

POINT of VIEW



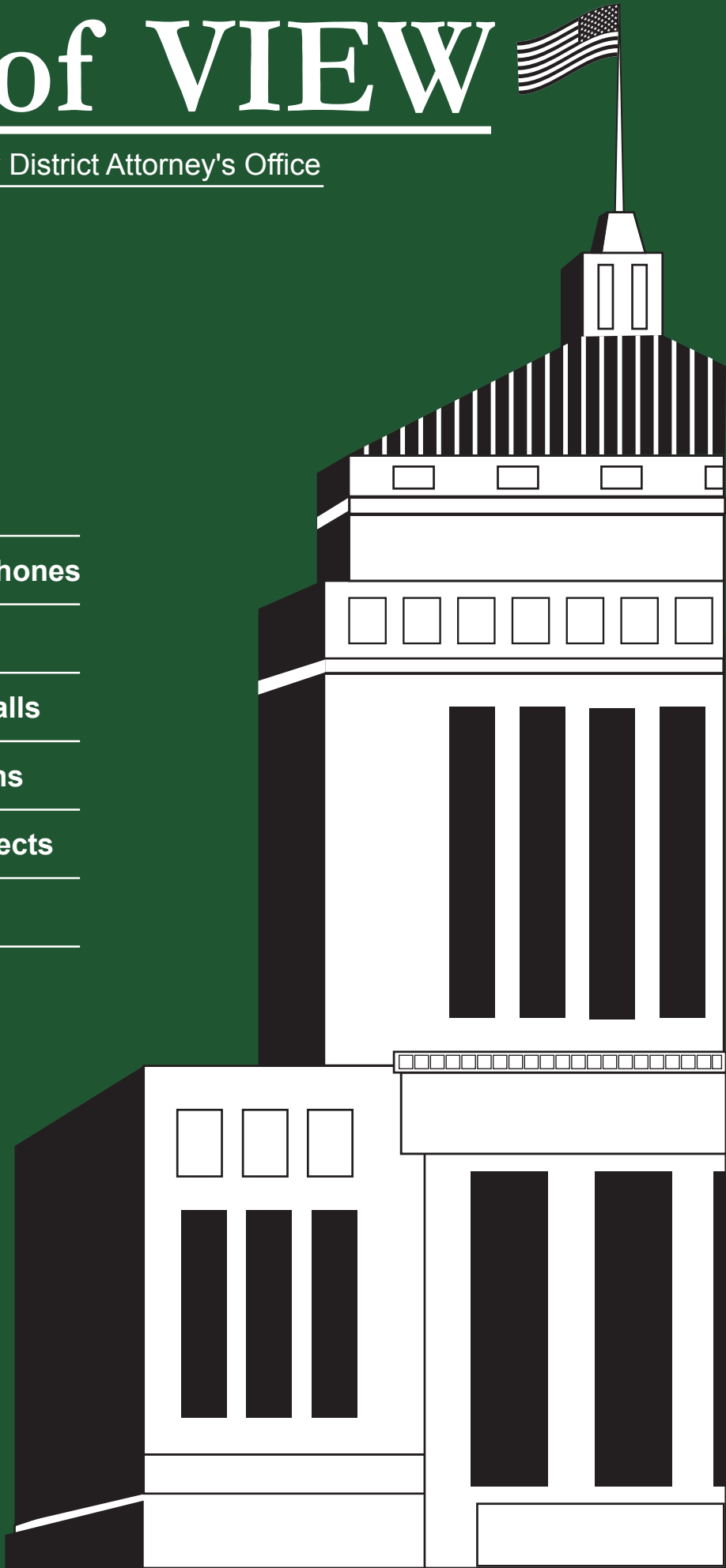
A publication of the Alameda County District Attorney's Office

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Point of View

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Attention Recent POV Subscribers

If you or someone you know recently requested a subscription for the POV hard copy, be advised that all orders received from May 1, 2014 through July 22, 2014 were permanently deleted due to a server malfunction. So, you will need to resubmit your order. Requests for the email version were not affected. We apologize for the inconvenience.

