

# POINT of VIEW



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# Investigative Detentions

*“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”*<sup>1</sup>

Of all the police field operations that result in the suppression of crime and the apprehension of criminals, the investigative detention is, by far, the most commonplace. After all, detentions occur at all hours of the day and night, and in virtually every imaginable public place, including streets and sidewalks, parks, parking lots, schools, shopping malls, and international airports. They take place in business districts and in “nice” neighborhoods, but mostly in areas that are blighted and beset by parolees, street gangs, drug traffickers, or derelicts.

The outcome of detentions will, of course, vary. Some result in arrests. Some provide investigators with useful—often vital—information. Some are fruitless. All are dangerous.

To help reduce the danger and to confirm or dispel their suspicions, officers may do a variety of things. For example, they may order the detainee to identify himself, stand or sit in a certain place, and state whether he is armed. Under certain circumstances, they may pat search the detainee or conduct a protective search of his car. If they think he just committed a crime that was witnessed by someone, they might conduct a field showup. To determine if he is wanted, they will usually run a warrant check. If they cannot develop probable cause, they will sometimes complete a field contact card for inclusion in a database or for referral to detectives.

But, for the most part, officers will try to confirm or dispel their suspicions by asking questions. “When circumstances demand immediate investigation by the police,” said the Court of Appeal, “the most useful, most available tool for such investigation is general on-the-scene questioning.”<sup>2</sup>

Because detentions are so useful to officers and beneficial to the community, it might seem odd that they did not exist—at least not technically—until 1968. That’s when the Supreme Court ruled in the landmark case of *Terry v. Ohio*<sup>3</sup> that officers who lacked probable cause to arrest could detain a suspect temporarily if they had a lower level of proof known as “reasonable suspicion.”<sup>4</sup>

In reality, however, law enforcement officers throughout the country had been stopping and questioning suspected criminals long before 1968. But *Terry* marks the point at which the Supreme Court ruled that this procedure was constitutional, and also set forth the rules under which detentions must be conducted.

What are those rules? We will cover them all in this article but, for now, it should be noted that they can be divided into two broad categories:

- (1) **Grounds to detain:** Officers must have had sufficient grounds to detain the suspect; i.e., reasonable suspicion.
- (2) **Procedure:** The procedures that officers utilized to confirm or dispel their suspicion and to protect themselves must have been objectively reasonable.

Taking note of these requirements, the Court in *Terry* pointed out that “our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>5</sup>

One more thing before we begin: In addition to investigative detentions, there are two other types of temporary seizures. The first (and most common) is the traffic stop. Although traffic stops are technically “arrests” when (as is usually the case) the officer witnessed the violation and, therefore, had probable cause, traffic stops are subject to the same

<sup>1</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 16.

<sup>2</sup> *People v. Manis* (1969) 268 Cal.App.2d 653, 665.

<sup>3</sup> (1968) 392 U.S. 1.

<sup>4</sup> See *Florida v. Royer* (1983) 460 U.S. 491, 498 [“Prior to *Terry v. Ohio*, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause.”].

<sup>5</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 19-20.

rules as investigative detentions.<sup>6</sup> The other type of detention is known as a “special needs detention” which is a temporary seizure that advances a community interest other than the investigation of a suspect or a suspicious circumstance. (We covered the subject of special needs detentions in the Winter 2003 edition in the article “Detaining Witnesses” which can be downloaded on Point of View Online ([www.le.alcoda.org](http://www.le.alcoda.org)).

## Reasonable Suspicion

While detentions constitute an important public service, they are also a “sensitive area of police activity”<sup>7</sup> that can be a “major source of friction” between officers and the public.<sup>8</sup> That is why law enforcement officers are permitted to detain people only if they were aware of circumstances that constituted reasonable suspicion. In the words of the United States Supreme Court, “An investigative stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.”<sup>9</sup>

Reasonable suspicion is similar to probable cause in that both terms designate a particular level of suspicion. They differ, however, in two respects. First, while probable cause requires a “fair probability” of criminal activity, reasonable suspicion requires something less, something that the Supreme Court recently described as a “moderate chance.”<sup>10</sup> Or, to put it another way, reasonable suspicion “lies in an area between probable cause and a mere hunch.”<sup>11</sup> Second, reasonable suspicion may be based on information that is not as reliable as the information needed to establish probable cause. Again quoting the Supreme Court:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable.<sup>12</sup>

Although the circumstances that justify detentions are “bewilderingly diverse,”<sup>13</sup> reasonable suspicion ordinarily exists if officers can articulate one or more specific circumstances that reasonably indicate, based on common sense or the officers’ training and experience, that “criminal activity is afoot and that the person to be stopped is engaged in that activity.”<sup>14</sup> Thus, officers “must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.”<sup>15</sup>

This does not mean that officers must have direct evidence that connects the suspect to a specific crime. On the contrary, it is sufficient that the circumstances were merely *consistent* with criminal activity. In the words of the California Supreme Court, “[W]hen circumstances are consistent with criminal activity, they permit—even demand—an investigation.”<sup>16</sup>

We covered the subject of reasonable suspicion in the 2008 article entitled “Probable Cause to Arrest” which can be downloaded on Point of View Online ([www.le.alcoda.org](http://www.le.alcoda.org)).

## Detention Procedure

In the remainder of this article, we will discuss the requirement that officers conduct their detentions in an objectively reasonable manner. As with many areas of the law, it will be helpful to start with the general principles.

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<sup>6</sup> See *People v. Hubbard* (1970) 9 Cal.App.3d 827, 833 [“[T]he violator is, during the period immediately preceding his execution of the promise to appear, under arrest.”]; *People v. Hernandez* (2008) 45 Cal.4th 295, 299 [traffic stops “are treated as detentions”].

<sup>7</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 9.

<sup>8</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 14, fn.11.

<sup>9</sup> *United States v. Cortez* (1981) 449 U.S. 411, 417.

<sup>10</sup> See *Safford Unified School District v. Redding* (2009) \_\_\_ U.S. \_\_\_ [2009 WL 1789472] [Reasonable suspicion “could as readily be described as a moderate chance of finding evidence of wrongdoing.”].

<sup>11</sup> *U.S. v. Fiasche* (7th Cir. 2008) 520 F.3d 694, 697.

<sup>12</sup> *Alabama v. White* (1990) 496 U.S. 325, 330. Edited.

<sup>13</sup> *People v. Manis* (1969) 268 Cal.App.2d 653, 659.

<sup>14</sup> *People v. Celis* (2004) 33 Cal.4th 667, 674. ALSO SEE *Terry v. Ohio* (1968) 392 U.S. 1, 21.

<sup>15</sup> *United States v. Sokolow* (1989) 490 U.S. 1, 7.

<sup>16</sup> *People v. Souza* (1994) 9 Cal.4th 224, 233.

## General principles

The propriety of the officers' conduct throughout detentions depends on two things. First, they must have restricted their actions to those that are reasonably necessary to, (1) protect themselves, and (2) complete their investigation.<sup>17</sup> As the Fifth Circuit explained in *United States v. Campbell*, "In the course of [their] investigation, the officers had two goals: to investigate and to protect themselves during their investigation."<sup>18</sup>

Second, even if the investigation was properly focused, a detention will be invalidated if the officers did not pursue their objectives in a prudent manner. Thus, the Ninth Circuit pointed out that "the reasonableness of a detention depends not only on *if* it is made, but also on *how* it is carried out."<sup>19</sup>

Although officers are allowed a great deal of discretion in determining how best to protect themselves and conduct their investigation, the fact remains that detentions are classified as "seizures" under the Fourth Amendment, which means they are subject to the constitutional requirement of objective reasonableness.<sup>20</sup> For example, even if a showup was reasonably necessary, a detention may be deemed unlawful if the officers were not diligent in arranging for the witness to view the detainee. Similarly, even if there existed a legitimate need for additional officer-safety precautions, a detention may be struck down if the officers did not limit their actions to those that were reasonably necessary under the circumstances.

**DE FACTO ARRESTS:** A detention that does not satisfy one or both of these requirements may be invalidated in two ways. First, it will be deemed a de facto arrest if the safety precautions were excessive, if the detention was unduly prolonged, or if the detainee was unnecessarily transported from the scene. While de facto arrests are not unlawful per se, they will be upheld only if the officers had probable cause to arrest.<sup>21</sup> As the court noted in *United States v. Shabazz*, "A prolonged investigative detention may be tantamount to a *de facto* arrest, a more intrusive custodial state which must be based upon probable cause rather than mere reasonable suspicion."<sup>22</sup>

Unfortunately, the term "de facto arrest" may be misleading because it can be interpreted to mean that an arrest results whenever the officers' actions were more consistent with an arrest than a detention; e.g., handcuffing. But, as we will discuss later, arrest-like actions can result in a de facto arrest only if they were not reasonably necessary.<sup>23</sup>

In many cases, of course, the line between a detention and de facto arrest will be difficult to detect.<sup>24</sup> As the Seventh Circuit observed in *U.S. v. Tilmon*, "Subtle, and perhaps tenuous, distinctions exist between a *Terry* stop, a *Terry* stop rapidly evolving into an arrest, and a de facto arrest."<sup>25</sup> So, in "borderline" cases—meaning cases in which the detention "has one or two arrest-like features but otherwise is arguably consistent with a *Terry* stop"—the assessment "requires a fact-specific inquiry into

<sup>17</sup> *Florida v. Royer* (1983) 460 U.S. 491, 500; *People v. Gentry* (1992) 7 Cal.App.4th 1225, 1267.

<sup>18</sup> (5th Cir. 1999) 178 F.3d 345, 348-9

<sup>19</sup> *Meredith v. Erath* (9th Cir. 2003) 342 F.3d 1057, 1062.

<sup>20</sup> *People v. Soun* (1995) 34 Cal.App.4th 1499, 1515.

<sup>21</sup> See *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 83 ["When the detention exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause."].

<sup>22</sup> (5th Cir. 1993) 993 F.2d 431, 436.

<sup>23</sup> See *People v. Harris* (1975) 15 Cal.3d 384, 390 ["A detention of an individual which is reasonable at its inception may exceed constitutional bounds when extended beyond what is *reasonably necessary* under the circumstances." Emphasis added.]; *Ganwich v. Knapp* (9th Cir. 2003) 319 F.3d 1115, 1125 ["The officers should have recognized that the manner in which they conducted the seizure was significantly more intrusive than was necessary"] *U.S. v. Acosta-Colon* (1st Cir. 1998) 157 F.3d 9, 17 ["This assessment requires a fact-specific inquiry into whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course."]. **NOTE:** In the past, the Supreme Court suggested that a detention may be deemed a de facto arrest regardless of whether the officers' actions were reasonably necessary. See, for example *Florida v. Royer* (1983) 460 U.S. 491, 499 (plurality decision) ["Nor may the police seek to verify their suspicions by means that approach the conditions of arrest."]. However, as we discuss later, even if officers handcuffed the suspect or detained him at gunpoint (both quintessential indications of an arrest), a de facto arrest will not result if the precaution was reasonably necessary.

<sup>24</sup> See *Florida v. Royer* (1983) 460 U.S. 491, 506 [no "litmus-paper test" . . . for determining when a seizure exceeds the bounds of an investigative stop"]; *People v. Celis* (2004) 33 Cal.4th 667, 674 ["The distinction between a detention and an arrest may in some instances create difficult line-drawing problems."].

<sup>25</sup> (7th Cir. 1994) 19 F.3d 1221, 1224.

whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course.”<sup>26</sup>

Second, even if a detention did not resemble an arrest, it may be invalidated on grounds that the officers investigated matters for which reasonable suspicion did not exist; or if they did not promptly release the suspect when they realized that their suspicions were unfounded or that they would be unable to confirm them.

**TOTALITY OF CIRCUMSTANCES:** In determining whether the officers acted in a reasonable manner, the courts will consider the totality of circumstances, not just those that might warrant criticism.<sup>27</sup> Thus, the First Circuit pointed out, “A court inquiring into the validity of a *Terry* stop must use a wide lens.”<sup>28</sup>

**COMMON SENSE:** Officers and judges are expected to evaluate the surrounding circumstances in light of common sense, not hypertechnical analysis. In the words of the United States Supreme Court, “Much as a ‘bright line’ rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.”<sup>29</sup>

**TRAINING AND EXPERIENCE:** A court may consider the officers’ interpretation of the circumstances based on their training and experience if the interpretation was reasonable.<sup>30</sup> For example, the detainee’s movements and speech will sometimes indicate to trained officers that he is about to fight or run.

**NO “LEAST INTRUSIVE MEANS” REQUIREMENT:** There are several appellate decisions on the books in which

the courts said or implied that a detention will be invalidated if the officers failed to utilize the “least intrusive means” of conducting their investigation and protecting themselves. In no uncertain terms, however, the Supreme Court has ruled that the mere existence of a less intrusive alternative is immaterial. Instead, the issue is whether the officers were negligent in failing to recognize and implement it. As the Court explained in *U.S. v. Sharpe*, “The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.”<sup>31</sup> The Court added that, in making this determination, judges must keep in mind that most detentions are “swiftly developing” and that judges “can almost always imagine some alternative means by which the objectives of the police might have been accomplished.”

**DEVELOPMENTS AFTER THE STOP:** The courts understand that detentions are not static events, and that the reasonableness of the officers’ actions often depends on what happened as things progressed, especially whether the officers reasonably became more or less suspicious, or more or less concerned for their safety.<sup>32</sup> For example, in *U.S. v. Sowers* the court noted the following:

Based on unfolding events, the trooper’s attention shifted away from the equipment violations that prompted the initial stop toward a belief that the detainees were engaged in more serious skullduggery. Such a shift in focus is neither unusual nor impermissible.<sup>33</sup>

<sup>26</sup> *U.S. v. Acosta-Colon* (1<sup>st</sup> Cir. 1998) 157 F.3d 9, 15.

<sup>27</sup> See *Gallegos v. City of Los Angeles* (9<sup>th</sup> Cir. 2002) 308 F.3d 987, 991 [“We look at the situation as a whole”].

<sup>28</sup> *U.S. v. Romain* (1<sup>st</sup> Cir. 2004) 393 F.3d 63, 71.

<sup>29</sup> *United States v. Sharpe* (1985) 470 U.S. 675, 685. ALSO SEE *U.S. v. Ruidiaz* (1<sup>st</sup> Cir. 2008) 529 F.3d 25, 29 [“the requisite objective analysis must be performed in real-world terms . . . a practical, commonsense determination”].

<sup>30</sup> See *U.S. v. Ellis* (6<sup>th</sup> Cir. 2007) 497 F.3d 606, 614 [the officer “was entitled to assess the circumstances and defendants in light of his experience as a police officer and his knowledge of drug courier activity”].

<sup>31</sup> (1985) 470 U.S. 675, 687. ALSO SEE *People v. Bell* (1996) 43 Cal.App.4<sup>th</sup> 754, 761, fn.1 [“The Supreme Court has since repudiated any ‘least intrusive means’ test for commencing or conducting an investigative stop. The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it.”]; *Gallegos v. City of Los Angeles* (9<sup>th</sup> Cir. 2002) 308 F.3d 987, 992 [“The Fourth Amendment does not mandate one and only one way for police to confirm the identity of a suspect. It requires that the government and its agents act *reasonably*.”].

<sup>32</sup> See *United States v. Place* (1983) 462 U.S. 696, 709, fn.10 [Court notes the officers may need “to graduate their responses to the demands of any particular situation”]; *U.S. v. Ruidiaz* (1<sup>st</sup> Cir. 2008) 529 F.3d 25, 29 [A detention “is not necessarily a snapshot of events frozen in time and place. Often, such a stop can entail an ongoing process.”]; *U.S. v. Christian* (9<sup>th</sup> Cir. 2004) 356 F.3d 1103, 1106 [“police officers must be able to deal with the rapidly unfolding and often dangerous situations on city streets through an escalating set of flexible responses, graduated in relation to the amount of information they possess”].

<sup>33</sup> (1<sup>st</sup> Cir. 1998) 136 F.3d 24, 27.



Similarly, the Seventh Circuit said that “[o]fficers faced with a fluid situation are permitted to graduate their responses to the demands of the particular circumstances confronting them.”<sup>34</sup> Or, in the words of the California Court of Appeal, “Levels of force and intrusion in an investigatory stop may be legitimately escalated to meet supervening events,” and “[e]ven a complete restriction of liberty, if brief and not excessive under the circumstances, may constitute a valid *Terry* stop and not an arrest.”<sup>35</sup>

**DETENTIONS BASED ON REASONABLE SUSPICION PLUS:** Before moving on, we should note that some courts have sought to avoid the problems that often result from the artificial distinction between lawful detentions and de facto arrests by simply permitting more intrusive actions when there is a corresponding increase in the level of suspicion. In one such case, *U.S. v. Tilmon*, the court explained:

[We have] adopted a sliding scale approach to the problem. Thus, stops too intrusive to be justified by suspicion under *Terry*, but short of custodial arrest, are reasonable when the degree of suspicion is adequate in light of the degree and the duration of restraint.<sup>36</sup>

In another case, *Lopez Lopez v. Aran*, the First Circuit said that “where the stop and interrogation comprise more of an intrusion, and the government seeks to act on less than probable cause, a balancing test must be applied.”<sup>37</sup>

Having discussed the basic principles that the courts apply in determining whether a detention was conducted in a reasonable manner, we will now look at how the courts have analyzed the various procedures that officers typically utilize in the course of investigative detentions.

## Using force to detain

If a suspect refuses to comply with an order to stop, officers may of course use force to accomplish the detention. This is because the right to detain “is meaningless unless officers may, when necessary, *forcibly* detain a suspect.”<sup>39</sup> Or, as the Ninth Circuit explained in *U.S. v. Thompson*:

A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest.<sup>40</sup>

How much force is permitted? All that can really be said is that officers may use the amount that a “reasonably prudent” officer would have believed necessary under the circumstances.<sup>38</sup>

Note that in most cases in which force is reasonably necessary, the officers will have probable cause to arrest the detainee for resisting, delaying, or obstructing.<sup>41</sup> If so, it would be irrelevant that the detention had become a de facto arrest.

## Officer-safety precautions

It is “too plain for argument,” said the Supreme Court, that officer-safety concerns during detentions are “both legitimate and weighty.”<sup>42</sup> This is largely because the officers are “particularly vulnerable” since “a full custodial arrest has not been effected, and the officer must make a quick decision as to how to protect himself and others from possible danger.”<sup>43</sup>

Sometimes the danger is apparent, as when the detainee was suspected of having committed a felony, especially a violent felony or one in which the

<sup>34</sup> *U.S. v. Tilmon* (7<sup>th</sup> Cir. 1994) 19 F.3d 1221, 1226.

<sup>35</sup> *People v. Johnson* (1991) 231 Cal.App.3d 1, 13.

