campbell** (11 years). Sgt. **Thomas Hogenmiller** (23 years), **Edgardo Ayala** (14 years), **Mayumi Taylor** (6 years), **Timothy Scarrott** (12 years), **Nicholas Miller** (6 years), **Kenneth L. Thompson** (30 years), **Nathan Brooks** (6 years), **Randall Chew** (10 years), **Michael Leonesio** (7 years), **Bruce White** (26 years), and **James Saleda** (16 years). Former Chief of Police **Anthony Batts** was appointed Commissioner of the Baltimore, Maryland PD. Former OPD deputy chief **Pete Dunbar** retired as chief of Pleasant Hill PD.

NEWARK POLICE DEPARTMENT

Commander **Tom Milner** retired after 29 years in law enforcement and over 10 years with the department. **David Higbee** and **David Lee** were promoted to sergeant. Transfers: **Aaron Slater** from School Resource Officer to Patrol, **Ryan Johnson** from Patrol to School Resource and **Karl Fredstrom** from Traffic to Patrol. Sgt. **David Lee** received an DA's Office Officer Recognition Award for his work on the NBD Cannabis Collective investigation. Sgt. **John Kovach**, **Randy Ramos**, and **Karl Geser** were recognized by the American Red Cross as Act of Courage Heroes for their actions in saving the life of a shooting victim. POV

War Stories

A dubious vibrator

While the homeowners were away, a man broke into their house in Oakland and, having located the liquor cabinet, proceeded to get drunk. A few hours later, the homeowners returned and found the man passed out on the floor. They called OPD and the man was arrested. Fast forward to the preliminary hearing. The defendant's attorney is cross-examining the man whose home was burglarized:

Attorney: Was anything disturbed other than the alcohol?

Witness: Yes.

Attorney: What?

Witness: To be blunt, my wife's vibrator was out on the table. This vibrator can also be used as a back massage, and I assume that the gentlemen gave himself a back massage. I hope.

Cutting medical expenses

A patient at Washington Hospital in Fremont removed his IV tube, got dressed, walked outside, and attempted to steal a contractor's truck parked out front. But before he could drive off, the contractor detained him and notified Fremont PD. When an officer questioned the man about his unusual behavior, the man explained, "It's real simple. I figured I had enough medical treatment. So I discharged myself. And, of course, I needed a ride home."

Judges are just like people

Millions of people in Sweden were watching the televised trial of a notorious terrorist when a camera behind the bench panned down on the judge who was intently working on something. As the camera zoomed in, the television audience saw that the judge was playing solitaire on his laptop.

Fun and games in Loomis

Police in Loomis (Placer County) are looking for the joker who hacked into some electronic traffic warning signs along a highway and changed the message from "Caution: Highway Construction Ahead" to "Caution Loose Gorilla Ahead!"

Don't mess with this motor officer

A motorcycle officer in Decatur, Illinois who had stopped a man for speeding was writing a traffic ticket when the man went on a tirade, and it got real personal. In fact, the man repeatedly questioned the officer's ancestry, intelligence, and sexual orientation. As he was signing the ticket, the man noticed that the officer had written "AH" in the corner and he demanded to know what it stood for. The officer explained, "That's so when we go to court, I'll remember that you're an asshole." Two months later in traffic court, the man's attorney is cross examining the officer:

Attorney: Officer, is there any particular notation on this ticket you don't normally make?

Officer: Yes sir, in the lower right corner of the narrative there is an "AH" and it's underlined.

Attorney: What does the "AH" stand for, officer?

Officer: Aggressive and hostile.

Attorney: Are you sure it doesn't stand for asshole?

Officer: Well, sir, I'm sure you know your client better than I do.

A little street justice

San Francisco police officers had detained a suspect in a purse snatch that had just occurred. The victim, an elderly woman, had just arrived for a field showup when she informed the officers that her eyesight wasn't very good and she needed to see the suspect up close. So, they escorted her to the handcuffed man, at which point she slugged him in the face. "I think that's him," she said.