Probable Cause to Arrest

In 2012, the number of people arrested in the U.S. for felonies and misdemeanors was around 12.2 million.¹

That's a lot of arrests. And all of them were made by officers who thought they had probable cause. Some were mistaken.

While some false arrests are inexcusable, most are made in good faith as the result of a slight defect in the concept of probable cause: Nobody really knows what it means. In fact, even the United States Supreme Court described it as something that is both “elusive” and “abstract,”² two words that would ordinarily be used to describe such unintelligible concepts as the meaning of life and Einstein's Theory of Relativity. But unlike philosophers and physicists who have years (or lifetimes) to ponder the questions before them, officers must often reach their conclusions on-the-spot, and may have to do so based on information that is disordered, incomplete, or conflicting. Plus their information often comes from sources whose motives and reliability are unknown or questionable.³

So unless probable cause happens to be an easy call, or unless officers have the luxury of conducting further investigation or waiting for an arrest warrant, they must try to make the correct decision based on whatever information is at hand and whatever inferences and conclusions they can draw from it.⁴ This necessarily requires an understanding of the basic principles of probable cause and how to determine the reliability of the various sources of information. Both of these subjects were covered in articles in the Spring-Summer 2014 *Point of View*, both of which can be downloaded at le.alcoda.org.

In this article, we will focus on probable cause to arrest and the related subject of reasonable suspicion to detain. (We will cover probable cause to search in

the Winter 2015 edition.) At first glance, this subject might seem simple because most of the relevant circumstances pertaining are fairly obvious. But it can be a challenge to keep track of—and especially recall—every major and minor incriminating circumstance that comes to light in the course of an investigation, whether it's a short investigation by a patrol officer on the street or a lengthy investigation by teams of detectives. And recalling incriminating circumstances is crucial because, as we discussed in the Spring-Summer edition, with each additional piece of incriminating evidence that an officer can testify to, the odds of having probable cause and reasonable suspicion increase *exponentially*.

To illustrate, if probable cause could be tallied on a court-approved scorecard, and if an officer who carried one around saw a pedestrian who matched the general description of the perpetrator of a robbery that had just occurred down the street, he would give the suspect a PC score of, say, two: one point for resembling the robber and a second point for being near the crime scene shortly after the holdup. But he would also give the suspect a bonus point because the combination of the two independent circumstances is, in effect, an additional incriminating circumstance in that it constitutes a “coincidence of information.”⁵ And if there were a third or fourth independent incriminating circumstance, the score starts climbing through the roof. In other words, when it comes to probable cause, the whole is much greater than the sum of its parts.

Another advantage of being able to catalogue the relevant circumstances is that it becomes easier to present the facts logically and persuasively in a declaration of probable cause, an arrest warrant affidavit, in testimony at a suppression hearing, or during an internal affairs investigation.

¹ Source: *Crime in the United States 2012*, FBI.

² *United States v. Arvizu* (2002) 534 U.S. 255, 274 [“abstract”]; *United States v. Cortez* (1981) 499 U.S. 411, 417 [“elusive”].

³ **NOTE:** Contrary to what happens on TV, officers cannot arrest people “for investigation” of a crime or “on suspicion.” This is because probable cause requires a fair probability that a person actually committed a crime—not that he *might* have done so. See *Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 169 [“Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system”].

⁴ See *U.S. v. Edwards* (5th Cir. 1978) 577 F.2d 883, 895; *Jackson v. U.S.* (D.C. Cir. 1962) 302 F.2d 194, 197.

⁵ *Ker v. California* (1963) 374 U.S. 23, 36.

One other thing: Most of these circumstances we will cover are relevant in establishing both probable cause to arrest and reasonable suspicion to detain. The only difference is that probable cause requires information of higher quality and quantity than reasonable suspicion. Again, this subject was covered at length in the Spring-Summer edition.