<sup>36</sup> (7<sup>th</sup> Cir. 1994) 19 F.3d 1221, 1226.

<sup>37</sup> (1<sup>st</sup> Cir. 1988) 844 F.2d 898, 905.

<sup>38</sup> See *Graham v. Connor* (1989) 490 U.S. 386, 396 [“[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”]; *Scott v. Harris* (2007) 550 U.S. 372; *People v. Brown* (1985) 169 Cal.App.3d 159, 167 [“A police officer may use reasonable force to make an investigatory stop.”].

<sup>39</sup> *People v. Johnson* (1991) 231 Cal.App.3d 1, 12.

<sup>40</sup> (9<sup>th</sup> Cir. 1977) 558 F.2d 522, 524.

<sup>41</sup> See Penal Code § 148(a)(1); *People v. Johnson* (1991) 231 Cal.App.3d 1, 13, fn. 2 [“Given their right to forcibly detain, California precedent arguably would have allowed the officers to *arrest* for flight which unlawfully delayed the performance of their duties.”]; *People v. Allen* (1980) 109 Cal.App.3d 981, 987 [“[Running and hiding] caused a delay in the performance of Officer Barton’s duty.”].

<sup>42</sup> *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110.

<sup>43</sup> *Michigan v. Long* (1983) 463 U.S. 1032, 1052.

perpetrators were armed.<sup>44</sup> Or it may be the detainee's conduct that indicates he presents a danger; e.g., he refuses to comply with an officer's order to keep his hands in sight, or he is extremely jittery, or he won't stop moving around.<sup>45</sup>

And then there are situations that are dangerous but the officers don't know *how* dangerous.<sup>46</sup> For example, they may be unaware that the detainee is wanted for a felony or that he possesses evidence that would send him to prison if it was discovered. Thus, in *Arizona v. Johnson*, a traffic stop case, the Supreme Court noted that the risk of a violent encounter "stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop."<sup>47</sup>

It is noteworthy that, in the past, it was sometimes argued that any officer-safety precaution was too closely associated with an arrest to be justified by anything less than probable cause. But, as the Seventh Circuit commented, that has changed, thanks to the swelling ranks of armed and violence-prone criminals:

[W]e have over the years witnessed a multifaceted expansion of *Terry*. For better or for worse, the trend has led to permitting of the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.<sup>48</sup>

Thus, officers may now employ any officer-safety precautions that were reasonably necessary under the circumstances—with emphasis on the word "reasonably."<sup>49</sup> The Ninth Circuit put it this way: "[W]e allow intrusive and aggressive police conduct without deeming it an arrest in those circumstances when it is a reasonable response to legitimate safety concerns on the part of the investigating officers."<sup>50</sup> Or in the words of the Fifth Circuit:

[P]ointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect—whether singly or in combination—do not automatically convert an investigatory detention into an arrest [unless] the police were unreasonable in failing to use less intrusive procedures to conduct their investigation safely.<sup>51</sup>

With this in mind, we will now look at how the courts are evaluating the most common officer-safety measures.

**KEEP HANDS IN SIGHT:** Commanding a detainee to keep his hands in sight is so minimally intrusive that it is something that officers may do as a matter of routine.<sup>52</sup>

**OFFICER-SAFETY QUESTIONS:** Officers may ask questions that are reasonably necessary to determine if, or to what extent, a detainee constitutes a threat—provided the questioning is brief and to the point. For example, officers may ask the detainee if he has any weapons or drugs in his possession, or if he is on probation or parole.<sup>53</sup>

<sup>44</sup> See *Terry v. Ohio* (1968) 392 U.S. 1 [robbery]; *People v. Campbell* (1981) 118 Cal.App.3d 588, 595 [drug trafficking]; *U.S. v. \$109, 179* (9<sup>th</sup> Cir. 2000) 228 F.3d 1080, 1084-85 [drug trafficking].

<sup>45</sup> See *Courson v. McMillian* (11<sup>th</sup> Cir. 1991) 939 F.2d 1479, 1496.

<sup>46</sup> See *Terry v. Ohio* (1968) 392 U.S. 1, 13 [detention may "take a different turn upon the injection of some unexpected element into the conversation"].

<sup>47</sup> (2009) 129 S.Ct. 781, 787. ALSO SEE *Maryland v. Wilson* (1997) 519 U.S. 408, 414.

<sup>48</sup> *U.S. v. Vega* (7<sup>th</sup> Cir. 1995) 72 F.3d 507, 515.

<sup>49</sup> See *Muehler v. Mena* (2005) 544 U.S. 93, 99 [officers may "use reasonable force to effectuate the detention"]; *People v. Rivera* (1992) 8 Cal.App.4<sup>th</sup> 1000, 1008 ["physical restraint does not convert a detention into an arrest if the restraint is reasonable"]; *U.S. v. Willis* (9<sup>th</sup> Cir. 2005) 431 F.3d 709, 716 ["Our cases have justified the use of force in making a stop if it occurs under circumstances justifying fear for an officer's personal safety."].

<sup>50</sup> *U.S. v. Meza-Corrales* (9<sup>th</sup> Cir. 1999) 183 F.3d 1116, 1123.

<sup>51</sup> *U.S. v. Sanders* (5<sup>th</sup> Cir. 1993) 994 F.2d 200, 206-7.

<sup>52</sup> See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1239; *People v. Padilla* (1982) 132 Cal.App.3d 555, 558.

<sup>53</sup> See *People v. Castellon* (1999) 76 Cal.App.4<sup>th</sup> 1369, 1377 ["[The officer] asked two standard questions [Do you have any weapons? Do you have any narcotics?] in a short space of time, both relevant to officer safety."]; *People v. Brown* (1998) 62 Cal.App.4<sup>th</sup> 493, 499 ["questions about defendant's probation status . . . merely provided the officer with additional pertinent information about the individual he had detained"]; *People v. McLean* (1970) 6 Cal.App.3d 300, 307-8 [asking a detainee "if he had anything illegal in his pocket" is a "traditional investigatory function"]; *U.S. v. Long* (8<sup>th</sup> Cir. 2008) 532 F.3d 791, 795 [OK to ask "whether a driver is carrying illegal drugs"].



**CONTROLLING DETAINEES' MOVEMENTS:** For their safety (and also in order to carry out their investigation efficiently), officers may require the detainee to stand or sit in a particular place. Both objectives are covered in the section "Controlling the detainee's movements," beginning on page ten.

**LIE ON THE GROUND:** Ordering a detainee to lie on the ground is much more intrusive than merely ordering him to sit on the curb. Consequently, such a precaution cannot be conducted as a matter of routine but, instead, is permitted only if there was some justification for it.<sup>54</sup>

**PAT SEARCHING:** Officers may pat search a detainee if they reasonably believed that he was armed or otherwise presented a threat to officers or others. Although the courts routinely say that officers must have reasonably believed that the detainee was armed *and* dangerous, either is sufficient. This is because it is apparent that a suspect who is armed with a weapon is necessarily dangerous to any officer who is detaining him, even if he was cooperative and exhibited no hostility.<sup>55</sup> For example, pat searches are permitted whenever officers reason-

ably believed that the detainee committed a crime in which a weapon was used, or a crime in which weapons are commonly used; e.g., drug trafficking. A pat search is also justified if officers reasonably believed that the detainee posed an immediate threat, even if there was no reason to believe he was armed.<sup>56</sup>

We covered the subject of pat searches in the Winter 2008 edition which can be downloaded on Point of View Online at [www.le.alcoda.org](http://www.le.alcoda.org).

**HANDCUFFING:** Although handcuffing "minimizes the risk of harm to both officers and detainees,"<sup>57</sup> it is not considered standard operating procedure.<sup>58</sup> Instead, it is permitted only if there was reason to believe that physical restraint was warranted.<sup>59</sup> In the words of the Court of Appeal:

[A] police officer may handcuff a detainee without converting the detention into an arrest if the handcuffing is brief and reasonably necessary under the circumstances.<sup>60</sup>

What circumstances tend to indicate that handcuffing was reasonably necessary? The following are examples:

<sup>54</sup> See *U.S. v. Taylor* (9<sup>th</sup> Cir. 1983) 716 F.2d 701, 709 [detainee was "extremely verbally abusive" and "quite rowdy"]; *U.S. v. Buffington* (9<sup>th</sup> Cir. 1987) 815 F.2d 1292, 1300 [detainee "had been charged in the ambush slaying of a police officer and with attempted murder"]; *U.S. v. Jacobs* (9<sup>th</sup> Cir. 1983) 715 F.2d 1343, 1345 [ordering bank robbery suspects to "prone out" was justified]; *Courson v. McMillian* (11<sup>th</sup> Cir. 1991) 939 F.2d 1479, 1496 [detainees were "uncooperative" and intoxicated, one was "unruly and verbally abusive," officer was alone, it was late at night]; *U.S. v. Sanders* (5<sup>th</sup> Cir. 1993) 994 F.2d 200, 207 ["[O]rdering a person whom the police reasonably believe to be armed to lie down may well be within the scope of an investigative detention."].

<sup>55</sup> See *Terry v. Ohio* (1968) 393 U.S. 1, 28; *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 112.

<sup>56</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1049 ["the protection of police and others can justify protective searches when police have a reasonable belief that the suspect *poses a danger*" [emphasis added]]; *Sibron v. New York* (1968) 392 U.S. 40, 65 [purpose of pat search is "disarming a potentially dangerous man"]; *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 [pat search permitted if officers reasonably believe "that defendant is armed or on other factors creating a potential for danger to the officers." Emphasis added]; *People v. Hill* (1974) 12 Cal.3d 731, 746 [pat search is permitted if officers reasonably believe a suspect "might forcibly resist an investigatory detention"]; *U.S. v. Bell* (6<sup>th</sup> Cir. 1985) 762 F.2d 495, 500, fn.7 ["The focus of judicial inquiry is whether the officer reasonably perceived the subject of a frisk as potentially dangerous, not whether he had an indication that the defendant was in fact armed."].

<sup>57</sup> *Muehler v. Mena* (2005) 544 U.S. 93, 100.

<sup>58</sup> See *Muehler v. Mena* (2005) 544 U.S. 93, 99 [handcuffing "was undoubtedly a separate intrusion in addition to detention"]; *In re Antonio B.* (2008) 166 Cal.App.4<sup>th</sup> 435, 442 [officer's "policy" of handcuffing any suspect he detains "was unlawful"]; *U.S. v. Meadows* (1<sup>st</sup> Cir. 2009) 571 F.3d 131, 141 ["[P]olice officers may not use handcuffs as a matter of routine."]. ALSO SEE *U.S. v. Bautista* (9<sup>th</sup> Cir. 1982) 684 F.2d 1286, 1289 ["handcuffing substantially aggravates the intrusiveness of an otherwise investigatory detention and is not part of a typical *Terry* stop."]. **NOTE:** One court has observed that "handcuffing—once problematic—is becoming quite acceptable in the context of *Terry* analysis." *U.S. v. Tilmon* (7<sup>th</sup> Cir. 1994) 19 F.3d 1221, 1228.

<sup>59</sup> See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385 ["The fact that a defendant is handcuffed while being detained does not, by itself, transform a detention into an arrest."]; *Haynie v. County of Los Angeles* (9<sup>th</sup> Cir. 2003) 339 F.3d 1071, 1077 ["A brief, although complete, restriction of liberty, such as handcuffing, during a *Terry* stop is not a de facto arrest, if not excessive under the circumstances."]; *U.S. v. Acosta-Colon* (1<sup>st</sup> Cir. 1998) 157 F.3d 9, 18 ["[O]fficers engaged in an otherwise lawful stop must be permitted to take measures—including the use of handcuffs—they believe reasonably necessary to protect themselves from harm, or to safeguard the security of others."].

<sup>60</sup> *People v. Osborne* (2009) 175 Cal.App.4<sup>th</sup> 1052, 1062.

- Detainee refused to keep his hands in sight.<sup>61</sup>
- Detainee kept reaching inside his clothing.<sup>62</sup>
- Detainee pulled away from officers.<sup>63</sup>
- During a pat search, the detainee tensed up “as if he were attempting to remove his hand” from the officer’s grasp.<sup>64</sup>
- Detainee appeared ready to flee.<sup>65</sup>
- Detainee was hostile.<sup>66</sup>
- Onlookers were hostile.<sup>67</sup>
- Officers had reason to believe he was armed.<sup>68</sup>
- Officers had reason to believe the detainee committed a felony, especially one involving violence or weapons.<sup>69</sup>
- Officers were outnumbered.<sup>70</sup>
- Detainee was transported to another location.<sup>71</sup>
- Officers were awaiting victim’s arrival for a showup.<sup>72</sup>

Three other points. First, if there was reason to believe that handcuffing was necessary, it is immaterial that officers had previously pat searched the detainee and did not detect a weapon. This is because a patdown “is not an infallible method of locating concealed weapons.”<sup>73</sup> Second, in close cases it is relevant that the officers told the detainee

that, despite the handcuffs, he was not under arrest and that the handcuffs were only a temporary measure for everyone’s safety.<sup>74</sup>

Third, even if handcuffing was necessary, it may convert a detention into a de facto arrest if the handcuffs were applied for an unreasonable length of time,<sup>75</sup> or if they were applied more tightly than necessary. As the Seventh Circuit put it, “[A]n officer may not knowingly use handcuffs in a way that will inflict unnecessary pain or injury on an individual who presents little or no risk of flight or threat of injury.”<sup>76</sup> Similarly, the Ninth Circuit observed that “no reasonable officer could believe that the abusive application of handcuffs was constitutional.”<sup>77</sup>

**WARRANT CHECKS:** Because wanted detainees necessarily pose an increased threat, officers may run warrant checks as a matter of routine. Because warrant checks are also an investigative tool, this subject is covered in the section, “Conducting the investigation.”

**PROTECTIVE CAR SEARCHES:** When a person is detained in or near his car, a gun or other weapon in the vehicle could be just as dangerous to the officers as a weapon in his waistband. Consequently, the

<sup>61</sup> See *U.S. v. Dykes* (D.C. Cir. 2005) 406 F.3d 717, 720 [“Dykes had kept his hands near his waistband, resisting both the officers’ commands and their physical efforts to remove his hands into plain view”].

<sup>62</sup> See *U.S. v. Thompson* (9<sup>th</sup> Cir. 1979) 597 F.2d 187, 190.

<sup>63</sup> See *U.S. v. Purry* (D.C. Cir. 1976) 545 F.2d 217, 219-20. *People v. Johnson* (1991) 231 Cal.App.3d 1, 14.

<sup>64</sup> *People v. Osborne* (2009) 175 Cal.App.4<sup>th</sup> 1052, 1062.

<sup>65</sup> See *U.S. v. Bautista* (9<sup>th</sup> Cir. 1982) 684 F.2d 1286, 1289 [detainee “kept pacing back and forth and looking, turning his head back and forth as if he was thinking about running”]. ALSO SEE *People v. Brown* (1985) 169 Cal.App.3d 159, 167 [detainee “started to run”]; *U.S. v. Wilson* (7<sup>th</sup> Cir. 1993) 2 F.3d 226, 232 [“very actively evading”]; *U.S. v. Meadows* (1<sup>st</sup> Cir. 2009) 571 F.3d 131, 142 [detainee “fled from a traffic stop”].

<sup>66</sup> See *Haynie v. County of Los Angeles* (9<sup>th</sup> Cir. 2003) 339 F.3d 1071, 1077 [detainee “became belligerent”].

<sup>67</sup> See *U.S. v. Meza-Corrales* (9<sup>th</sup> Cir. 1999) 183 F.3d 1116, 1123 [“uncooperative persons . . . and uncertainty prevailed”].

<sup>68</sup> See *U.S. v. Meadows* (1<sup>st</sup> Cir. 2009) 571 F.3d 131, 142; *U.S. v. Meza-Corrales* (9<sup>th</sup> Cir. 1999) 183 F.3d 1116, 1123 [“weapons had been found (and more weapons potentially remained hidden)”].

<sup>69</sup> See *People v. Celis* (2004) 33 Cal.4<sup>th</sup> 667, 676 [handcuffing “may be appropriate when the stop is of someone suspected of committing a felony”]; *People v. Soun* (1995) 34 Cal.App.4<sup>th</sup> 1499, 1517 [murder suspect]; *People v. Brown* (1985) 169 Cal.App.3d 159, 166 [bank robbery suspect]; *U.S. v. Johnson* (9<sup>th</sup> Cir. 2009) 581 F.3d 993 [bank robbers].

<sup>70</sup> See *U.S. v. Meza-Corrales* (9<sup>th</sup> Cir. 1999) 183 F.3d 1116, 1123 [“A relatively small number of officers was present”].

<sup>71</sup> See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385; *Gallegos v. City of Los Angeles* (9<sup>th</sup> Cir. 2002) 308 F.3d 987, 991.

<sup>72</sup> See *People v. Bowen* (1987) 195 Cal.App.3d 269, 274 [handcuffing a purse snatch suspect while awaiting the victim’s arrival for a showup “does not mean that appellant was under arrest during this time”].

<sup>73</sup> *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385.

<sup>74</sup> See *U.S. v. Bravo* (9<sup>th</sup> Cir. 2002) 295 F.3d 1002, 1011 [telling detainee that the handcuffs “were only temporary” was a factor that “helped negate the handcuffs’ aggravating influence and suggest mere detention, not arrest”].

<sup>75</sup> See *Muehler v. Mena* (2005) 544 U.S. 93, 100; *Haynie v. County of Los Angeles* (9<sup>th</sup> Cir. 2003) 339 F.3d 1071, 1077.

<sup>76</sup> *Stainback v. Dixon* (7<sup>th</sup> Cir. 2009) 569 F.3d 767, 772. ALSO SEE *Heitschmidt v. City of Houston* (5<sup>th</sup> Cir. 1998) 161 F.3d 834, 839-40 [“no justification for requiring Heitschmidt to remain painfully restrained”]; *Burchett v. Kiefer* (6<sup>th</sup> Cir. 2002) 310 F.3d 937, 944 [“applying handcuffs so tightly that the detainee’s hands become numb and turn blue certainly raises concerns of excessive force”].

<sup>77</sup> *Palmer v. Sanderson* (9<sup>th</sup> Cir. 1993) 9 F.3d 1433, 1436.

United States Supreme Court ruled that officers may look for weapons inside the passenger compartment if they reasonably believed that a weapon—even a “legal” one—was located there.<sup>78</sup>

For example, in *People v. Lafitte*<sup>79</sup> Orange County sheriff’s deputies stopped Lafitte at about 10:15 P.M. because he was driving with a broken headlight. While one of the deputies was talking with him, the other shined a flashlight inside the passenger compartment and saw a knife on the open door of the glove box. The deputy then seized the knife and searched for more weapons. He found one—a handgun—in a trash bag hanging from the ashtray. Although the court described the knife as “legal,” and although Lafitte had been cooperative throughout the detention, the court ruled the search was justified because “the discovery of the weapon is the crucial fact which provides a reasonable basis for the officer’s suspicion.”