A "fully equipped" used car

A man complained to Hayward police that a guy on Craigslist had sold him a car that, according to his mechanic, was a piece of junk. And he wanted the man arrested and sent to prison for fraud or something. He also mentioned that the purchase price included two marijuana plants in the back seat. Neither the man nor his mechanic had any complaints about the marijuana.

Some wise advice for carjackers

A man armed with a handgun carjacked a car in Sacramento but was arrested as he was trying to figure out how to operate the stick shift. The man was convicted and filed an appeal. In its opinion on the case, the Court of Appeal began, “We strongly discourage anyone from choosing crime as a career. Nevertheless, as with any pursuit in life, one should be prepared. For instance, if you are planning to carjack someone, you should make sure you can drive a stick-shift.”

Just doing it

A loss prevention officer at the Walmart store in Union City noticed that a man who had just walked in was the same guy he had seen two months earlier running out of the store with a pair of expensive tennis shoes. He also noticed that the man was wearing the same tennis shoes, except they were now looking pretty ratty. The officer arrested the shoplifter and asked if he would make a written statement. The guy said OK and wrote the following: “When I came into your store, I looked at my shoes, the ones I ripped off, and they were dirty and looked shitty. I was walking over to the shoe department to bag a new pair when you grabbed me.”

A valuable spelling lesson

Members of the Savage Psychos street gang in Castro Valley decided to have some t-shirts made up with the name of their gang in big bold letters. When they picked up their shirts from the store they were pleased with the shirts and wore them proudly. That is until one of their members—the smart one who had graduated from the seventh grade—informed them that the word “psychos” is not spelled “sykos.”

Telling it like it is

During a trial in a county that will remain anonymous, the defense attorney had just asked the judge to appoint a psychologist to evaluate his client and conduct an IQ test:

Judge: The court does not see the need for an IQ test since it appears he is dumber than a fencepost.

Attorney: Would the court please state its opinion in numerical terms?

Judge: Gladly. His IQ is probably less than zero.

Not ready for prime time

Late one night, two juveniles—one of them armed with a flare gun—walked up to a man near the Bay Point BART station and robbed him. The victim immediately called BART PD and described the robbers and their flare gun. A few minutes later, two of the responding officers saw someone was firing flares into the sky from a nearby vacant lot. So they converged on the lot and arrested the two robbers. When asked why they were firing off the flares, the boys said they were celebrating. As one of them explained, “It was our first successful holdup.”

Unclear on the concept

A San Benito County sheriff’s deputy had just notified a young man that he was under arrest for possession of burglary tools when the man informed the deputy that he could not legally arrest him. The deputy inquired, “Oh yeah? Why not?” “It would be a violation of my double jeopardy,” explained the man, “because I’ve already been arrested for possessing burglary tools.”

The War Story Hotline
POV@acgov.org

What do you need to know?

Does it include the latest information on probable cause to arrest, investigative detentions, obtaining and executing search warrants, consent searches, *Miranda* waivers and invocations, parole and probation searches, arrest requirements, computer searches, traffic stops, exigent circumstances, interrogation, vehicle searches, obtaining medical and financial records, suppression of evidence, probable cause to search, plain view, lineups and showups, surveillance, knock-notice, no-knock warrants, “hot” and “fresh” pursuits, the good faith rule, wiretaps, searches incident to arrest, investigative contacts, arrest warrants, pat searches, felony car stops, questioning by police agents, obtaining internet and email records, citizens arrests, bodily intrusion searches, obtaining voicemail, “knock and talks,” intercepting prisoner communications, anticipatory search warrants, questioning charged suspects, police trespassing, reasonable expectations of privacy, immunity, the inevitable discovery rule, booking searches, “wall stops,” use of force, entrapment, obtaining phone records, *Steagald* warrants, protective sweeps, roadblocks and checkpoints, workplace searches, searches on school grounds, the “collective knowledge” rule, the “official channels” rule, searches by civilians and police agents, out-of-jurisdiction search warrants, medical marijuana, “wired” agents, investigative firewalls, protecting against disclosure of informants, obtaining text messages, testifying in court, preserving and authenticating evidence, decoys and stings, electronic vehicle tracking, and other such things? Relax.

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