Description Similarities

When a witness sees the perpetrator of a crime but does not know him, probable cause will frequently be based, at least in part, on physical similarities between the perpetrator and suspect, their clothing, or their vehicles. And, of course, any similarity becomes much more significant if there was something unique or unusual about it; e.g., a distinctive tattoo or scar.⁶ As the Court of Appeal observed, “Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others.”⁷

PHYSICAL APPEARANCE: Each individual physical similarity between the perpetrator and suspect—height, weight, build, age, race, hair color—has little significance. In other words, neither a “mere resemblance” to the perpetrator nor a resemblance to a “vague” physical description will carry much weight, even for an investigative detention.⁸ Instead, what matters—and it matters a lot—is the *number* of independent corresponding characteristics.⁹

CLOTHING: Similar or matching clothing or other attire is highly relevant especially if the crime occurred so recently that it was unlikely that the perpetrator had time to change clothes.¹⁰ And, of course, multiple similarities in the clothing and the manner in which they were worn are also important; e.g., red 49er baseball cap worn backwards.¹¹

VEHICLE SIMILARITIES: If a vehicle was used in the commission of the crime, each similarity between the perpetrator’s and suspect’s vehicles is necessarily significant; e.g., similar license plate numbers,¹² both vehicles were very old,¹³ both were light colored compact station wagons.¹⁴ And these similarities become even more important if there was some additional independent reason to connect the vehicle to the crime; e.g., an occupant resembled the perpetrator, the car was spotted near the crime scene, the occupants acted in a suspicious manner.¹⁵

CORRESPONDING NUMBER OF PEOPLE: If there were two or more perpetrators, it is significant that officers detained a group of suspects shortly after the crime was committed and the number of suspects corresponded with the number of perpetrators.¹⁶

DISCREPANCIES: The courts understand that witnesses may inadvertently provide officers with descriptions of perpetrators and vehicles that are not entirely accurate. Thus, officers may make allowances for the types of errors they have come to expect.¹⁷ As the Court of Appeal observed, “Crime

⁶ See *People v. Flores* (1974) 12 Cal.3d 85, 92 [“distinctive” hat]; *People v. Carpenter* (1997) 15 Cal.4th 312, 364 [corresponding shoeprint]; *People v. Orozco* (1981) 114 Cal.App.3d 435, 440 [unusual color of car].

⁷ *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174.

⁸ See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 381-82; *In re Dung T.* (1984) 160 Cal.App.3d 697, 713; *People v. Walker* (2012) 210 Cal.App.4th 165, 182; *Grant v. Long Beach* (9th Cir. 2002) 315 F.3d 1081, 1088 [“mere resemblance to a general description”].

⁹ See *People v. Fields* (1984) 159 Cal.App.3d 555, 564; *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174.

¹⁰ See *Chambers v. Maroney* (1970) 399 U.S. 42, 46 [corresponding green sweater]; *People v. Fields* (1984) 159 Cal.App.3d 555, 564 [corresponding jogging pants]; *People v. Hagen* (1970) 6 Cal.App.3d 35, 41 [corresponding three-quarter length coat].

¹¹ *People v. Soun* (1995) 34 Cal.App.4th 1499, 1524-25. Also see *People v. Adams* (1985) 175 Cal.App.3d 55, 859, 861 [white straw hat, dark pants, light shirt]; *People v. Little* (2012) 206 Cal.App.4th 1364, 1370 [male wore a white shirt; female wore a green dress]; *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174 [jacket with “shiny red hood” and soccer-style bag with double handles]; *People v. Joines* (1970) 11 Cal.App.3d 259, 264 [bandage on the left hand].

¹² *People v. Soun* (1995) 34 Cal.App.4th 1499, 1522; *People v. Watson* (1970) 12 Cal.App.3d 130, 134-135.

¹³ *People v. Flores* (1974) 12 Cal.3d 85.