Note that a protective vehicle search may be conducted even though the detainee had been handcuffed or was otherwise restrained.<sup>80</sup>

**DETENTION AT GUNPOINT:** Although a detention at gunpoint is a strong indication that the detainee was under arrest, the courts have consistently ruled that such a safety measure will not require probable cause if, (1) the precaution was reasonably necessary, and (2) the weapon was reholstered after it was safe to do so.<sup>81</sup> Said the Fifth Circuit, “[I]n and of itself, the mere act of drawing or pointing a weapon during an investigatory detention does not cause it to exceed the permissible grounds of a *Terry* stop or to become a de facto arrest.”<sup>82</sup> The Seventh Circuit put it this way:

Although we are troubled by the thought of allowing policemen to stop people at the point of a gun when probable cause to arrest is lacking, we are unwilling to hold that [a detention] is never lawful when it can be effectuated safely only in that manner. It is not nice to have a gun pointed at you by a policeman but it is worse to have a gun pointed at you by a criminal.<sup>83</sup>

For instance, in *United States v. Watson* a detainee argued that, even though the officers reasonably believed that he was selling firearms illegally, they “had no right to frighten him by pointing their guns at him.” The court responded, “The defendant’s case is weak; since the police had reasonable suspicion to think they were approaching an illegal seller of guns who had guns in the car, they were entitled for their own protection to approach as they did.”<sup>84</sup>

**FELONY CAR STOPS:** When officers utilize felony car stop procedures, they usually have probable cause to arrest one or more of the occupants of the vehicle. So they seldom need to worry about the intrusiveness of felony stops.

But the situation is different if officers have only reasonable suspicion. Specifically, they may employ felony stop measures only if they had direct or circumstantial evidence that one or more of the occupants presented a substantial threat of imminent violence. A good example of such a situation is found in the case of *People v. Soun* in which the California Court of Appeal ruled that Oakland police officers were justified in conducting a felony stop when they pulled over a car occupied by six people who were suspects in a robbery-murder. As the court pointed out:

<sup>78</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1049-51. **NOTE:** For a more thorough discussion of protective vehicle searches, see the article “Protective Car Searches” in the Winter 2008 edition.

<sup>79</sup> (1989) 211 Cal.App.3d 1429.

<sup>80</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1051-52.

<sup>81</sup> See *People v. Glaser* (1995) 11 Cal.4th 354, 366 [the issue is whether “detention at gunpoint [was] justified by the need of a reasonably prudent officer”]; *People v. Celis* (2004) 33 Cal.4th 667, 676 [“Faced with two suspects, each of whom might flee if Detective Strain stopped one but not the other, it was not unreasonable for him to draw his gun to ensure that both suspects would stop.”]; *People v. McHugh* (2004) 119 Cal.App.4th 202, 211 [“A police officer may use force, including . . . displaying his or her weapon, to accomplish an otherwise lawful stop or detention as long as the force used is reasonable under the circumstances to protect the officer or members of the public or to maintain the status quo.”]; *Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991 [“Our cases have made clear that an investigative detention does not automatically become an arrest when officers draw their guns.”].

<sup>82</sup> *U.S. v. Sanders* (5th Cir. 1993) 994 F.2d 200, 205.

<sup>83</sup> *U.S. v. Serna-Barreto* (7th Cir. 1988) 842 F.2d 965, 968.

<sup>84</sup> (7th Cir. 2009) 558 F.3d 702, 704. Edited. ALSO SEE *U.S. v. Vega* (7th Cir. 1995) 72 F.3d 507, 515 [detention to investigate “massive cocaine importation conspiracy”].

[The officer] concluded that to attempt to stop the car by means suitable to a simple traffic infraction—in the prosecutor’s words, “just pull up alongside and flash your lights and ask them to pull over”—“would not be technically sound as far as my safety or safety of other officers.” We cannot fault [the officer] for this reasoning, or for proceeding as he did.<sup>85</sup>

Felony extraction procedures may also be used on all passengers in a vehicle at the conclusion of a pursuit, even though officers had no proof that the passengers were involved in the crime that prompted the driver to flee. For instance, in *Allen v. City of Los Angeles*, a passenger claimed that a felony stop was unlawful as to him “because he attempted to persuade [the driver] to pull over and stop.” That’s “irrelevant,” said the court, because the officers “could not have known the extent of [the passenger’s] involvement until after they questioned him.”<sup>86</sup>

**UTILIZING TASERS:** Officers may employ a taser against a detainee if the detainee “poses an immediate threat to the officer or a member of the public.”<sup>87</sup>

Having stopped the detainee, and having taken appropriate officer-safety precautions, officers will begin their investigation into the circumstances that generated reasonable suspicion. As we will now discuss, there are several things that officers may do to confirm or dispel their suspicions.

### Controlling the detainee’s movements

Throughout the course of investigative detentions and traffic stops, officers may position the detainee and his companions or otherwise control their movements. While this is permitted as an officer-safety measure (as noted earlier), it is also justified by the

officers’ need to conduct their investigation in an orderly fashion.<sup>88</sup> As the Supreme Court explained, it would be unreasonable to expect officers “to allow people to come and go freely from the physical focal point of [a detention].”<sup>89</sup>

**GET OUT, STAY INSIDE:** If the detainee was the driver or passenger in a vehicle, officers may order him and any occupants who are not detained to step outside or remain inside.<sup>90</sup> And if any occupants had already exited, officers may order them to return to the vehicle.<sup>91</sup> In discussing the officer-safety rationale for ordering detainees to exit, the Supreme Court noted that “face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements.”<sup>92</sup>

**STAY IN A CERTAIN PLACE:** Officers may order the detainee and his companions to sit on the ground, on the curb, or other handy place; e.g., push bar.<sup>93</sup>

**CONFINE IN PATROL CAR:** A detainee may be confined in a patrol car if there was some reason for it.<sup>94</sup> For example, it may be sufficient that the officers were awaiting the arrival of a witness for a showup;<sup>95</sup> or waiting for an officer with experience in drug investigations;<sup>96</sup> or when it was necessary to prolong the detention to confirm the detainee’s identity;<sup>97</sup> or if the detainee was uncooperative;<sup>98</sup> or if the officers needed to focus their attention on another matter, such as securing a crime scene or dealing with the detainee’s associates.<sup>99</sup>

**SEPARATING DETAINEES:** If officers have detained two or more suspects, they may separate them to prevent the “mutual reinforcement” that may result when a suspect who has not yet been questioned is able to hear his accomplice’s story.<sup>100</sup>

<sup>85</sup> (1995) 34 Cal.App.4th 1499, 1519. ALSO SEE *People v. Celis* (2004) 33 Cal.4th 667, 676 [detention for drug trafficking].

<sup>86</sup> (9th Cir. 1995) 66 F.3d 1052, 1057.

<sup>87</sup> See *Bryan v. McPherson* (9th Cir. 2009) 590 F.3d. 767, 775. **NOTE:** See the report on *Bryan* in the Recent Cases section.

<sup>88</sup> See *Arizona v. Johnson* (2009) 129 S.Ct. 781; *U.S. v. Williams* (9th Cir. 2005) 419 F.3d 1029, 1034.

<sup>89</sup> *Brendlin v. California* (2007) 551 U.S. 249, 250.

<sup>90</sup> See *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 111, fn.6; *Maryland v. Wilson* (1997) 519 U.S. 408, 415.

<sup>91</sup> See *U.S. v. Williams* (9th Cir. 2005) 419 F.3d 1029, 1032, 1033; *U.S. v. Sanders* (8th Cir. 2007) 510 F.3d 788, 790.

<sup>92</sup> *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110.

<sup>93</sup> See *People v. Celis* (2004) 33 Cal.4th 667, 676; *People v. Vibanco* (2007) 151 Cal.App.4th 1, 12.

<sup>94</sup> See *People v. Natale* (1978) 77 Cal.App.3d 568, 572; *U.S. v. Stewart* (7th Cir. 2004) 388 F.3d 1079, 1084.

<sup>95</sup> *People v. Craig* (1978) 86 Cal.App.3d 905, 913 [“awaiting the victim”].

<sup>96</sup> *People v. Gorak* (1987) 196 Cal.App.3d 1032, 1038 [“awaiting the arrival of another officer”].

<sup>97</sup> See *U.S. v. Jackson* (7th Cir. 2004) 377 F.3d 715, 717; *U.S. v. Rodriguez* (7th Cir. 1987) 831 F.2d 162, 166.

<sup>98</sup> *Haynie v. County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 [detainee “uncooperative and continued to yell”].

<sup>99</sup> See *People v. Lloyd* (1992) 4 Cal.App.4th 724, 734.

<sup>100</sup> See *People v. Nation* (1980) 26 Cal.3d 169, 180.



Separating detainees is also permitted for officer-safety purposes. Thus, in *People v. Maxwell* the court noted that, “upon effecting the early morning stop of a vehicle containing three occupants, the officer was faced with the prospect of interviewing the two passengers in an effort to establish the identity of the driver. His decision to separate them for his own protection, while closely observing defendant as he rummaged through his pockets for identification, was amply justified.”<sup>101</sup>

### Identifying the detainee

One of the first things that officers will do as they begin their investigation is determine the detainee’s name. “Without question,” said the Court of Appeal, “an officer conducting a lawful *Terry* stop must have the right to make this limited inquiry, otherwise the officer’s right to conduct an investigative detention would be a mere fiction.”<sup>102</sup>

This is also the opinion of the Supreme Court, which added that identifying detainees also constitutes an appropriate officer-safety measure. Said the Court, “Obtaining a suspect’s name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.”<sup>103</sup>

Not only do officers have a right to require that the detainee identify himself, they also have a right to confirm his identity by insisting that he present “satisfactory” documentation.<sup>104</sup> “[W]here there is such a right to so detain,” explained the Court of Appeal, “there is a companion right to request, and obtain, the detainee’s identification.”<sup>105</sup>

**WHAT IS “SATISFACTORY” ID:** A current driver’s license or the “functional equivalent” of a license is presumptively “satisfactory” unless there was reason to believe it was forged or altered.<sup>106</sup> A document will be deemed the functional equivalent of a driver’s license if it contained all of the following: the detainee’s photo, brief physical description, signature, mailing address, serial numbering, and information establishing that the document is current.<sup>107</sup> While other documents are not presumptively satisfactory, officers may exercise discretion in determining whether they will suffice.<sup>108</sup>

**REFUSAL TO ID:** If a detainee will not identify himself, there are several things that officers may do. For one thing, they may prolong the detention for a reasonable time to pursue the matter. As the Court of Appeal observed, “To accept the contention that the officer can stop the suspect and request identification, but that the suspect can turn right around and refuse to provide it, would reduce the authority of the officer to identify a person lawfully stopped by him to a mere fiction.”<sup>109</sup>

Officers may also arrest the detainee for willfully delaying or obstructing an officer in his performance of his duties if he refuses to state his name or if he admits to having ID in his possession but refuses to permit officers to inspect it.<sup>110</sup>

Also note that a detainee’s refusal to furnish ID is a suspicious circumstance that may be a factor in determining whether there was probable cause to arrest him.<sup>111</sup>

**SEARCH FOR ID:** If the detainee denies that he possesses ID, but he is carrying a wallet, officers may, (1) order him to look through the wallet for ID

<sup>101</sup> (1988) 206 Cal.App.3d 1004, 1010.

<sup>102</sup> *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002. ALSO SEE *People v. Long* (1987) 189 Cal.App.3d 77, 89 [court notes the “law enforcement need to confirm identity”].

<sup>103</sup> *Hiibel v. Nevada* (2004) 542 U.S. 177, 186.

<sup>104</sup> See *People v. Long* (1987) 189 Cal.App.3d 77, 86; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002.

<sup>105</sup> *People v. Rios* (1983) 140 Cal.App.3d 616, 621.

<sup>106</sup> *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1186. Also see *People v. McKay* (2002) 27 Cal.4th 601, 620.

<sup>107</sup> See *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1187.

<sup>108</sup> See *People v. McKay* (2002) 27 Cal.4th 601, 622 “[W]e do not intend to foreclose the exercise of discretion by the officer in the field in deciding whether to accept or reject other evidence—including oral evidence—of identification.”]

<sup>109</sup> *People v. Long* (1987) 189 Cal.App.3d 77, 87. Edited. ALSO SEE *U.S. v. Christian* (9th Cir. 2004) 356 F.3d 1103, 1107 [“Narrowly circumscribing an officer’s ability to persist [in determining the detainee’s ID] until he obtains the identification of a suspect might deprive him of the ability to relocate the suspect in the future.”]; *U.S. v. Martin* (7th Cir. 2005) 422 F.3d 597, 602 [“Here, failure to produce a valid driver’s license necessitated additional questioning”].

<sup>110</sup> See Penal Code § 148(a)(1); *Hiibel v. Nevada* (2004) 542 U.S. 177, 188.

<sup>111</sup> See *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002.



while they watch, or (2) search it themselves for ID.<sup>112</sup> Officers may not, however, pat search the detainee for the sole purpose of determining whether he possesses a wallet.<sup>113</sup>

If the detainee is an occupant of a vehicle and he says he has no driver's license or other identification in his possession, officers may conduct a search of the passenger compartment for documentation if they reasonably believed it would be impossible, impractical, or dangerous to permit the detainee or other occupants to conduct the search. For example, these searches have been upheld when the officers reasonably believed the car was stolen,<sup>114</sup> the driver fled,<sup>115</sup> the driver refused to explain his reason for loitering in a residential area at 1:30 A.M.,<sup>116</sup> and a suspected DUI driver initially refused to stop and there were two other men in the vehicle.<sup>117</sup>

**IDENTIFYING DETAINEE'S COMPANIONS:** Officers may request—but not demand—that the detainee's companions identify themselves, and they may attempt to confirm the IDs if it does not unduly prolong the stop. As the First Circuit advised, “[B]ecause passengers present a risk to officer safety equal to the risk presented by the driver, an officer may ask for identification from passengers and run background checks on them as well.”<sup>118</sup>

## Duration of the detention

As we will discuss shortly, officers may try to confirm or dispel their suspicions in a variety of ways, such as questioning the detainee, conducting a showup, and seeking consent to search. But before we discuss these and other procedures, it is necessary to review an issue that pervades all of them: the overall length of the detention.

Everything that officers do during a detention takes time, which means that everything they do is, to some extent, an intrusion on the detainee. Still, the courts understand that it would be impractical to impose strict time limits.<sup>119</sup> Addressing this issue, the Court of Appeal commented:

The dynamics of the detention-for-questioning situation may justify further detention, further investigation, search, or arrest. The significance of the events, discoveries, and perceptions that follow an officer's first sighting of a candidate for detention will vary from case to case.<sup>120</sup>

For this reason, the Supreme Court has ruled that “common sense and ordinary human experience must govern over rigid [time] criteria,”<sup>121</sup> which simply means that officers must carry out their duties diligently.<sup>122</sup> As the Court explained:

<sup>112</sup> See *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002; *People v. Long* (1987) 189 Cal.App.3d 77, 89.

<sup>113</sup> See *People v. Garcia* (2007) 145 Cal.App.4th 782, 788.

<sup>114</sup> See *People v. Vermouth* (1971) 20 Cal.App.3d 746, 752 [“When the driver was unable to produce the registration certificate and said the car belonged to someone else, it was reasonable and proper for the officers to look in the car for the certificate.”]; *People v. Martin* (1972) 23 Cal.App.3d 444, 447 [“When the driver was unable to produce a driver's license and stated that he did not know where the registration certificate was located, since the automobile was owned by another person, the police officers were, under the circumstances, reasonably justified in searching the automobile for the registration certificate”]; *People v. Turner* (1994) 8 Cal.4th 137, 182 [“Here, the Chrysler was abandoned, and the person observed to have been a passenger disclaimed any knowledge, let alone ownership, of the vehicle.”]; *People v. Webster* (1991) 54 Cal.3d 411, 431 [the driver said that the car belonged to one of his passengers, but the passengers claimed they were hitchhikers].

<sup>115</sup> See *People v. Remiro* (1979) 89 Cal.App.3d 809, 830; *People v. Turner* (1994) 8 Cal.4th 137, 182.

<sup>116</sup> See *People v. Hart* (1999) 74 Cal.App.4th 479, 490.

<sup>117</sup> See *People v. Faddler* (1982) 132 Cal.App.3d 607, 610.

<sup>118</sup> *U.S. v. Rice* (10th Cir. 2007) 483 F.3d 1079, 1084. ALSO SEE *People v. Vibanco* (2007) 151 Cal.App.4th 1, 14; *People v. Grant* (1990) 217 Cal.App.3d 1451, 1461-62; *U.S. v. Chaney* (1st Cir. 2009) 584 F.3d 20, 26 [“the officer's initial inquiries into Chaney's identity took at most a minute or two and did not measurably extend the duration of the stop”]; *U.S. v. Cloud* (8th Cir. 2010) \_\_ F.3d \_\_ [2010 WL 547041] [“Cloud points to nothing in the record suggesting that he was compelled to give [the officer] his name”].

<sup>119</sup> See *United States v. Place* (1983) 462 U.S. 696, 709, fn.10; *People v. Gallardo* (2005) 130 Cal.App.4th 234, 238.

<sup>120</sup> *Pendergraft v. Superior Court* (1971) 15 Cal.App.3d 237, 242. ALSO SEE *People v. Russell* (2000) 81 Cal.App.4th 96, 102; *People v. Huerta* (1990) 218 Cal.App.3d 744, 751 [“The officers ‘were having to make decisions. We had a lot of things going on.’”].

<sup>121</sup> *United States v. De Hernandez* (1985) 473 U.S. 531, 543.

<sup>122</sup> See *Muehler v. Mena* (2005) 544 U.S. 93, 100; *People v. Gomez* (2004) 117 Cal.App.4th 531, 537 [“a detention will be deemed unconstitutional when extended beyond what is reasonably necessary”]; *People v. Russell* (2000) 81 Cal.App.4th 96, 101 [“An investigatory stop exceeds constitutional bounds when extended beyond what is reasonably necessary under the circumstances that made its initiation permissible.”]; *U.S. v. Torres-Sanchez* (9th Cir. 1996) 83 F.3d 1123, 1129 [“‘Brevity’ can only be defined in the context of each particular case.”].

In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.<sup>123</sup>

For example, in rejecting an argument that a detention took too long, the court in *Ingle v. Superior Court* pointed out, “Each step in the investigation conducted by [the officers] proceeded logically and immediately from the previous one.”<sup>124</sup> Responding to a similar argument in *Gallegos v. City of Los Angeles*, the Ninth Circuit said:

Gallegos makes much of the fact that his detention lasted forty-five minutes to an hour. While the length of Gallegos’s detention remains relevant, more important is that [the officers’] actions did not involve any delay unnecessary to their legitimate investigation.<sup>125</sup>

**OFFICERS NEED NOT RUSH:** To say that officers must be diligent, does not mean they must “move at top speed” or even rush.<sup>126</sup> Nor does it mean (as we will discuss later) that they may not prolong the detention for a short while to ask questions that do not directly pertain to the crime under investigation. Instead, it simply means the detention must not be “measurably extended.”<sup>127</sup>

**EXAMPLES:** The following are circumstances that were found to warrant extended detentions:

- Waiting for backup.<sup>128</sup>
- Waiting for an officer with special training and experience; e.g. DUI drugs, VIN location.<sup>129</sup>
- Waiting for an interpreter.<sup>130</sup>
- Waiting for a drug-detecting dog.<sup>131</sup>
- Waiting to confirm detainee’s identity.<sup>132</sup>
- Officers needed to speak with the detainee’s companions to confirm his story.<sup>133</sup>
- Computer was slow.<sup>134</sup>
- Officers developed grounds to investigate another crime.<sup>135</sup>
- Officers needed to conduct a field showup.<sup>136</sup>
- There were multiple detainees.<sup>137</sup>
- Additional officer-safety measures became necessary.<sup>138</sup>

For instance, in *People v. Soun* (discussed earlier) police officers in Oakland detained six suspects in a robbery-murder that had occurred the day before in San Jose. Although the men were detained for approximately 45 minutes, the Court of Appeal ruled the delay was justifiable in light of several factors; specifically, the number of detainees, the need for officer-safety precautions that were appropriate to a murder investigation, and the fact that the Oakland officers needed to confer with the investigating officers in San Jose.<sup>139</sup>

<sup>123</sup> *United States v. Sharpe* (1985) 470 U.S. 675, 686.

<sup>124</sup> (1982) 129 Cal.App.3d 188, 196. ALSO SEE *People v. Soun* (1995) 34 Cal.App.4th 1499, 1520 [officer “full accounted” for the 30-minute detention].

<sup>125</sup> (9th Cir. 2002) 308 F.3d 987, 992. Edited.

<sup>126</sup> *U.S. v. Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7.

<sup>127</sup> See *Johnson v. Arizona* (2009) \_\_ U.S. \_\_ [2009 WL 160434].

<sup>128</sup> *Courson v. McMillian* (11th Cir. 1991) 939 F.2d 1479, 1493 [detention by single officer of three suspects, one of whom was unruly].

<sup>129</sup> See *United States v. Sharpe* (1985) 470 U.S. 675, 687, fn.5 [“[A]s a highway patrolman, he lacked Cooke’s training and experience in dealing with narcotics investigations.”]; *People v. Gorak* (1987) 196 Cal.App.3d 1032, 1038 [inexperienced officer awaited arrival of officer with experience in DUI-drugs].

<sup>130</sup> See *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1577; *U.S. v. Rivera* (8th Cir. 2009) 570 F.3d 1009, 1013.

<sup>131</sup> See *U.S. v. Bloomfield* (8th Cir. 1994) 40 F.3d 910, 917.

<sup>132</sup> See *People v. Grant* (1990) 217 Cal.App.3d 1451, 1459; *U.S. v. Ellis* (6th Cir. 2007) 497 F.3d 606, 614; *U.S. v. \$109,179* (9th Cir. 2000) 228 F.3d 1080, 1086; *U.S. v. Long* (7th Cir. 2005) 422 F.3d 597, 602.

<sup>133</sup> See *U.S. v. Brigham* (5th Cir. 2004) 382 F.3d 500, 508 [OK to “verify the information provided by the driver”].

<sup>134</sup> See *U.S. v. Rutherford* (10th Cir. 1987) 824 F.2d 831, 834.

<sup>135</sup> See *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1228; *U.S. v. Ellis* (6th Cir. 2007) 497 F.3d 606, 614.

<sup>136</sup> See *People v. Bowen* (1987) 195 Cal.App.3d 269, 273-74.

<sup>137</sup> See *People v. Soun* (1995) 34 Cal.App.4th 1499 [six detainees]; *U.S. v. Shareef* (10th Cir. 1996) 100 F.3d 1491, 1506.

<sup>138</sup> See *Muehler v. Mena* (2005) 544 U.S. 93, 100 [“[T]his case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons.”]; *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374 [“At the point where Castellon failed to follow [the officer’s] order to remain in the car and [the officer] became concerned for his safety, the . . . focus shifted from a routine investigation of a Vehicle Code violation to officer safety.”].

<sup>139</sup> (1995) 34 Cal.App.4th 1499, 1524.

**DELAYS ATTRIBUTABLE TO THE DETAINEE:** One of the most common reasons for prolonging an investigative detention or traffic stop is that the detainee said or did something that made it necessary to interrupt the normal progression of the stop.<sup>140</sup> For example, in *United States v. Sharpe* the Supreme Court ruled that an extended detention became necessary when the occupants of two cars did not immediately stop when officers lit them up but, instead, attempted to split up. As a result, they were detained along different parts of the roadway, which necessarily made the detention more time consuming.<sup>141</sup>

Similarly, a delay for further questioning may be necessary because the detainee lied or was deceptive. Thus, the court *U.S. v. Suitt* ruled that a lengthy detention was warranted because “Suitt repeatedly gave hesitant, evasive, and incomplete answers.”<sup>142</sup>

Finally, it should be noted that the clock stops running when officers develop probable cause to arrest, or when they convert the detention into a contact. See “Converting detentions into contacts,” below.

### Questioning the detainee

In most cases, the fastest way for officers to confirm or dispel their suspicion is to pose questions to the detainee and, if any, his companions. Thus, after noting that such questioning is “the great engine of the investigation,” the Court of Appeal observed in *People v. Manis*:

When circumstances demand immediate investigation by the police, the most useful, most available tool for such investigation is general on-the-scene questioning designed to bring out the person’s explanation or lack of explanation of the circumstances which aroused the suspicion of the police, and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.<sup>143</sup>

Detainees cannot, however, be required to answer an officer’s questions. For example, in *Garwich v. Knapp* the Ninth Circuit ruled that officers acted improperly when they told the detainees that they would not be released until they started cooperating. Said the court, “[I]t was not at all reasonable to condition the plaintiffs’ release on their submission to interrogation.”<sup>144</sup>

**MIRANDA COMPLIANCE:** Although detainees are not free to leave, a *Miranda* waiver is not ordinarily required because the circumstances surrounding most detentions do not generate the degree of compulsion to speak that the *Miranda* procedure was designed to alleviate.<sup>145</sup> “The comparatively nonthreatening character of detentions of this sort,” said the Supreme Court, “explains the absence of any suggestion in our opinions that [detentions] are subject to the dictates of *Miranda*.”<sup>146</sup>

A *Miranda* waiver will, however, be required if the questioning “ceased to be brief and casual” and had

<sup>140</sup> See *United States v. Montoya De Hernandez* (1985) 473 U.S. 531, 543 [“Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect’s evasive actions.”]; *People v. Allen* (1980) 109 Cal.App.3d 981, 987 [“The actions of appellant (running and hiding) caused a delay”]; *People v. Williams* (2007) 156 Cal.App.4th 949, 960 [“The detention was necessarily prolonged because of the remote location of the marijuana grow.”]; *U.S. v. Shareef* (10<sup>th</sup> Cir. 1996) 100 F.3d 1491, 1501 [“When a defendant’s own conduct contributes to a delay, he or she may not complain that the resulting delay is unreasonable.”].

<sup>141</sup> (1985) 470 U.S. 675, 687-88.

<sup>142</sup> (8<sup>th</sup> Cir. 2009) 569 F.3d 867, 872. ALSO SEE *U.S. v. Sullivan* (4<sup>th</sup> Cir. 1998) 138 F.3d 126, 132-33; *People v. Huerta* (1990) 218 Cal.App.3d 744, 751 [delay resulted from detainee’s lying to officers].

<sup>143</sup> (1969) 268 Cal.App.2d 653, 665. ALSO SEE *Hiibel v. Nevada* (2004) 542 U.S. 177, 185 [“Asking questions is an essential part of police investigations.”]; *Berkemer v. McCarty* (1984) 468 U.S. 420, 439 [“Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.”]; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002 [“Inquiries of the suspect’s identity, address and his reason for being in the area are usually the first questions to be asked”].

<sup>144</sup> (9<sup>th</sup> Cir. 2003) 319 F.3d 1115, 1120. ALSO SEE *U.S. v. \$404,905* (8<sup>th</sup> Cir. 1999) 182 F.3d 643, 647, fn.2 [the detainee “may not be compelled to answer, and may not be arrested for refusing to answer”].

<sup>145</sup> See *People v. Clair* (1992) 2 Cal.4<sup>th</sup> 629, 679 [“Generally, however, [custody] does not include a temporary detention for investigation.”]; *People v. Farnam* (2002) 28 Cal.4<sup>th</sup> 107, 1041 [“the term ‘custody’ generally does not include a temporary detention”]; *U.S. v. Booth* (9<sup>th</sup> Cir. 1981) 669 F.2d 1231, 1237 [“We have consistently held that even though one’s freedom of action may be inhibited to some degree during an investigatory detention, *Miranda* warnings need not be given prior to questioning since the restraint is not custodial.”].

<sup>146</sup> *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.

become “sustained and coercive,”<sup>147</sup> or if there were other circumstances that would have caused a reasonable person in the suspect’s position to believe that he was under arrest. As the U.S. Supreme Court pointed out in *Berkemer v. McCarty*:

If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him “in custody” for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.<sup>148</sup>

The question arises: Is a waiver required if the detainee is in handcuffs? In most cases, the answer is yes because handcuffing is much more closely associated with an arrest than a detention.<sup>149</sup> But because the issue is whether a reasonable person would have concluded that the handcuffing was “tantamount to a formal arrest,”<sup>150</sup> it is arguable that a handcuffed detainee would not be “in custody” if, (1) it was reasonably necessary to restrain him, (2) officers told him that he was not under arrest and that the handcuffing was merely a temporary safety measure, and (3) there were no other circumstances that reasonably indicated he was under arrest.<sup>151</sup>

A further question: Is a suspect “in custody” for *Miranda* purposes if he was initially detained at gunpoint? It appears not if, (1) the precaution was warranted, (2) the weapon was reholstered before the detainee was questioned, and (3) there were no other circumstances that indicated the detention

had become an arrest. As the court said in *People v. Taylor*, “Assuming the citizen is subject to no other restraints, the officer’s initial display of his reholstered weapon does not require him to give *Miranda* warnings before asking the citizen questions.”<sup>152</sup>

**OFF-TOPIC QUESTIONING:** Until last year, one of the most hotly debated issues in the law of detentions (especially traffic stops) was whether a detention becomes an arrest if officers prolonged the stop by questioning the detainee about matters that did not directly pertain to the matter upon which reasonable suspicion was based. Although some courts would rule that all off-topic questioning was unlawful, most held that such questioning was allowed if it did not prolong the stop (e.g., the officer questioned the suspect while writing a citation or while waiting for warrant information), or if the length of the detention was no longer than “normal.”<sup>153</sup>

In 2009, however, the Supreme Court resolved the issue in the case of *Arizona v. Johnson* when it ruled that unessential or off-topic questioning is permissible if it did not “measurably extend” the duration of the stop. Said the Court, “An officer’s inquiries into matters unrelated to the justification for the traffic stop 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.”<sup>154</sup> Although decided before *Johnson*, the case of *United States v. Childs* contains a good explanation of the reasons for this rule:

<sup>147</sup> *People v. Manis* (1969) 268 Cal.App.2d 653, 669.

<sup>148</sup> (1984) 468 U.S. 420, 440.

<sup>149</sup> See *New York v. Quarles* (1984) 467 U.S. 649, 655; *Dunaway v. New York* (1979) 442 U.S. 200, 215; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1405 [handcuffing “is a distinguishing feature of a formal arrest”].

<sup>150</sup> *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1406.

<sup>151</sup> See *U.S. v. Cervantes-Flores* (9th Cir. 2005) 421 F.3d 825, 830.

<sup>152</sup> (1986) 178 Cal.App.3d 217, 230. ALSO SEE *People v. Clair* (1992) 2 Cal.4th 629, 679; *Cruz v. Miller* (2nd Cir. 2001) 255 F.3d 77.

<sup>153</sup> See, for example, *Muehler v. Mena* (2005) 544 U.S. 93, 101; *People v. Bell* (1996) 43 Cal.App.4th 754, 767.

<sup>154</sup> (2009) 129 S.Ct. 781, 788. Edited. ALSO SEE *Muehler v. Mena* (2005) 544 U.S. 93, 101 [“We have held repeatedly that mere police questioning does not constitute a seizure.”]; *U.S. v. Rivera* (8th Cir. 2009) 570 F.3d 1009, 1013 [applies “measurably extend” test]; *U.S. v. Chaney* (1st Cir. 2009) 584 F.3d 20, 24 [applies “measurably extend” test]; *U.S. v. Taylor* (7th Cir. 2010) \_\_ F.3d \_\_ [2010 WL 522831] [“They asked him a few questions, some of which were unrelated to the traffic stop, but that does not transform the stop into an unreasonable seizure.”]. **NOTE:** Prior to *Johnson*, some courts ruled that off-topic questioning was permissible if it did not significantly extend the duration of the stop. See, for example, *U.S. v. Alcaraz-Arellano* (10th Cir. 2006) 441 F.3d 1252, 1259; *U.S. v. Turvin* (9th Cir. 2008) 517 F.3d 1097, 1102; *U.S. v. Stewart* (10th Cir. 2007) 473 F.3d 1265, 1269; *U.S. v. Chhien* (1st Cir. 2001) 266 F.3d 1, 9 [“The officer” did not stray far afield”]; *U.S. v. Purcell* (11th Cir. 2001) 236 F.3d 1274, 1279 [delay of three minutes was *de minimis*]; *U.S. v. Sullivan* (4th Cir. 1998) 138 F.3d 126, 133 [“brief one-minute dialogue” was insignificant]; *U.S. v. Martin* (7th Cir. 2005) 422 F.3d 597, 601-2 [off-topic questions are permitted if they “do not unreasonably extend” the stop]; *U.S. v. Long* (8th Cir. 2008) 532 F.3d 791, 795 [“Asking an off-topic question, such as whether a driver is carrying illegal drugs, during an otherwise lawful traffic stop does not violate the Fourth Amendment.”]. COMPARE *U.S. v. Peralez* (8th Cir. 2008) 526 F.3d 1115, 1121 [“The off-topic questions more than doubled the time Peralez was detained.”].



Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public—for all suspects (even the guilty ones) may protect themselves fully by declining to answer.<sup>155</sup>

### Warrant checks

Officers who have detained a person (even a traffic violator<sup>156</sup>) may run a warrant check and rap sheet if it does not measurably extend the length of the stop.<sup>157</sup> This is because warrant checks further the public interest in apprehending wanted suspects,<sup>158</sup> and because knowing whether detainees are wanted and knowing their criminal history helps enable officers determine whether they present a heightened threat.<sup>159</sup> As the Ninth Circuit put it:

On learning a suspect's true name, the officer can run a background check to determine whether a suspect has an outstanding arrest warrant, or a history of violent crime. This information could be as important to an officer's safety as knowing that the suspect is carrying a weapon.<sup>160</sup>

While a detention may be invalidated if there was an unreasonable delay in obtaining warrant information, a delay should not cause problems if officers had reason to believe a warrant was outstanding, and they were just seeking confirmation.<sup>161</sup>

### Showups

Officers may prolong a detention for the purpose of conducting a showup if the crime under investigation had just occurred, and the detainee would be arrestable if he was ID'd by the victim or a witness.<sup>162</sup>

Single-person showups are, of course, inherently suggestive because, unlike physical and photo lineups, there are no fillers, and the witness is essentially asked, "Is this the guy?" Still, they are permitted for two reasons. First, an ID that occurs shortly after the crime was committed is generally more reliable than an ID that occurs later. Second, showups enable officers to determine whether they need to continue the search or call it off.<sup>163</sup> As the Court of Appeal observed in *In re Carlos M.*:

[T]he element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended.<sup>164</sup>

**SHOWUPS FOR OLDER CRIMES:** Although most showups are conducted when the crime under investigation occurred recently, there is no prohibition against conducting showups for older crimes. According to the Court of Appeal, "[N]o case has held that a single-person showup in the absence of compelling circumstances is per se unconstitutional."<sup>165</sup>

Still, because showup IDs are more susceptible to attack in trial on grounds of unreliability, it would be better not to use the showup procedure unless there was an overriding reason for not conducting a physical or photo lineup. As the court noted in *People v. Sandoval*, the showup procedure "should not be used without a compelling reason because of the great danger of suggestion from a one-to-one viewing which requires only the assent of the witness."<sup>166</sup>

<sup>155</sup> (7<sup>th</sup> Cir. 2002) 277 F.3d 947, 954.

<sup>156</sup> **NOTE:** The California Supreme Court's opinion in *People v. McGaughran* (1979) 25 Cal.3d 577 has been widely interpreted as imposing strict time requirements on traffic stops. Not only would such an interpretation be contrary to the U.S. Supreme Court's "measurably extend" test (*Arizona v. Johnson* (2009) \_\_ U.S. \_\_), the Court of Appeal recently ruled that *McGaughran* was abrogated by Proposition 8. *People v. Branner* (2009) \_\_ Cal.App.4<sup>th</sup> \_\_ [2009 WL 4858105].

<sup>157</sup> See *People v. Stoffle* (1991) 1 Cal.App.4<sup>th</sup> 1671, 1679; *U.S. v. Nichols* (6<sup>th</sup> Cir. 2008) 512 F.3d 789, 796.

<sup>158</sup> See *U.S. v. Hensley* (1985) 469 U.S. 221, 229; *U.S. v. Villagrana-Flores* (10<sup>th</sup> Cir. 2006) 467 F.3d 1269, 1277.

<sup>159</sup> See *Hibel v. Nevada* (2004) 542 U.S. 177, 186; *U.S. v. Holt* (10<sup>th</sup> Cir. 2001) 264 F.3d 1215, 1221-22.

<sup>160</sup> *U.S. v. Christian* (9<sup>th</sup> Cir. 2004) 356 F.3d 1103, 1107.

<sup>161</sup> See *Carpio v. Superior Court* (1971) 19 Cal.App.3d 790, 792.

<sup>162</sup> See *People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 412.

<sup>163</sup> See *People v. Irvin* (1968) 264 Cal.App.2d 747, 759; *People v. Dampier* (1984) 159 Cal.App.3d 709, 712-13.

<sup>164</sup> (1990) 220 Cal.App.3d 372, 387.