¹⁴ *People v. Chandler* (1968) 262 Cal.App.2d 350, 354.

¹⁵ See *People v. Leath* (2013) 217 Cal.App.4th 344, 354; *People v. Little* (2012) 206 Cal.App.4th 1364, 1373; *In re Dung T.* (1984) 160 Cal.App.3d 697, 713.

¹⁶ See *Chambers v. Maroney* (1970) 399 U.S. 42, 46; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1518; *People v. Joines* (1970) 11 Cal.App.3d 259, 263; *In re Brian A.* (1985) 173 Cal.App.3d 1168, 1174; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1092.

¹⁷ See *Hill v. California* (1971) 401 U.S. 797, 803, fn.6; *Dawkins v. Los Angeles* (1978) 22 Cal.3d 126, 133; *People v. Arias* (1996) 13 Cal.4th 92, 169; *People v. Price* (1991) 1 Cal.4th 324, 410-11.

victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock.”¹⁸ For example, the following discrepancies in vehicle descriptions were considered insignificant:

- The perpetrator’s license plate number 127AOQ was reported as 107AOQ.¹⁹
- Yellow 1959 Cadillac, license number XQC 335 was described as a yellow 1958 or 1959 Cadillac with partial plate of OCX.²⁰
- Tan over brown 1970 Oldsmobile, license 276AFB, was described as a 1965 Oldsmobile or Pontiac, license 276ABA.²¹
- A black-over-gold Cadillac was described as a light brown vehicle, possibly a Chevrolet.²²

Three other things about discrepancies: First, the courts are not so forgiving when the error was made by an officer instead of a witness. As the Court of Appeal explained, “While officers should not be held to absolute accuracy of detail in remembering the numerous crime dispatches broadcast over police radio . . . [a]n investigative detention premised upon an officer’s materially distorted recollection of the true suspect description is [unlawful].”²³

Second, if the crime had just occurred, and if officers detained a group of suspects, the fact that the number of people in the group was larger or smaller than the number of perpetrators is not considered a significant discrepancy. This is because, as the California Court of Appeal observed in a robbery case, “it is a matter of common knowledge that holdup gangs often operate in varying numbers and combinations,

and the victim of a robbery does not always see all of the participants.”²⁴ Third, even if witnesses did not see a getaway car, officers may usually infer that one was used. Thus, if the suspect was in a vehicle when he was detained or arrested, the fact that witnesses did not see a vehicle will not ordinarily constitute a discrepancy.²⁵

Suspect’s Location

While probable cause may often be based largely on a suspect’s presence in a certain house, car, or other private place, officers may not ordinarily arrest or detain a person merely because he was present in a place that was open to the public.²⁶ Still, the suspect’s presence at a public location is often highly relevant.²⁷ And it may become critical if there was some independent circumstantial evidence of his involvement in a crime, such as a similar physical, clothing, or vehicle description, or any of the various suspicious circumstances we will discuss later. Also note that if the suspect’s presence in a certain location was incriminating, it is significant that there were few, if any, other people in the area because, for example, it was late at night or early in the morning.²⁸

NEAR THE CRIME SCENE: A suspect’s presence at or near the scene of a crime—whether before, during, or just after the crime occurred—is of course a relevant circumstance. And, thanks to modern technology, this circumstance is becoming increasingly important as officers are often able to determine the suspect’s whereabouts at a particular time by means of GPS tracking or cell tower triangulation.²⁹

¹⁸ *People v. Smith* (1970) 4 Cal.App.3d 41, 48.

¹⁹ *People v. Weston* (1981) 114 Cal.App.3d 764, 775, fn.5. Also see *U.S. v. Marxen* (6th Cir. 2005) 410 F.3d 326, 331, fn.5.

²⁰ *People v. Watson* (1970) 12 Cal.App.3d 130, 134-35.

²¹ *People v. Jones* (1981) 126 Cal.App.3d 308, 313-14.