<sup>165</sup> *People v. Nash* (1982) 129 Cal.App.3d 513, 518. ALSO SEE *People v. Craig* (1978) 86 Cal.App.3d 905, 914.

<sup>166</sup> (1977) 70 Cal.App.3d 73, 85.



**TRANSPORTING THE DETAINEE:** As a general rule, showups are permitted only if they occur at the scene of the detention. This subject is discussed below in the section, “Transporting the detainee.”

**DILIGENCE:** Because officers must be diligent in carrying out their duties, they must be prompt in arranging for the witness to be transported to the scene of the detention. For example, in *People v. Bowen*<sup>167</sup> SFPD officers detained two suspects in a purse snatch that had occurred about a half hour earlier. The court noted that the officers “immediately” radioed their dispatcher and requested that the victim be transported to the scene of the detention. When the victim did not arrive promptly, they asked their dispatcher for an “estimation of the time of arrival of the victim,” at which point they were informed that the officer who was transporting her “was caught in traffic and would arrive shortly.” All told, the suspects were detained for about 25 minutes before the victim arrived and identified them.

In rejecting the argument that the delay had transformed the detention into a de facto arrest, the court pointed out that the officers had “immediately” requested that the victim be brought to the scene; and when they realized there would be a delay, they asked their dispatcher for the victim’s ETA. Because these circumstances demonstrated that the officers took care to minimize the length of the detention, the court ruled it was lawful.

**REDUCING SUGGESTIVENESS:** As noted earlier, showups are inherently suggestive because the witness is not required to identify the perpetrator from among other people of similar physical appearance. Furthermore, some witnesses might assume that, because officers do not go around detaining people at random in hopes that someone will ID them, there must be a good reason to believe that the person they

are looking at is the culprit. This assumption may be inadvertently bolstered if the witness sees the detainee in handcuffs or if he is sitting behind the cage in a patrol car.

Still, the courts have consistently ruled that showup IDs are admissible at trial unless officers did something that rendered the procedure *unnecessarily* suggestive.<sup>168</sup> Consequently, if it was reasonably necessary to present the detainee in handcuffs for the safety of officers, the witness, or others, this circumstance is immaterial. Furthermore, officers will usually take steps to reduce any suggestiveness that is inherent in the showup procedure by providing the witness with some cautionary instructions, such as the following:

- You will be seeing a person who will be standing with other officers. Do not assume that this person is the perpetrator or even a suspect merely because we are asking you to look at him or because other officers are present.

*(If two or more witnesses will view the detainee)*

- Do not speak with the other witnesses who will be going with us.
- When we arrive, do not say anything in their presence that would indicate you did or did not recognize someone. You will all be questioned separately.

### Transporting the detainee

A detention will ordinarily become a de facto arrest if the detainee was transported to the crime scene, police station, or some other place.<sup>169</sup> This is because the act of removing the detainee from the scene constitutes an exercise of control that is more analogous to a physical arrest than a detention. Moreover, officers can usually accomplish their objectives by less intrusive means.

<sup>167</sup> (1987) 195 Cal.App.3d 269.

<sup>168</sup> See *People v. Yeoman* (2003) 31 Cal.4th 93, 125 [“Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification.”]; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1461, fn.5 [“Even one-person showups are not inherently unfair.”].

<sup>169</sup> See *Kaupp v. Texas* (2003) 538 U.S. 626, 630 [“Such involuntary transport to a police station for questioning is sufficiently like arrest to invoke the traditional rule that arrests may constitutionally be made only on probable cause.”]; *Hayes v. Florida* (1985) 470 U.S. 811, 815 [“[T]ransportation to and investigative detention at the station house without probable cause or judicial authorization together violate the Fourth Amendment.”]; *People v. Harris* (1975) 15 Cal.3d 384, 391 [insufficient justification for transporting the detainee to the crime scene]; *U.S. v. Parr* (9th Cir. 1988) 843 F.2d 1228, 1231 [“[A] distinction between investigatory stops and arrests may be drawn at the point of transporting the defendant to the police station.”].

There are, however, three exceptions to this rule. First, officers may transport the detainee if he freely consented.<sup>170</sup> Second, they may transport him a short distance if it might reduce the overall length of the detention.<sup>171</sup> As the California Supreme Court observed, “[T]he surrounding circumstances may reasonably indicate that it would be less of an intrusion upon the suspect’s rights to convey him speedily a few blocks to the crime scene, permitting the suspect’s early release rather than prolonging unduly the field detention.”<sup>172</sup>

Third, removing the detainee to another location is permitted if there was good reason for doing so. In the words of the Ninth Circuit:

[T]he police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention given the specific circumstances of the case.<sup>173</sup>

For example, if a hostile crowd had gathered it would be reasonable to take the detainee to a place where the detention could be conducted safely.<sup>174</sup> Or it might be necessary to drive the detainee to the crime scene or a hospital for a showup if the victim

had been injured.<sup>175</sup> Thus, in *People v. Harris*, the court noted, “If, for example, the victim of an assault or other serious offense was injured or otherwise physically unable to be taken to promptly view the suspect, or a witness was similarly incapacitated, and the circumstances warranted a reasonable suspicion that the suspect was indeed the offender, a ‘transport’ detention might well be upheld.”<sup>176</sup>

Another example of a situation in which a “transport detention” was deemed reasonable is found in the case of *People v. Soun*.<sup>177</sup> In *Soun*, the Court of Appeal ruled it was reasonable for Oakland officers to drive six suspects in a San Jose robbery-murder to a parking lot three blocks from the detention site because the officers reasonably believed that they would not be able to resolve the matter quickly (given the number of suspects and the need to coordinate their investigation with SJPD detectives), plus it was necessary to detain the suspects in separate patrol cars which were impeding traffic. Said the court, “A three-block transportation to an essentially neutral site for these rational purposes did not operate to elevate [the suspects’] custodial status from detention to arrest.”

<sup>170</sup> See *In re Gilbert R.* (1994) 25 Cal.App.4th 1121, 1225; *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 125. COMPARE *People v. Campbell* (1981) 118 Cal.App.3d 588, 596 [court rejects the argument that “a person who is handcuffed and asked to accompany an officer, freely consents to do so”]; *U.S. v. Shaw* (6th Cir. 2006) 464 F.3d 615, 622 [“Although he did not express any resistance to going with SA Ford, neither was he given the option of choosing not to go.”].

<sup>171</sup> See *People v. Daugherty* (1996) 50 Cal.App.4th 275, 287 [detention at airport, OK to walk the detainee 60 yards to the police office for canine sniff of luggage]; *U.S. v. Holzman* (9th Cir. 1989) 871 F.2d 1496, 1502 [“the movement of Holzman from the open floor to the more private counter area” is “not the sort of transporting that has been found overly intrusive”]; *Pliska v. City of Stevens Point* (7th Cir. 1987) 823 F.2d 1168, 1176 [“The mere fact that [the officer] drove the squad car a short distance does not necessarily convert the stop into an arrest.”]; *U.S. v. Bravo* (9th Cir. 2002) 295 F.3d 1002, 1011 [30-40 yard walk to border patrol security office]; *U.S. v. \$109,179* (9th Cir. 2000) 228 F.3d 1080, 1085 [“only a short distance down the hall”]. COMPARE *In re Dung T.* (1984) 160 Cal.App.3d 697, 714 [“the police simply ‘loaded up the occupants, put them in police cars, transported them to the police facility’”].

<sup>172</sup> *People v. Harris* (1975) 15 Cal.3d 384, 391.

<sup>173</sup> *U.S. v. Charley* (9th Cir. 2005) 396 F.3d 1074, 1080.

<sup>174</sup> See *People v. Courtney* (1970) 11 Cal.App.3d 1185, 1192. ALSO SEE *Florida v. Royer* (1983) 460 U.S. 491, 504 [“[T]here are undoubtedly reasons of safety or security that would justify moving a suspect from one location to another during an investigatory detention, such as from an airport concourse to a more private area.”].

<sup>175</sup> See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 382 [permissible to transport a rape suspect to a hospital for a showup because the victim was undergoing a “rape-victim examination” which officers believed would take about two hours]; *People v. Gatch* (1976) 56 Cal.App.3d 505, 510 [“this case is one in which it was less of an intrusion to convey the defendant speedily a short distance to the crime scene” for a showup]; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094 [transport a half block away OK when “the victim is injured and physically unable to be taken promptly to view the suspects”]; *U.S. v. Charley* (9th Cir. 2005) 396 F.3d 1074, 1080 [“[W]e have held that the police may move a suspect without exceeding the bounds of an investigative detention when it is a reasonable means of achieving the legitimate goals of the detention given the specific circumstances of the case.”]; *U.S. v. Meadows* (1st Cir. 2009) 571 F.3d 131, 143 [person detained inside his house could be transported outside because of “the threat of enclosed spaces and secret compartments to officers who are legitimately in a home and are effecting a [detention]”].

<sup>176</sup> (1975) 15 Cal.3d 384, 391.

<sup>177</sup> (1995) 34 Cal.App.4th 1499.

Keep in mind that this exception will be applied only if officers are able to articulate one or more specific reasons for moving the detainee. Thus, in *U.S. v. Acosta-Colon* the court responded as follows when an officer cited only “security reasons” as justification for the move:

[T]here will *always* exist “security reasons” to move the subject of a *Terry*-type stop to a confined area pending investigation. But if this kind of incremental increase in security were sufficient to warrant the involuntary movement of a suspect to an official holding area, then such a measure would be justified in every *Terry*-type investigatory stop.<sup>178</sup>

### Other procedures

**CONSENT SEARCHES:** During an investigative detention, officers may, of course, seek the detainee’s consent to search his person, vehicle, or personal property if a search would assist the officers in confirming or dispelling their suspicions.<sup>179</sup> If a search would not be pertinent to the matter upon which reasonable suspicion was based (such as traffic stops), officers may nevertheless seek consent to search because, as noted earlier, a brief request in the course of a lawful detention does not render the detention unlawful.<sup>180</sup> As the Supreme Court explained in *Florida v. Bostick*, “[E]ven when officers have no basis for suspecting a particular individual, they may generally request consent to search his or her luggage.”<sup>181</sup>

Note, however, that consent may be deemed invalid if a court finds that it was obtained after the officers had completed all of their duties pertaining to the stop, and were continuing to detain the suspect without sufficient cause.<sup>182</sup> Officers may,

however, seek consent to search if they converted the detention into a contact. (See “Converting detentions into contacts,” next page.)

**FIELD CONTACT CARDS:** For various reasons, officers may want to obtain certain information about the detainee, such as his physical description, vehicle description, the location of the detention, the names of his companions, and a summary of the circumstances surrounding the stop. Oftentimes, this information will be uploaded to a database or routed to a particular investigator or outside agency.

In any event, a brief delay for this purpose should not cause problems because, as the Court of Appeal observed, “Field identification cards perform a legitimate police function. If done expeditiously and in an appropriate manner after a lawful stop and in response to circumstances which indicate that a crime has taken place and there is cause to believe that the person detained is involved in same, the procedure is not constitutionally infirm.”<sup>183</sup>

**FINGERPRINTING THE DETAINEE:** Officers may fingerprint the detainee if, (1) they reasonably believed that fingerprinting would help confirm or dispel their suspicion, and (2) the procedure was carried out promptly. As the Supreme Court observed:

There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect’s connection with that crime, and if the procedure is carried out with dispatch.<sup>184</sup>

**PHOTOGRAPHING THE DETAINEE:** A detainee may, of course, be photographed if he consented.<sup>185</sup> But

<sup>178</sup> (1<sup>st</sup> Cir. 1998) 157 F.3d 9, 17.

<sup>179</sup> See *Florida v. Jimeno* (1991) 500 U.S. 248, 250-1; *United States v. Drayton* (2002) 536 U.S. 194, 207 [“In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent.”].

<sup>180</sup> See *People v. Gallardo* (2005) 130 Cal.App.4<sup>th</sup> 234, 238 [grounds to continue the detention is not required before seeking consent]; *U.S. v. Canipe* (6<sup>th</sup> Cir. 2009) 569 F.3d 597, 602 [“When Canipe signed the citation and [the officer] returned his information, thereby concluding the initial purpose of the stop, Canipe neither refused [the officer’s] immediate request for permission to search the truck nor asked to leave.”].

<sup>181</sup> (1991) 501 U.S. 429, 434.

<sup>182</sup> See *People v. Lingo* (1970) 3 Cal.App.3d 661, 663-64.

<sup>183</sup> See *People v. Harness* (1983) 139 Cal.App.3d 226, 233.

<sup>184</sup> *Hayes v. Florida* (1985) 470 U.S. 811, 817. ALSO SEE *Davis v. Mississippi* (1969) 394 U.S. 721, 727-28; *Virgle v. Superior Court* (2002) 100 Cal.App.4<sup>th</sup> 572.

<sup>185</sup> See *People v. Marquez* (1992) 1 Cal.4<sup>th</sup> 553, 578 [in detaining a person who resembled the composite drawing of a murder suspect, there was “no impropriety in . . . asking defendant for his permission to be photographed.”].

what if he doesn't consent? Although we are unaware of any cases in which the issue has been addressed, it seems likely that it would be judged by the same standards as nonconsensual fingerprinting; i.e., taking a photograph of the detainee should be permitted if the officers reasonably believed that the photograph would help them confirm or dispel their suspicion, and the procedure was carried out promptly.<sup>186</sup>

### Terminating the detention

Officers must discontinue the detention within a reasonable time after they determine that grounds for the stop did not exist.<sup>187</sup> In the words of the Eighth Circuit, "[A]n investigative stop must cease once reasonable suspicion or probable cause dissipates."<sup>188</sup>

Officers must also terminate the detention if it becomes apparent that they would be unable to confirm or dispel their suspicions within a reasonable time. And, of course, a traffic stop must end promptly after the driver has signed a promise to appear.<sup>189</sup>

### Converting detentions into contacts

Many of the procedural problems that officers encounter during detentions can be avoided by converting the detention into a consensual encoun-

ter or "contact." After all, if the suspect knows he can leave at any time, and if he says he doesn't mind answering some more questions, there is no reason to prohibit officers from asking more questions.

To convert a detention into a contact, the officers must make it clear to the suspect that he is now free to go. Thus, they must ordinarily do two things. First, they must return all identification documents that they had obtained from the suspect, such as his driver's license.<sup>190</sup> This is because "no reasonable person would feel free to leave without such documentation."<sup>191</sup>

Second, although not technically an absolute requirement,<sup>192</sup> they should inform the suspect that he is now free to leave.<sup>193</sup> As the Court of Appeal observed in *People v. Profit*, "[D]elivery of such a warning weighs heavily in favor of finding voluntariness and consent."<sup>194</sup>

One other thing. The courts sometimes note whether officers explained to the suspect *why* they wanted to talk with him further, *why* they were seeking consent to search, or *why* they wanted to run a warrant check. Explanations such as these are relevant because this type of openness is more consistent with a contact than a detention, and it would indicate to the suspect that the officers were seeking his voluntary cooperation.<sup>195</sup>

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<sup>186</sup> See *People v. Thierry* (1998) 64 Cal.App.4th 176, 184 ["[The officers] merely used the occasion of appellant's arrest for that crime to take a photograph they would have been entitled to take on the street or elsewhere without an arrest."].

<sup>187</sup> See *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 199; *People v. Grace* (1973) 32 Cal.App.3d 447, 451 ["[The officer's] right to detain the driver ceased as soon as he discovered the brakelight was operative and not in violation of statute."]; *People v. Bello* (1975) 45 Cal.App.3d 970, 973 [after the officer determined that the detainee was not under the influence "he had no legitimate reason for detaining him further"]; *U.S. v. Pena-Montes* (10th Cir. 2009) \_\_ F.3d \_\_ [2009 WL 4547058] [the "investigation was complete when [the officer] saw that the vehicle actually had a plate"].

<sup>188</sup> *U.S. v. Watts* (8th Cir. 1993) 7 F.3d 122, 126.

<sup>189</sup> See *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 199 [in a routine traffic stop, the violator must be released "forthwith" when he gives "his written promise that he will appear as directed."].

<sup>190</sup> See *Florida v. Royer* (1983) 460 U.S. 491, 504 ["[B]y returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers might have obviated any claim that the encounter was anything but a consensual matter from start to finish."]; *U.S. v. Holt* (10th Cir. 2000) 229 F.3d 931, 936, fn.5; *U.S. v. Munoz* (8th Cir. 2010) \_\_ F3 \_\_ [2010 WL 99076] ["Munoz was no longer seized once [the officer] handed him the citation and rental agreement [and] merely requested further cooperation"].

<sup>191</sup> *U.S. v. Sandoval* (10th Cir. 1994) 29 F.3d 537, 540.

<sup>192</sup> See *Ohio v. Robinette* (1996) 519 U.S. 33, 40 [Court rejects as "unrealistic" a requirement that officers "always inform detainees that they are free to go before a consent search may be deemed voluntary."]; *U.S. v. Mendenhall* (1980) 446 U.S. 544, 555 ["Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed."]; *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064; *U.S. v. Sullivan* (4th Cir. 1998) 138 F.3d 126, 132.

<sup>193</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 436 ["Certainly few motorists would feel free [to] leave the scene of a traffic stop without being told they might do so."].

<sup>194</sup> (1986) 183 Cal.App.3d 849, 877.

<sup>195</sup> See *People v. Spicer* (1984) 157 Cal.App.3d 213, 220; *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.



# “Open Carry” Detentions

For the past few years, officers in California have occasionally encountered people in public places who are carrying holstered handguns in plain view. It appears that most of these people are law-abiding citizens who are merely demonstrating their right to bear arms.<sup>1</sup> And yet, while criminals do not ordinarily carry their firearms in plain view, officers can never be sure what an armed person intends to do with the weapon.

Furthermore, officers do not know whether the firearm is loaded, whether the person is a felon who is prohibited from possessing any weapon, whether the gun has been stolen, whether the serial number has been obliterated, or whether the gun is unregistered—all of which are matters that would seemingly call for immediate investigation.

So, the question has arisen: What may officers do when they encounter such people? Ordinarily, such a question would be silly because—given the number of people who are shot and killed each day, and the prevalence of handguns among the criminal element—officers are expected to detain and investigate anyone on the street who is carrying a handgun. Moreover, the Supreme Court has ruled that Second Amendment rights are “not unlimited,”<sup>2</sup> which apparently means that all of the California statutes pertaining to handgun control are constitutional and, therefore, enforceable.<sup>3</sup>

But the issue is not so simple when the person’s objective is to exercise a constitutional right, raise public awareness of the right to bear arms, and sometimes provoke officers into taking action that can be used to generate a Second Amendment test case. Adding to the confusion, the courts have not yet addressed the constitutional issues, which means that officers must muddle through as best they can. Still, there is some helpful authority.

For one thing, it is apparent that officers may detain any person who is carrying a handgun in a public place—even if he appears to be an upstanding citizen. For example, in *Schubert v. City of Springfield*<sup>4</sup> an officer in Springfield, Massachusetts saw Schubert walking toward the courthouse with a holstered handgun under his coat. It turned out that Schubert was not a criminal—he was a “prominent” criminal

defense attorney. But it appears the officer was unaware of that or he didn’t care, because he detained Schubert at gunpoint and pat searched him after securing the weapon. Finding no other weapons, and confirming that Schubert was licensed to carry the weapon, the officer released him.

Naturally, Schubert sued him. For one thing, he contended that an officer who sees a person carrying a handgun in public cannot detain him unless he has reason to believe the person is carrying the weapon for some criminal enterprise. The court disagreed, ruling that mere possession of the handgun in a public place “provided a sufficient basis for [the officer’s] concern that Schubert may have been about to commit a serious criminal act, or, at the very least, was openly carrying a firearm without a license to do so.” The court also pointed out the absurdity of requiring officers to guess at a person’s intentions based on his physical appearance. Said the court:

Schubert contends that his clothing, his age, and the fact that he was carrying a briefcase are factors that should undercut the reasonableness of [the officer’s] suspicion. We are not persuaded. A *Terry* stop is intended for just such a situation, where the officer has a reasonable concern about potential criminal activity based on his “on-the-spot observations,” and where immediate action is required to ensure that any criminal activity is stopped or prevented.

The court also rejected Schubert’s argument that, by detaining him at gunpoint and conducting a pat search, the officer had converted the detention into an illegal *de facto* arrest. As the court pointed out, these actions “were related in scope to the circumstances that justified the initial stop, namely, Schubert’s open possession of a weapon.”

Finally, Schubert complained that the officer was required to release him immediately after he had inspected Schubert’s concealed weapon permit, and that the officer unreasonably prolonged the detention for “several minutes” to confirm that the permit was valid. Said the court, “Just as an officer is justified in attempting to confirm the validity of a driver’s license, such a routine check is also valid and prudent regarding a gun license.”



In addition to *Schubert*, Penal Code § 833.5 specifically states that officers who have reasonable suspicion to believe that a person is unlawfully carrying a firearm in a public place may detain the person “to determine whether a crime relating to firearms or deadly weapons has been committed.” Furthermore, the court in *U.S. v. Stewart* ruled that officers who are questioning a detainee about his possession of a weapon may briefly inquire into matters that do not directly pertain to whether the weapon is possessed lawfully; e.g., whether the gun is loaded.<sup>5</sup>

It would appear, therefore, that officers who detain a person for carrying a handgun in a public place should be able to do the following:

**DETERMINE IF WEAPON IS LOADED:** Officers may inspect the weapon for the purpose of determining whether it is loaded in violation of Penal Code § 12031(a).<sup>6</sup> A firearm is “loaded” when “a shell or cartridge has been placed into a position from which it can be fired.”<sup>7</sup>

**DETERMINE IF DETAINEE IS A MINOR:** If the person appears to be a minor, they may seek to determine if he is violating Penal Code § 12101 which prohibits possession of concealable firearms by minors.

**ARREST FOR PC 626:** Officers may arrest the person for a violation of Penal Code § 626.9 if he should have known that he was within 1000 feet of a school.

The more difficult—and currently unresolved—question is whether officers who have detained a person for the sole purpose of determining whether his possession of a firearm is lawful are permitted to do the things they normally do in the course of detentions, especially the following:

- **DETERMINE AND CONFIRM ID:** Officers have a legal right to determine and confirm the identity of every person they detain.<sup>8</sup> As the court observed in *People v. Loudermilk*, “Without question, an officer conducting a lawful *Terry* stop must have the right to make this limited inquiry, otherwise the officer’s right to conduct an investigative detention would be a mere fiction.”<sup>9</sup> This is also the view of the Supreme Court which pointed out that “[o]btaining a suspect’s name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder.”<sup>10</sup>

- **ARREST FOR REFUSAL TO ID:** If the detainee refuses to identify himself, officers may ordinarily arrest him for willfully delaying or obstructing.<sup>11</sup>
- **PAT SEARCH:** Under current law, officers who reasonably believe that a detainee is armed with a firearm may conduct a pat search to determine if he possesses any other weapons.<sup>12</sup>
- **RUN RAP SHEET:** When officers detain a person who possesses a handgun, they may ordinarily check the detainee’s criminal history to determine if he is a felon and is therefore in violation of Penal Code § 12021(a)(1).<sup>13</sup>
- **CHECK SERIAL NUMBER:** Officers who have temporarily seized a handgun may ordinarily examine the weapon to determine whether the serial number is in plain view. If so, it would seem they could briefly prolong the detention to determine whether the weapon had been stolen. And, if the serial number is not in plain view, they should nevertheless be able to closely examine the weapon (i.e. “search” it) to locate the serial number for the purpose of running the serial number, and determining whether the detainee is carrying a weapon with an obliterated serial number in violation of Penal Code §§ 537e or 12094(a). POV

<sup>1</sup> See [www.californiaopencarry.org](http://www.californiaopencarry.org); Pen. Code § 12025(f) [“Firearms carried openly in belt holsters are not concealed within the meaning of this section.”]

<sup>2</sup> *District of Columbia v. Heller* (2008) \_\_ U.S. \_\_ [128 S.Ct. 2783, 2816].

<sup>3</sup> See *District of Columbia v. Heller* (2008) 128 S.Ct. 2783, 2822.

<sup>4</sup> (1<sup>st</sup> Cir. 2009) 589 F.3d 496.

<sup>5</sup> (10<sup>th</sup> Cir. 2007) 473 F.3d 1265, 1269.

<sup>6</sup> See Penal Code § 12031(e) [to determine whether a firearm is loaded, “peace officers are authorized to examine any firearm carried by anyone on his or her person”].

<sup>7</sup> *People v. Clark* (1996) 45 Cal.App.4<sup>th</sup> 1147, 1153-54. ALSO SEE Pen. Code §§ 626.9(j); 12031(g).

<sup>8</sup> See *People v. Long* (1987) 189 Cal.App.3d 77, 89 [court notes the “law enforcement need to confirm identity”].

<sup>9</sup> (1987) 195 Cal.App.3d 996, 1002.

<sup>10</sup> See *Hibel v. Nevada* (2004) 542 U.S. 177, 186. ALSO SEE *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002 [“Inquiries of the suspect’s identity, address and his reason for being in the area are usually the first questions to be asked”].

<sup>11</sup> See Penal Code § 148(a)(1); *Hibel v. Nevada* (2004) 542 U.S. 177, 187 [“The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop.”].

<sup>12</sup> See *Arizona v. Johnson* (2009) \_\_ U.S. \_\_ [pat search of detainee lawful “upon reasonable suspicion that [the detainee] may be armed and dangerous”]; *Terry v. Ohio* (1968) 392 U.S. 1, 27-28.

<sup>13</sup> See *U.S. v. Vongxay* (9<sup>th</sup> Cir. 2010) \_\_ F.3d \_\_ [2010 WL 431768] [prohibiting felons from possessing firearms does not violate the Second Amendment.

# Recent Cases

## Greene v. Camreta

(9<sup>th</sup> Cir. 2009) 588 F.3d 1011

### Issue

Did a child protective services caseworker and a deputy sheriff violate a young girl's Fourth Amendment rights by questioning her at school to determine if she had been sexually molested by her father?

### Facts

While investigating a report that Nimrod Greene had molested a seven-year old boy (F.S.), officers in Oregon obtained information from two sources that Greene might have also molested his two young daughters (S.G. and K.G.). Nimrod's wife, Sarah, reportedly told F.S.'s mother that she "doesn't like the way Nimrod makes [their daughters] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." In addition, Nimrod told F.S.'s father that Sarah had accused him of molesting his daughters and also said she "doesn't like the girls laying [sic] in bed with [him] when he has been drinking."

Nimrod was arrested for molesting F.S., and was subsequently released subject to certain court restrictions. A report on the matter was sent to a caseworker with the Department of Human Services, Bob Camreta. Based on this information, Camreta testified he became "concerned about the safety and well-being" of Nimrod's daughters.

Consequently, Camreta and sheriff's deputy James Alford went to S.G.'s elementary school and arranged to interview her in an office. Camreta said he decided to conduct the interview at school because it is a place "where children feel safe" and he would be able to interview S.G. "away from the potential influence of suspects, including parents."

After a counselor escorted S.G. to the office, Camreta questioned her about Nimrod's behavior. (Deputy Alford did not ask questions.) In the course of the interview, S.G. said, among other things:

- When Nimrod drinks, he "tries to touch her on her private parts."
- Nimrod started touching her when she was three years old.
- The last incident occurred one week ago, and she "had tried to tell him to stop."
- Her mother "knew about the touching [and it was] one of our secrets."

S.G.'s account of the interview was quite different. After her mother filed a lawsuit against the two officials, S.G. reportedly said (presumably via interrogatories) that she "remembered all of my dad's touches with fondness" and she denied that he ever touched her private parts. "He was a very loving father," she said, "and I loved hugging and kissing him. These were the touches that I was referring to when I said my dad touched me."<sup>1</sup> She also claimed that Camreta had pressured her, that he "kept asking me the same questions, just in different ways, trying to get me to change my answers," and that at some point "I just started saying yes to whatever he said." S.G. also said the interview lasted two hours; Camreta and Alford said it lasted one.

Based on the interview with S.G., and also on "other information" that the court did not disclose, Nimrod accepted a plea agreement in which he maintained his innocence about molesting his two daughters but admitted that there was sufficient evidence from which a jury could find him guilty of molesting F.S. As a result, the charges that he molested S.G. and K.G. were dismissed, and he was found guilty of molesting F.S.

Sarah Greene subsequently sued Camreta and Alford for money damages, claiming, among other things, that their act of meeting with S.G. at her school constituted a "seizure" under the Fourth Amendment, and that it was an illegal seizure because there was insufficient justification for it. The District Court agreed that S.G. was "seized," but ruled the seizure was objectively reasonable. Sarah Greene appealed to the Ninth Circuit.

<sup>1</sup> **NOTE:** It is hard to avoid the conclusion that these were not, in fact, the words of S.G., but of someone who had a monetary interest in the subsequent lawsuit. After all, it is highly unlikely that a child in elementary school would say, "I remembered all of my dad's touches *with fondness*," or "These were the touches *that I was referring to*."

## Discussion

There were essentially two issues before the court. First, was S.G. “seized” when a guidance counselor escorted her from a classroom to a school office where she was interviewed? Without explaining how it reached its conclusion, the court summarily ruled she was, in fact, “seized.”

The second issue was whether the seizure was reasonable. The court ruled it was not for three reasons. First, S.G. was not a suspected criminal, nor was she “suspected of having violated any school rule, nor is there any evidence that her immediate seizure was necessary to maintain discipline in the classroom and on school grounds.” Second, the interview was unnecessary because there was no reason to believe that S.G. and her sister were in any immediate danger. Third, the investigators neglected to obtain authorization to interview S.G.

The court then announced a new rule: In the absence of exigent circumstances, officers are prohibited from interviewing the suspected victims of child abuse at their schools unless the officers obtain a search warrant, court order, or parental consent.

Although Camreta and Alford had violated its new rule, the court held they were both entitled to qualified immunity because the rule was not “clearly established” when the interview occurred.

## Comment

Once again, an irresponsible parent tries to cash in on the efforts of officials who were forced to grapple with a serious threat to her child—a threat that the parent created or allowed to continue.<sup>2</sup> And once again, a panel of the Ninth Circuit manufactures a “problem,” which it proceeds to “fix” by making a sweeping—and unnecessary—change in criminal procedure.<sup>3</sup>

But this time the panel did much more than change a few rules: it made it difficult or impossible for officers and child welfare caseworkers to investigate one of the most heinous crimes on the books: child abuse. To make matters worse, the panel was not *required* by the law to rule as it did. Instead, it

struggled mightily to thrust its exquisite notions of propriety into these difficult and heartbreaking investigations.

Why would it do such a thing? A promising clue is found at the beginning of its opinion when it said that, according to statistics it had plucked from a law review article, of the millions of child abuse cases investigated in 2007, “*only*” about a quarter of the children “were indeed victims of abuse.” Based on this statistic, the court deduced that, “in the name of saving children from the harm that their parents and guardians are thought to pose,” the investigations by caseworkers and officers may “ultimately cause more harm to many more children than they ever help.”

In hopes that the Ninth Circuit reviews this case en banc, or that the United States Supreme Court reverses it, or that the California courts reject its reasoning, we will address the issues upon which it was based.

A “SEIZURE?” For some incomprehensible reason, Camreta and Alford did not contest the district court’s determination that the interview was a “seizure.” And for some equally baffling reason, the panel accepted their concession without even a perfunctory inquiry as to whether it was warranted.

Because it is likely that other courts will not be so rash, it should be noted that the U.S. Supreme Court has ruled that a “seizure” occurs “[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”<sup>4</sup> It is, therefore, hard to imagine that anyone would seriously contend that S.G. was subjected to a coercive “show of authority” when she was escorted by a guidance counselor to an office in her own school, or because a Human Services caseworker interviewed her there.

It is possible that the panel presumed that a seizure resulted because a uniformed sheriff’s deputy was present. In fact, the panel pointed out no fewer than three times that the deputy was armed. But this would make no sense because, as the United States Supreme Court has observed, “That most law enforcement officers are armed is a fact well known to

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<sup>2</sup> NOTE: Another example is found in *Hunsberger v. Wood* (4<sup>th</sup> Cir. 2009) 570 F.3d 546 which we reported on in 2009.

<sup>3</sup> NOTE: Another example is found in *U.S. v. Comprehensive Drug Testing, Inc.* (9<sup>th</sup> Cir. 2009) 579 F.3d 989.

<sup>4</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 16, fn.16.

the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.”<sup>5</sup>

**NO EXIGENT CIRCUMSTANCES?** Having casually ruled that S.G. was “seized,” the panel then determined that the “seizure” was unreasonable because there were no exigent circumstances. Specifically, it said there was simply no need to interview S.G. at the school for her safety or the safety of her younger sister because the situation constituted a “non-emergency.” The court was able to reach this remarkable conclusion by ignoring all of the following circumstances:

- (1) **ONGOING MOLESTATION:** Nimrod had allegedly molested S.G. since she was three-years old and, based on his recent arrest, it appeared he was continuing to engage in deviant behavior.
- (2) **SARAH GREEN DID NOT STOP IT:** Sarah Greene told F.S.’s mother that she knew Nimrod might be molesting their daughters; i.e., she said “she doesn’t like the way Nimrod makes [their daughters] sleep in his bed when he is intoxicated and she doesn’t like the way he acts when they are sitting on his lap.” Nevertheless, Sarah apparently did nothing to stop it. In addition, Nimrod confirmed that Sarah was aware that he might be molesting his daughters because, as noted, he told F.S.’s father that “Sarah was accusing him of molesting his daughters and Sarah reportedly doesn’t like the girls laying [sic] in bed with [him] when he has been drinking.”
- (3) **NIMROD’S M.O.:** The molestation of F.S. reportedly occurred when Nimrod “was drunk.” This circumstance adds credence to the investigator’s belief that Nimrod was continuing to molest S.G. because Sarah reportedly told F.S.’s mother that she “doesn’t like the way Nimrod makes [their daughters] sleep in his bed *when he is intoxicated.*”
- (4) **NIMROD’S RELEASE FROM CUSTODY:** The investigators were aware that Nimrod had been released from custody.

In light of these circumstances, it is unimaginable that a panel of the Ninth Circuit was able to reach the conclusion that the situation facing S.G. and her sister in their home—especially when Nimrod was drinking—was not sufficiently threatening to warrant an immediate interview.

It is curious—bordering on bizarre—that the panel felt that such an interview would have been justified if the objective of the caseworker and sheriff’s deputy had been to investigate a report that S.G. had violated some school rule. Said the court, “S.G. is not suspected of having violated any school rule, nor is there any evidence that her immediate seizure was necessary to maintain discipline in the classroom.” In other words, the panel concluded that the threat resulting from a violation of a school rule, such as running in the corridors or chewing gum in class, presented a greater danger to S.G. and her sister than the threat resulting from years of sexual molestation by their father.

A further example of the muddled thinking that went into this opinion, is found in the court’s attempt to blunt the affect of its ruling by suggesting that investigators in such cases could obtain legal authorization to interview the child by means of a search warrant. Said the panel, “[We hold] that the general law of search warrants applies to child abuse investigations. Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context.”

It appears the panel was unaware that search warrants are issued for the sole purpose of authorizing law enforcement officers to search a person, place, or thing for physical evidence of a crime.<sup>6</sup> Furthermore, the idea that a search warrant could ever authorize officers to “search” the mind of a victim to obtain information about the crime under investigation is patently absurd.

The panel also suggested that a court could issue a generic court order that authorized the seizure of

<sup>5</sup> *United States v. Drayton* (2002) 536 U.S. 194, 204. ALSO SEE *People v. Zamudio* (2008) 43 Cal.4<sup>th</sup> 327, 346 [that the officers “had badges and weapons and were wearing uniforms” has “little weight in the analysis for determining whether a seizure occurred”].

<sup>6</sup> See *Steagald v. United States* (1981) 451 U.S. 204, 213 [“A search warrant is issued upon a showing of probable cause to believe that the legitimate object of the search is located in a particular place.”].



the student for the purpose of conducting an interview. But the court neglected to set forth the legal authority for the issuance of such an order, which might indicate that it couldn't find any.

Finally, the panel said that the officers should have asked Nimrod or Sarah for consent to interview S.G. No, this is not a misprint. The panel actually said that officers who are investigating a report that a young girl is being molested by her father, and that her mother knows about it and has done nothing to stop it, should seek consent from these same people before interviewing the child.

The question, then, is how can officers obtain interviews at school from suspected victims of child abuse? (Note: The Oregon Attorney General has reportedly filed a petition for en banc review of this opinion.) First, it should be noted that schools do not have a legal right to prohibit officers from interviewing children who are believed to have been the victims of abuse by a parent or anyone else. On the contrary, the California Penal Code specifically states that such a child "may be interviewed during school hours, on school premises."<sup>7</sup>

Second, to guard against an allegation that such an interview constituted a "seizure," it would be helpful that the officers were in plain clothes, and that they began the interview by telling the child that she is not in trouble, that they just want to talk with her, but she can leave whenever she wants.

Third, all interviews should be recorded (preferably secretly) so that officers will have proof of the following: (a) that they did not employ coercive or suggestive interviewing methods, (b) that they had advised the child that she did not have to talk with them, (c) that they informed the child of her right to have a member of the school staff present,<sup>8</sup> and (d) the precise duration of the interview.