²² *People v. Rico* (1979) 97 Cal.App.3d 124, 132.

²³ See *Williams v. Superior Court* (1985) 168 Cal.App.3d 349, 361.

²⁴ *People v. Coffee* (1980) 107 Cal.App.3d 28, 33-34. Also see *People v. Chandler* (1968) 262 Cal.App.2d 350, 354.

²⁵ See *People v. Anthony* (1970) 7 Cal.App.3d 751, 761; *People v. Overten* (1994) 28 Cal.App.4th 1497, 1505; *People v. Joines* (1970) 11 Cal.App.3d 259, 263.

²⁶ See *Brown v. Texas* (1979) 443 U.S. 47, 52; *Ybarra v. Illinois* (1979) 444 U.S. 85, 91.

²⁷ See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [“officers are not required to ignore the relevant characteristics of a location”].

²⁸ See *People v. Anthony* (1970) 7 Cal.App.3d 751, 761; *People v. Conway* (1994) 25 Cal.App.4th 385, 390.

²⁹ See *United States v. Jones* (2012) __ U.S. __ [132 S.Ct. 945, 947; *In re Application of the U.S.* (S.D.N.Y. 2006) 460 F.Supp.2d 448, 452 [“Where the government obtains information from multiple towers simultaneously, it often can triangulate the caller’s precise location and movements by comparing the strength, angle, and timing of the cell phone’s signal measured from each of the sites.”]; *In re Application of the U.S.* (3rd Cir. 2010) 620 F.3d 304, 308 [data included “which of the tower’s ‘faces’ carried a given call at its beginning and end”)], or by GPS technology if equipment has been upgraded to the Enhanced 911 standards.”]; *In re Application of the U.S.* (3rd Cir. 2010) 620 F.3d 304, 311 [the Government noted that “much more precise location information is available when global positioning system (‘GPS’) technology is installed in a cell phone”].

ON ACTUAL ESCAPE ROUTE: If a witness reported that he saw the perpetrator flee on a certain street, it would be of major importance that officers saw the suspect on that street or on an artery at a time and distance consistent with flight by the perpetrator.³⁰

ON A LOGICAL ESCAPE ROUTE: Officers may be able to predict a perpetrator's escape route based on their knowledge of traffic patterns in the area. If so, it would be significant that the suspect was traveling along a logical escape route if his distance from the crime scene and the elapsed time were consistent with flight by the perpetrator. Examples:

- At about 4 A.M., two men robbed a gas station in Long Beach. Two officers "proceeded to a nearby intersection, a vantage point which permitted them to survey the street leading from the crime scene to a freeway entrance, a logical escape route." A few minutes later, they saw two men in a car; the men fit the description of the robbers. No other cars were in the area; the suspects were "excessively attentive to the officers."³¹
- Shortly after a gang-related drive-by murder, LAPD officers found the shooters' car abandoned, and they reasonably believed the occupants had fled on foot. An officer assigned to a gang unit figured the shooters would be heading to their own neighborhood "by a route which avoided the territories of rival and hostile gangs," and he knew their "most logical route." Along that route, he detained several young men who were wearing the colors of the perpetrators' gang.³²
- At about 8 P.M., two men robbed a motel in Coronado, an island in San Diego Bay with only two bridges leading in and out. Police dispatch transmitted a very general description of the suspects but no vehicle description. Within minutes, an officer at one of the bridges saw a car occupied by two men who matched the general

description. Two other men in the car ducked down when the officer started following them.³³

HIGH CRIME AREA: A suspect's presence in a "high crime area" is virtually irrelevant.³⁴ "It is true, unfortunately," said the Court of Appeal, "that today it may be fairly said that our entire nation is a high crime area where narcotic activity is prevalent. Therefore, such factors, standing alone, are not sufficient to justify interference with an otherwise innocent-appearing citizen."³⁵ It is, however, a circumstance that may become relevant in light of other circumstances,³⁶ especially if officers or witnesses saw the suspect engage in conduct that is associated with the type of criminal activity that is prevalent in the area.