Fourth, although there is no specific authority that would permit the issuance of court orders to interview students, we posted on our website a court order form and points and authorities based on the Civil Code's "all orders and writs" provision.<sup>9</sup> The address is [www.le.alcoda.org](http://www.le.alcoda.org). Click on "Forms."

## Maryland v. Shatzer

(2010) \_\_ U.S. \_\_ [2010 WL 624042]

### Issue

If a suspect invokes his *Miranda* right to counsel, may officers seek to interview him at a later time?

### Facts

Officers in Maryland received a report that Shatzer may have sexually abused his 3-year old son. They also learned that Shatzer was currently serving time in a Maryland state prison, having been convicted of sexually abusing another child. An officer went to the prison to interview him about the new allegation but Shatzer invoked his *Miranda* right to counsel.

The investigation stalled for almost three years, but then the investigators obtained additional incriminating information from the victim, Shatzer's son. So they returned to prison and asked Shatzer if he would now be willing to speak with them without having an attorney present. He said yes, waived his *Miranda* rights, and made incriminating admissions which were used against him at trial. He was convicted.

### Discussion

On appeal to the United States Supreme Court, Shatzer argued that, because he made his statements after he had invoked his *Miranda* right to counsel, they were inadmissible. The Court disagreed.

In 1988, the Court ruled in *Arizona v. Roberson* that officers may not seek to interview incarcerated suspects about any crime if they had previously invoked their *Miranda* right to counsel.<sup>10</sup> One of the more obvious problems with this ruling is that suspects such as Shatzer who remained incarcerated after they invoked could never be subjected to police-initiated questioning.

The Court in *Shatzer*, however, concluded that there must a point in time at which this restriction terminates; i.e., a time when officers may seek to question a suspect who has remained in custody after invoking his *Miranda* right to counsel. Moreover, the Court observed that a "logical endpoint" to this

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<sup>7</sup> See Pen. Code § 11174.3(a).

<sup>8</sup> See Pen. Code § 11174.3(a).

<sup>9</sup> Code Civ. Proc. § 166(a).

<sup>10</sup> (1988) 486 U.S. 675. ALSO SEE *Edwards v. Arizona* (1981) 451 U.S. 477, 483-84.



restriction would make sense because, although incarcerated suspects remain in custody, there is a psychological “break” in custody when they return to the general population because, at that point, they “return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation.” In addition, they “are not isolated with their accusers . . . and often can receive visitors and communicate with people on the outside by mail or telephone.”

The question, then, was how long must officers wait before they recontact the suspect after he was returned to the general inmate population. Rather than saddle the lower courts with the job of debating what constitutes a reasonable time, the Court ruled that 14 days would be sufficient.<sup>11</sup> Specifically, it ruled that officers may seek to question an incarcerated suspect who had previously invoked his *Miranda* right to counsel if, (1) the inmate was returned to the general inmate population, and (2) the officers did not recontact the suspect until at least 14 days after he invoked.

The Court also ruled, however, that this 14-day rule also applies if the suspect was released from custody after he invoked. In other words, if an invoking suspect was later released from custody (via bail, O.R., or if the charges were dropped), officers would still be required to wait for 14 days before seeking to question him.

Applying these new standards, the Court ruled that Shatzer’s return to the general prison population after he invoked constituted a “break” in *Miranda* custody. And because the break lasted more than the required 14 days (actually, almost three years), the officers did not violate *Miranda* when they sought to question him.

## Comment

There are two problems with this opinion that must be addressed. First, the Court did not explain

why officers must wait 14 days before seeking to interview a suspect who had been released from custody and who was under absolutely no compulsion. In fact, it observed that such a suspect has “returned to his normal life,” has “no longer been isolated,” and “has likely been able to seek advice from an attorney, family members, and friends,” and “he knows from his earlier experience that he need only demand counsel to bring the interview to a halt.”

Second, over the past few years, the lower courts have ruled that county jail and state prison inmates were not “in custody” for *Miranda* purposes if they were not restrained to a degree *greater* than that which is inherent in the facility.<sup>12</sup> At first glance, the Court in *Shatzer* seemed to wholeheartedly agree with the rationale of these cases, having ruled that a “break” in *Miranda* custody occurs when incarcerated suspects have returned to the general inmate population. As noted, the Court observed that these inmates have returned “to their accustomed surroundings and daily routine,” they “regain the degree of control they had over their lives prior to the interrogation,” they are “not isolated with their accusers,” they “live among other inmates, guards, and workers,” and often can receive visitors and communicate with people on the outside.”

And yet, the Court implied that, at the moment such an inmate voluntarily agrees to speak with officers, he is suddenly back in *Miranda* “custody,” and is once again “cut off from his normal life and companions, thrust into and isolated in an unfamiliar, police-dominated atmosphere, where his captors appear to control his fate.” Unfortunately, the Court was either unaware of its illogical leap or chose to ignore it.<sup>13</sup> In any event, while trying to clear up the confusion it generated when it issued its decision in *Roberson*, the Court created more of the same. Still, we do not think that *Shatzer* necessarily undermines the rationale of these other cases, especially if the inmate was told he may leave the room at any time.

<sup>11</sup> NOTE: The Court admitted that 14 days is somewhat arbitrary, but said 14 days “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”

<sup>12</sup> See, for example, *People v. Macklem* (2007) 149 Cal.App.4th 674 [county jail inmate awaiting trial was not “in custody” for *Miranda* purposes when he was questioned about a jailhouse assault]; *People v. Fradiue* (2000) 80 CA4 15, 21 [“no restraints were placed upon defendant to coerce him into participating in the interrogation over and above those normally associated with his inmate status. Hence, *Miranda* warnings were not required”]; *Saleh v. Fleming* (9th Cir. 2008) 512 F.3d 548, 551.

<sup>13</sup> NOTE: The Court said, “No one questions that Shatzer was in custody for *Miranda* purposes [when he was interviewed about molesting his son].” But it neglected to say whether the “ones” who did not question Shatzer’s custody status included the justices.

## People v. Lessie

(2010) 47 Cal.4<sup>th</sup> 1152

### Issue

Does a *Miranda* invocation result when a minor requests to speak with a parent?

### Facts

As part of an initiation into a street gang, 16-year old Tony Lessie shot and killed a young man in Oceanside. A few months later, Oceanside detectives developed probable cause and arrested Lessie for the murder.

When Lessie arrived at the police station, Det. Kelly Deveney asked if he wanted her to notify his father, or whether he wanted to make the call himself. Lessie responded, "I'd like to call him." He then waived his *Miranda* rights and confessed. About four months later, Det. Deveney went to juvenile hall and, after obtaining another *Miranda* waiver, asked Lessie some more questions about the murder. He repeated his earlier confession and provided additional details.

Both of Lessie's confessions were admitted against him at trial, and he was convicted of murder.

### Discussion

Lessie argued that his confessions should have been suppressed because they were obtained in violation of *Miranda*. In particular, he contended that, although he had waived his rights, he had effectively invoked them beforehand by requesting to speak with his father. The court disagreed.

Lessie's argument was based on the California Supreme Court's 1971 decision in *People v. Burton* in which the court ruled that, under California law, a minor's request to speak with a parent must be deemed a *Miranda* invocation unless there was some evidence "demanding a contrary conclusion."<sup>14</sup>

But the law has changed a lot since *Burton* was decided. And the biggest change took place 11 years later when, in response to *Burton* and several other ill-advised cases from the 1970s-era California Supreme Court, the state's voters passed Proposition 8 which provided that evidence can be suppressed only if it was obtained in violation of federal constitutional

law—not independent California law. Consequently, the issue in *Lessie* was whether a minor's request to speak with a parent constitutes an invocation under federal law.

The court had no trouble finding the answer. In *Fare v. Michael C.* the United States Supreme Court addressed the issue of whether a *Miranda* invocation automatically results when a minor requests to speak with a probation officer. And the Court ruled it did *not*; that, in determining whether a minor or an adult invoked his *Miranda* rights, the courts must consider the totality of circumstances—not just one. Said the Court, "Where the age and experience of a juvenile indicate that his request for his probation officer *or his parents* is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination."<sup>15</sup>

Consequently, the court in *Lessie* ruled that a minor's request to speak with a parent does not constitute a *Miranda* invocation unless there were additional circumstances that demonstrated an intent by the minor to not undergo questioning in the absence of the parent. Said the court:

*Burton's* special rule for minors is inconsistent with the high court's subsequent decision in *Fare v. Michael C.* which requires courts to determine whether a defendant—minor or adult—has waived the Fifth Amendment privilege by inquiring into the totality of the circumstances surrounding the interrogation.<sup>16</sup>

Having determined that Lessie had not automatically invoked his *Miranda* rights by asking to speak with his father, the court then looked to see whether there was reason to believe he intended to invoke; i.e., whether his subsequent *Miranda* waiver was not knowing and intelligent. Among other things, it pointed out that he was 16 years old, he had completed the 10<sup>th</sup> grade, he had held jobs in retail stores, and he was "no stranger to the justice system," having been previously arrested for burglary. He had also served time in juvenile hall for possession of marijuana and fleeing from police. Said the court, "Nothing in this background, or in the transcript of defendant's interrogation, suggests his decision to

<sup>14</sup> (1971) 6 Cal.3d 375.

<sup>15</sup> (1979) 442 U.S. 707, 725. Emphasis added.

<sup>16</sup> **NOTE:** In *Fare*, the Court overturned another wayward decision by the 1970s California Supreme Court—*In re Michael C.* (1978) 21 Cal.3d 471—in which the court ruled that a minor's request to speak with a probation officer also constituted an invocation.

waive his *Miranda* rights was other than knowing and voluntary.” As a result, the court ruled that Lessie’s confessions were obtained in compliance with *Miranda* and that they were properly received in evidence.

## Comment

Two other things should be noted about this opinion. First, the court summarily dismissed Lessie’s argument that implied *Miranda* waivers are invalid; i.e., it rejected the argument that suspects must expressly state that they had decided to waive their rights. Instead, it affirmed the rule that an implied *Miranda* waiver will suffice, and that an implied waiver will ordinarily result if the suspect freely responded to questioning after, (1) he was correctly advised of his rights, and (2) he said that he understood those rights,<sup>17</sup> both of which happened in *Lessie*. Said the court, “While defendant did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights.”

Second, the court noted that the officers technically violated Welfare and Institutions Code § 627(b) by not advising Lessie of his right to make completed phone calls to a designated adult and to an attorney within an hour of his arrest. But the court explained that, because this is not a federal constitutional right, evidence cannot be suppressed as the result of such a violation.

## U.S. v. Pineda-Moreno

(9<sup>th</sup> Cir. 2010) 591 F.3d 1212

### Issues

(1) Must officers obtain a search warrant to install an electronic tracking device to the undercarriage of a vehicle? (2) Is a warrant required to walk onto a suspect’s driveway to install such a device?

### Facts

DEA agents in Portland suspected that Pineda-Moreno and several associates were growing large quantities of marijuana. Having learned that the men had used Pineda-Moreno’s Jeep to transport their

gardening supplies, the agents decided to keep tabs on them by periodically attaching tracking devices to the vehicle. These devices were about the size of a bar of soap, and were magnetized which made them easy to install. Some of the devices allowed the agents to access the tracking information in real time, while others required that they remove the device and download the data.

On four occasions, they installed trackers while the vehicle was parked in front of Pineda-Moreno’s home, and twice they installed them while it was parked in a public parking lot. They also installed a real-time tracker early one morning—at about 4 A.M.—while the Jeep was parked on the unfenced driveway next to Pineda-Moreno’s trailer.

Later that day, while monitoring the tracker, the agents determined that the Jeep had just left the location of a suspected marijuana grow. So they utilized the tracker to locate the vehicle, at which point they pulled in behind and made a car stop. There were three people inside; the driver was Pineda-Moreno. After arresting all three on immigration charges, the agents obtained Pineda-Moreno’s consent to search the Jeep and his trailer. The search of the trailer netted two large garbage bags filled with marijuana. As a result, Pineda-Moreno was charged with manufacturing and conspiring to manufacture marijuana. When his motion to suppress the evidence was denied, he pled guilty.

### Discussion

On appeal to the Ninth Circuit, Pineda-Moreno contended that his motion to suppress should have been granted on grounds that the installation and monitoring of tracking devices is illegal unless authorized by a warrant. The court disagreed.

**INSTALLATION:** Pineda-Moreno argued that the installation was unlawful for three reasons. First, as noted, he claimed that warrants are required to install tracking devices to the undercarriages of motor vehicles. But the court pointed out that it had resolved that issue in 1999 when it ruled that the undercarriage is “part of the exterior” of the vehicle and is therefore “not entitled to a reasonable expectation or privacy.”<sup>18</sup> Hence, it ruled that the agents

<sup>17</sup> See *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.”]; *People v. Sully* (1991) 53 Cal.3d 1195, 1233 [“*Johnson* remains good law”].

<sup>18</sup> Citing *U.S. v. McIver* (9<sup>th</sup> Cir. 1999) 186 F.3d 1119, 1127.

did not need a warrant to slip underneath Pineda-Moreno's Jeep and attach the tracking devices.

Second, he claimed that, even if a warrant was not needed to attach the devices to his Jeep, a warrant was required to enter the driveway next to his home. It is settled that a warrant is not required to install a tracking device on a vehicle that was parked on the street, in a public parking garage, or any other public place.<sup>19</sup> It is also settled that because driveways are only "semi-private areas," officers do not need a warrant to walk onto a suspect's private driveway for this purpose if the driveway was readily accessible from the street and the occupant had not taken reasonable steps to prevent entry.<sup>20</sup>

So, the court examined the physical layout of the driveway and noted that, in addition to the absence of gates and "No Trespassing" signs, there were "no features to prevent someone standing in the street from seeing the entire driveway." The court added that "[i]f a neighborhood child had walked up Pineda-Moreno's driveway and crawled under his Jeep to retrieve a lost ball or runaway cat, Pineda-Moreno would have no grounds to complain." Thus, said the court, "because Pineda-Moreno did not take steps to exclude passersby from his driveway, he cannot claim a reasonable expectation of privacy in it, regardless of whether a portion of it was located within the curtilage of his home."

Third, Pineda-Moreno argued that, even if he could not ordinarily expect that people would not walk on his driveway, he should be able to expect that they would not do so while he was asleep at around 4 A.M. But the court disagreed, simply saying that the time of day or night that the installation occurred is "immaterial."

**WARRANTLESS MONITORING:** Pineda-Moreno also claimed that officers must obtain a warrant whenever they "continuously monitor" the location of vehicles by means of electronic trackers. But the court pointed out that the Supreme Court has ruled

a warrant is not required if the tracking device only provides officers with information as to the vehicle's whereabouts in public places.<sup>21</sup> And because the agents only tracked Pineda-Moreno's Jeep while it was on the street, a warrant was not necessary.

Accordingly, the court ruled that the information that led to Pineda-Moreno's arrest and the search of his trailer was obtained lawfully, and it affirmed his convictions.

## People v. Branner

(2009) 180 Cal.App.4<sup>th</sup> 308

### Issue

Must evidence be suppressed if it was obtained during a lawful search that would have been unlawful under standards that were prescribed afterward?

### Facts

In 2004, Sacramento County sheriff's deputies made a traffic stop on a vehicle for two equipment violations. The deputies were aware that the driver, Branner, was required to register as a drug offender.<sup>20</sup> So, after obtaining his driver's license, one of the deputies ran a warrant check and learned that Branner was not living at the address he had listed on his registration form. Consequently, they arrested him for violating the registration requirement.

After confining Branner in their car, the deputies searched his car incident to the arrest and found cocaine and a firearm in the passenger compartment. As a result, Branner was charged with drug possession and possession of a firearm by a convicted felon.

### Discussion

In 1981, the Supreme Court ruled in *New York v. Belton*<sup>22</sup> that officers who had arrested an occupant of a vehicle could, as an incident to the arrest, conduct a contemporaneous search of the passenger compartment for weapons and evidence. The Court also held

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<sup>19</sup> See *U.S. v. Pretzinger* (9<sup>th</sup> Cir. 1976) 542 F.2d 517, 520 ["[N]o warrant is needed to justify installation of an electronic beeper unless fourth amendment rights necessarily would have to be violated in order to initially install the device."]; *People v. Zichwic* (2001) 94 Cal.App.4<sup>th</sup> 944, 956 ["It does not amount to a search to examine the undercarriage, to touch it, or to attach a tracking device, so long as a police officer does so from a place where the officer has a right to be."].

<sup>20</sup> See *U.S. v. McIver* (9<sup>th</sup> Cir. 1999) 186 F.3d 1119, 1126.

<sup>21</sup> Citing *United States v. Knotts* (1982) 460 U.S. 276; *Kyllo v. United States* (2001) 533 U.S. 27.

<sup>22</sup> (1981) 453 U.S. 454.



that, in order to provide officers with an easy-to-apply rule, these searches could be conducted even though the arrestee had been handcuffed or was otherwise unable to reach into the passenger compartment to grab a weapon or destroy evidence. Because *Belton* was the law when the officers searched Branner's car, the search was plainly lawful.

But five years later, the Court gutted *Belton*. In the case of *Arizona v. Gant*<sup>23</sup> it decided that *Belton* searches would now be permitted only in the unlikely event that, after arresting the suspect, officers made sure that he had ready access to the passenger compartment so that he would have been able to quickly grab any weapons or destructible evidence that happened to be inside. It was therefore apparent that, because the search of Branner's car occurred while he was restrained in a patrol car, it would have been unlawful had it occurred after *Gant* was decided.

So the issue in *Branner* was whether evidence should be suppressed if it was obtained in the course of a police search that, although lawful when it was conducted, would have been unlawful had it occurred after the law had changed. To resolve this issue, it was necessary for the court to look no further than the legal justification for suppressing evidence; i.e., deterring officers from violating the law. As the Supreme Court explained, "[E]vidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."<sup>24</sup>

Accordingly, the court in *Branner* ruled that it would make no sense to suppress evidence when, as here, the officers acted in full compliance with the existing law. Said the court:

[T]o require suppression of evidence against defendant not because the constable blundered but because the constable did precisely what the Supreme Court told him he could do—but then changed its mind after the constable acted—would be unjustified because it would not advance the purpose of the exclusionary rule, it would offend basic concepts of the criminal justice system by allowing a guilty and possibly dangerous criminal to go free, and it would damage public confidence in the judicial system.

For this reason, the court ruled that the firearm and drugs found in Branner's car were admissible.

## Comment

As we reported in the Winter 2010 edition, the Ninth Circuit in *U.S. v. Gonzales*<sup>25</sup> reached the opposite conclusion, ruling that evidence obtained during a lawful *Belton* search must be suppressed because *Belton* was subsequently invalidated. The question arises: How is it possible for two courts to reach opposite conclusions in cases that were, for all practical purposes, identical?

The answer is that, unlike the court in *Branner*, the Ninth Circuit ignored the fact that there is no rational basis for punishing officers and the public by suppressing evidence when the officers did absolutely nothing wrong. Instead, the court claimed that suppression was required to promote its concept of judicial "integrity," which it achieved at the expense of the integrity of the officers, the protection of the public, and the search for "truth."

## Bryan v. McPherson

(9<sup>th</sup> Cir. 2009) 590 F.3d 767

### Issue

Under what circumstances may officers utilize a taser on a suspect?

### Facts

A Coronado police officer, Brian McPherson, stopped 21-year old Carl Bryan for a seatbelt violation. Bryan was highly agitated because, earlier that day, his girlfriend had accidentally taken the keys to his car, which necessitated an unplanned trip from Camarillo to Los Angeles, capped with a speeding ticket. As McPherson explained the reason for the stop, Bryan stared straight ahead and then "hit his steering wheel and yelled expletives to himself." At some point, Bryan stepped from the car—wearing only a pair of boxer shorts and tennis shoes—and Officer McPherson told him to get back inside. But Bryan testified he didn't hear the command.

Now standing about 25 feet from the officer, Bryan started "shouting gibberish, and more expletives,"

<sup>23</sup> (2009) \_\_ U.S. \_\_ [129 S.Ct. 1710].

<sup>24</sup> *Illinois v. Krull* (1987) 480 U.S. 340, 348.

<sup>25</sup> (9<sup>th</sup> Cir. 2009) 578 F.3d 1130.

and he began “hitting himself in the quadriceps.” According to Officer McPherson, Bryan then took one step towards him, at which point the officer fired his taser. As a result of the electrical shock, Bryan fell to the ground, breaking four teeth and suffering facial contusions.

He later sued McPherson for using excessive force. When the trial court ruled that the officer was not entitled to qualified immunity, he appealed.

## Discussion

The central issue on appeal was whether there was a triable issue of fact as to whether McPherson’s use of the taser was objectively reasonable. At the outset, the court ruled that, although the shock resulting from a taser is not classified as deadly force, it results in such “high levels of pain, and foreseeable risk of physical injury” that it falls into the category of “intermediate force.”

For this reason, the court ruled that tasers may be employed only if the facts indicate that the suspect “poses an immediate threat to the officer or a member of the public.” The question, then, was whether there existed a triable issue as to whether Bryan presented such a threat.

Although the court acknowledged that his “volatile, erratic conduct could lead an officer to be wary,” it also noted that, because Bryan wearing only boxer shorts, it was apparent that he was unarmed. Further, he was standing about 25 feet from the officer “without advancing in any direction.” Said the court, “The circumstances here show that Officer McPherson was confronted by, at most, a disturbed and upset young man, not an immediately threatening one,” and thus “there was simply no immediate need to subdue Bryan before Officer McPherson’s fellow officers arrived or less-invasive means were attempted.” As a result, the court ruled that the case should go to trial.

## People v. C.S.A.

(2010) \_\_ Cal.App.4th \_\_ [2010 WL 324442]

### Issue

Are prosecutors bound by an agreement between officers and an informant that charges would be dismissed if the informant provided assistance in a criminal investigation?

### Facts

After C.S.A. was charged with a felony and related probation violations in Sonoma County, officers with a local police department promised him that the charges would “go away” if he “worked with and provided information” to them. C.S.A. accepted the deal and furnished the requested information.

It turned out that Sonoma County prosecutors were unaware of the agreement and, when C.S.A. appeared in court, they refused to drop the charges. So C.S.A. filed a motion to dismiss which the trial judge granted. The judge reasoned that, even though prosecutors were not parties to the agreement, it should be enforceable against them if the officers had “apparent authority” to carry out their promise. The court then ruled that the officers did, in fact, have apparent authority because a reasonable person in C.S.A.’s position would have believed that, given the close working relationship between officers and prosecutors, the officers had the authority to make his legal problems “go away.”

### Discussion

As noted, the trial judge ruled that the cooperation agreement between the officers and C.S.A. was enforceable because C.S.A. reasonably believed that the officers did, in fact, have the authority to drop the charges. But the Court of Appeal ruled that apparent authority is insufficient—that such an agreement is enforceable only if the officers had *actual* authority to do what they promised. It then ruled that, because officers plainly lack actual authority to dismiss or reduce charges that have been filed in court, the agreement with C.S.A. was not enforceable. As the court explained, “[T]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor who ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek.”<sup>19</sup>

There is, however, one exception to this rule, although the court pointed out that it is “seldom seen.” Specifically, a cooperation agreement based on apparent authority may be enforceable against prosecutors if it induced the informant to give up a constitutional right that implicated due process. But because C.S.A. was not required by the agreement to do or say anything that had “constitutional consequences,” the agreement was unenforceable. POV

# The Changing Times

## ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

The following officers have joined the Inspectors' Division: **Lou Cruz** (Oakland PD), **Jeff Wood** (Oakland PD), **Veronica Ibarra** (Alameda County SO), **Tom Haselton** (Union City PD), and **Robert Davila** (Fremont PD).

Inspectors **Kathy Boyovich** and **Hansen Pang** were promoted to Inspector III. Former file room technician **Markell Smith** has become an officer with the Fremont PD. Deputy DA **Eileen McAndrew** has been named Head of the Pleasanton Branch. She succeeds **Jon Goodfellow** who will supervise the newly created Community Offender Management Unit. Insp. **Sheila Mariana** retired after 10 years of service with the DA's Office and 15 years with the Department of Justice. Retired Captain of Inspectors **Jim Crisolo** was appointed Chief of Investigators for the San Francisco District Attorney's Office. Retired prosecutor **Walter Brown** died on January 2, 2010 after a 28-year struggle with Parkinson's Disease. He was 68 years old.

## ALAMEDA COUNTY NARCOTICS TASK FORCE

Transferring in: **Nick Calonge** (Oakland PD).

## BART POLICE DEPARTMENT

Chief **Gary Gee** retired after 42 years as a police officer, 36 years with BART PD, nine years as Chief. Former Berkeley Police Chief **Dash Butler** has been named acting chief.

The following officers have retired: Cmdr. **Travis Gibson** (28 years), Lt. **Gregg Savage** (28 years), Lt. **Steven Langner** (27 years), Sgt. **Glenn Huff** (25 years), Sgt. **Keith Curlett** (24 years), and Officer **Paul Slivinsky** (30 years). Sgt. **Paul Kwon** was selected as Internal Affairs sergeant. Officer **Era Hendrix** was assigned to Backgrounds from Patrol. Officer **David McCormick** was assigned to Patrol from Backgrounds. New officers: **Deborah Erdy**, **Christopher Plumley**, and **Barrett Wilder**.

## BERKELEY POLICE DEPARTMENT

Officer **George Gravette** retired after 22 years with the department.

## EAST BAY REGIONAL PARKS POLICE DEPT.

Sgt. **Andrew White** retired after 30 years of service. Officer **Paul Wilson**, who was a deputy with Alameda County SO for four years before joining EBPRD, retired after 29 years of service. Officer **Christopher Chapman** was promoted to sergeant.

Officers **Christopher Feliciano** and **Terrence Cotcher** were assigned to the Special Enforcement Unit. Officer **Matthew Lillie** was appointed to the position of Field Training Officer. Lateral appointment: **Jeffrey Vignau** (Department of Fish and Game). New appointment: **Thomas Urquhart**, who also serves with U.S. Coast Guard Reserves, recently graduated from the academy and has been assigned to the field operations division.

## EMERYVILLE POLICE DEPARTMENT

After six years in investigations, and closing two homicide cases with convictions, **Robert Alton** returns to patrol. EPD welcomed **Jeremy McBroom** who transferred from the Contra Costa Sheriff's Department. Officers **Eric White** and **Kevin Goodman** transferred to investigations. Officers **Salaiz**, **Kellner**, **Yu**, **Thompson** and **Sgt. Bosetti** were awarded the Medal of Commendation.

## FREMONT POLICE DEPARTMENT

It is with great sadness that the department reports the death of **Roger Kellman** on November 24, 2009. Roger was a 21-year veteran of the department and was formerly an officer with the City of Pacifica, and the California Department of Fish and Game. Roger is survived by his wife, Cindi, sons Brian and Brendan, daughter Brittany, and countless family, friends, and co-workers. Roger is dearly missed by all.

Officers **John Harnett** and **Dan Harvey** were promoted to sergeant. Det. **Julie Cochran** was appointed Semi-Permanente Robbery/Homicide Detective. Lateral appointment: **Bradford Wilson** (Contra Costa SO). New officers: **Chris Howard**, **William Gourley**, **Marrkel Smith**, **Frank Smith**, **Matt Stone**, **Calvin Tang**, and **Nicholas VanSickle**. **Kristen Escamilla** and **Brenda Martinez** were appointed to the position of Community Service Officer. **Linda**

**Aguirre, Ilonka Inerbichler, and Gerardette Williams** have been hired as new dispatchers. **Heather Weldon** has been hired as a Detention Technician.

#### LIVERMORE POLICE DEPARTMENT

Lt. **Steve Gallagher** was promoted to captain. Capt. **Mark Weiss** retired after 32 years of service, Officer **James Vestri** retired after 20 years of service, and Officer **Charlie Garrison** retired after 30 years of service. Officer **Dan Cleghorn** medically retired after six years of service. Lateral appointment: **Tim Lendman** (Stanislaus County SO).

#### NEWARK POLICE DEPARTMENT

Officer **Eric Kelly** left the department. Retired DARE officer and current part-time DARE instructor, **John Boga**, received the "Community Partner of the Year" award from Assembly Majority Leader Alberto Torrico.

#### OAKLAND HOUSING AUTHORITY POLICE DEPT.

Sgt. **James Williams** was promoted to lieutenant. Officer **Kenneth Nielsen** was promoted to acting sergeant. Officer **Aida DuPree** returned to full duty after she was violently assaulted in September 2009. Reserve officers **Fabain Velazquez** and **Ricardo Flores** were hired as full-time officers. New reserve officers: **Christopher MacGregor, Daniel Alvarez, Manual DeOchoa, and Christopher Hough**. Sgt. **Jerold Coats**, a member of the U.S. Navy Reserves, was deployed to the Middle East on February 1, 2010. His fellow officers wish him a safe return home.

#### PIEDMONT POLICE DEPARTMENT

Sgt. **Gary Shively** retired after 29 years of service (12 years with Piedmont PD, 12 years with Antioch PD, and five years with Pittsburg PD). Officer **Robert Wells** was promoted to sergeant. Lateral appointment: **Willie Wright** (Sacramento County SO).

#### PLEASANTON POLICE DEPARTMENT

Lt. **Darrin Davis** retired after 25 years of service. Lateral appointment: **Jarrold Yee** (San Francisco State University PD).

#### SAN LEANDRO POLICE DEPARTMENT

Officer **Paul Henning** retired after 23 years of service. Transfers: Sgt. **Joey Delgado** from Administrative Services to Patrol, and Sgt. **Luis Torres** from

Patrol to Administrative Services. **Beverly Cromwell** was promoted to Property Clerk.

#### UNION CITY POLICE DEPARTMENT

Lateral appointments: **Daniel Padilla** (Contra Costa SO), **Adalberto Alberto** (Sacramento SO), **Christopher Lanier** (Atlanta, GA PD), **Jean Luevano** (Hayward PD). Transfers: Cpl. **Janice Turbyfill** from Investigations to Patrol; Cpl. **Victor Derting** from Gang Violence Suppression to Investigations; Cpl. **Bob Kensic, Joshua Clubb, and Daniel Bankston** from Patrol to Community Policing; Cpl. **Mark Housley** and **Kirk Wu** from Community Policing to Patrol; **Andrew Gannam** from Patrol to Gang Violence Suppression; and **Robert Paul** from Patrol to Investigations. **Chris Leete** was appointed K-9 Officer.

#### UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Det. **Bruce Bauer** retired after more than 31 years of service to the University of California.

Retired lieutenant **John E. Jones** passed away on January 21, 2010. Lt. Jones was sworn as a UCPD officer on July 15, 1955. Prior to his selection, he worked as an officer at the Lawrence Radiation Lab (now LBL). He was promoted to sergeant in March of 1969 and then to lieutenant in September of that same year. In 1974, Lt. Jones served as Acting Chief of Police at U.C. Santa Cruz. He retired in 1984 after 32 years of service.

Retired sergeant **James D. "Jim" Bryan** passed away on January 24, 2010. Sgt. Bryan's career with UCPD began on March 7, 1960. He was promoted to sergeant on August 15, 1969 and was selected to organize and supervise the original "Telegraph Avenue Patrol" from 1969 to 1971. He retired in 1991 after 31 years of service. POV



# War Stories

## That's right

Alameda County prosecutor Jim Meehan was speaking to a class of sophomores at Encinal High School. The subject was the death penalty, and Jim had just unveiled a chart listing all the special circumstances that could warrant a death sentence. As he was running down the list, he came to “oral copulation,” at which point a girl raised her hand and asked, “You mean you can get the death penalty for doing that?”

## Getting the message

A red-light runner was caught by one of those enforcement cameras in Oakland, and he received a citation in the mail along with a notice saying the fine was \$200. So he photographed two \$100 bills and mailed the photos to the clerk of the traffic court. The clerk was so impressed with the man's creativity that she sent him an equally-creative warning: a photograph of a pair of handcuffs. The fine was paid the next day.

## More red-light camera news

In Phoenix, a notorious habitual traffic offender was worried that the city's new red-light cameras would cramp his style. So he went out and bought a giraffe mask which he would cleverly use to cover his face just before running red lights at camera-equipped intersections. It was great fun, and it worked for a while until Giraffe Man piled up over 75 traffic tickets. That's when Phoenix police took a real close look at all the videos and happily discovered that, in one of them, they could see his face clearly as he was putting on the mask, a big smile on his face. But he's not smiling now: A judge not only imposed a fine of \$6,700, he seized the mask.

## A “sensitive” armed robber

A man armed with a handgun was robbing a pedestrian in Oakland when, for no apparent reason, he handed the victim a pocket knife and said, “You can use this on me if I go crazy.” He then hugged the puzzled victim and ran off . . . toward Berkeley.

## An impressive achievement

Marguerite Engle of South Dakota has claimed the title of The World's Drunkest Person. Well, at least she's the drunkest in South Dakota since the state started keeping blood-alcohol records. Talk about putting points on the board—her score was .708%. This is an amazing achievement, especially considering that a score of .40% is considered lethal. Unfortunately, Marguerite won't be able to accept her trophy in person. She was arrested two days later, passed out behind the wheel of a stolen car.

## Working on Marguerite's record

At a DUI trial in Oakland, the defendant's lawyer was cross-examining the prosecution's pathologist about the effects of alcohol:

**Attorney:** What's the highest blood-alcohol level you've ever seen?

**Pathologist:** Six-two.

**Attorney:** And could he walk and talk okay?

**Pathologist:** Not really. He was dead at the time, and I was cutting him open.

## Going down

A man who resides in San Francisco took BART to San Leandro where he robbed the Bayview Bank. When he arrived back at the San Leandro BART station, he was feeling so happy that, having noticed that the escalator was broken (a chronic problem at BART stations), he decided to pamper himself by taking the handicapped-only elevator up to the train platform. But as the door opened, he encountered a BART police officer who inquired as to the nature of the man's supposed disability. Just then, there was an announcement over the officer's police radio that the nearby Bayview Bank had just been robbed and, as the dispatcher started to describe the robber, it quickly became apparent that riding handicapped-only elevators was the least on the man's transgressions. As the officer was handcuffing him, the robber complained, “You know, somebody really ought to fix your damned escalators.”

### Another robbery tale

An Oakland officer was taking a report from a woman who had just been robbed by a man:

**Officer:** How tall was he?

**Victim:** Pretty tall.

**Officer:** What, six feet?

**Victim:** Oh, heavens no, he wasn't that tall. Maybe five-twelve or thirteen.

### This is your brain on marijuana

A man walked into the Emeryville police station and reported that he had just lost his backpack. He explained that he had been walking down San Pablo Avenue when he decided to smoke a joint. So he set the backpack on the ground while he lit up. It was very potent grass, he said. In fact, it was so potent that he forgot all about his backpack and walked off without it.

### Another marijuana-addled brain

A Hayward High School security officer in full uniform was approached by a student:

**Student:** Dude, you wanna buy some weed?

**Officer:** Say what?

**Student:** Weed, you wanna buy some?

**Officer:** Sure, let me see it.

At that point, the student pulled out his stash and the astonished officer pulled out his handcuffs.

### A depressing thought

At the Courthouse in Oakland, a sheriff's deputy was walking by a holding cell when he overheard two career criminals who were having the following conversation just after they were sentenced to very long prison terms for armed robbery:

**Prisoner #1:** So, when do you think we'll get out?

**Prisoner #2:** Well, the way I figure it, our parole officer ain't even been born yet.

### The joys of parenthood

Bumper sticker spotted on a car parked in front of the Courthouse in Oakland: "My son was 'Inmate of the Month' at Santa Rita Jail."

### An unusual vacation idea

For only \$65, tourists can now take guided bus tours through the streets occupied by some of Southern California's most notorious street gangs. The tours are run by a company called "LA Gang Tours" which provides an unarmed gangster-guide who will point out all of the colorful historical landmarks, such as the house in which the Crips gang was formed and the current headquarters of the 18<sup>th</sup> Street Gang. Although all customers are required to sign a liability waiver, the company claims the tours are fairly safe because most of the gangs have signed "cease fire" agreements.

### Getting high on memories

While executing a search warrant in a drug house, Newark police officers found several boxes of meth and arrested the two men who lived in the house. As the search continued, one of the officers discovered a small box containing some greyish-white powder. But he didn't know what it was, so he asked an officer who used to be a narc. The ex-narc tasted it and announced, "Definitely crank! High quality, too." From the other side of the room, one of the arrestees said, "That ain't crank. That's my wife. She died a few years back, and them's her ashes."

#### The War Story Hotline

Email: [POV@acgov.org](mailto:POV@acgov.org)

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Oakland, CA 94612

# We made your job easier (unless you're a criminal)

**F**or officers, prosecutors, and judges, knowing the law and keeping up with all the changes has never been easier. For starters, there's the 2010 edition of *California Criminal Investigation*, the authority for laws and principles that control criminal investigations and police field operations in California. *CCI 2010* contains over 700 pages with more than 3,500 endnotes featuring comments, examples, and over 15,000 case citations with illuminating quotes.

You may also choose to get this information from CCI Online, the new and innovative website that, (1) is updated daily, (2) displays endnotes automatically, (3) includes a global word search application, and (4) provides links to articles and case reports published in *POV*.

In addition, you can now buy *CCI 2010* or an unlimited one-year subscription to CCI Online from our law enforcement website: [www.le.alcoda.org](http://www.le.alcoda.org). Here are the topics:

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