For example, in *In re Michael S.*³⁷ the court upheld the detention of a suspected auto burglar mainly because he was in an area in which officers had received "many complaints" of vehicle tampering, and the officers saw him "secreted or standing between two parked cars, looking first into one and then into the other as if examining them." (As for hand-to-hand transactions in high crime areas, see "Suspicious Activity" (High crime area), below.)

INSIDE A PERIMETER: A suspect's presence inside a police perimeter is significant, especially if the perimeter was fairly tight and was set up quickly after the crime occurred. For example, in *People v. Rivera*³⁸ the court ruled that an officer had probable cause to arrest two men suspected of having just broken into an ATM because, among other things, he "knew that 10 surveillance units and at least 10 other patrol cars, with their lights flashing, had formed a perimeter to contain the suspects."

Reaction to Seeing Officers

Even if they are not doing anything illegal at the moment, criminals tend to become nervous when they see an officer or patrol car. So officers naturally

³⁰ See *In re Louis F.* (1978) 85 Cal.App.3d 611; *U.S. v. Jones* (8th Cir. 2008) 535 F.3d 886.

³¹ *People v. Joines* (1970) 11 Cal.App.3d 59, 62-65.

³² *People v. Superior Court (Price)* (1982) 137 Cal.App.3d 90, 96.

³³ *People v. Overten* (1994) 28 Cal.App.4th 1497, 1505.

³⁴ See *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.2; *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.

³⁵ *People v. Holloway* (1985) 176 Cal.App.3d 150, 155.

³⁶ See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124; *People v. Souza* (1994) 9 Cal.4th 224, 240.

³⁷ (1983) 141 Cal.App.3d 814.

³⁸ (1992) 8 Cal.App.4th 1000, 1009-10.

view this as a suspicious circumstance. And so do the courts—but with two qualifications: First, the officers must have had reason to believe the suspect had seen and recognized them. Second, the nature of the reaction must have been sufficiently suspicious.

Proving recognition

As noted, a suspect's reaction to seeing officers can be deemed suspicious only if it reasonably appeared he had recognized them as officers. As the Court of Appeal explained, "Absent a showing the citizen should reasonably know that those who are approaching are law enforcement officers, no reasonable inference of criminal conduct may be drawn."³⁹

In most cases, this requirement is easily satisfied if (1) the reaction occurred immediately after the suspect looked in the officers' direction; and (2) the officers were in a marked patrol car or were wearing a standard uniform or other clearly identifiable departmental attire. But if the officers were in plain clothes or in an unmarked car, the relevance of the suspect's reaction will depend on whether there was some circumstantial evidence of recognition. Thus, in *People v. Huntsman*⁴⁰ the court ruled that the defendant's flight from officers was not incriminating because the officers "were in plain clothes and were driving an unmarked car at night."

In addition to marked cars, there are semi-marked vehicles; i.e., vehicles with enough exposed police equipment or other markings that most people—especially criminals—will easily spot them. As the Court of Appeal put it, some of these cars are "about as inconspicuous as three bull elephants in a backyard swimming pool."⁴¹ Still, when this issue arises at a hearing on a motion to suppress evidence, officers must be able to prove that they reasonably believed

the defendant had identified them or their car. This might be accomplished by describing in detail the various police markings and equipment that were readily visible. Thus, in *U.S. v. Nash* the court ruled that an officer's vehicle was clearly identifiable mainly because it was "a dark blue Dodge equipped with several antennae and police lights on the rear shelf."⁴²

Suspicious reactions

Assuming that the officers reasonably believed the suspect had recognized them, the significance of his reaction will depend on the extent to which it indicated alarm or fear.⁴³ The following reactions are especially noteworthy.

FLIGHT: Running from an officer is one of the strongest nonverbal admissions of guilt a person can make. In the words of the Supreme Court, flight is "the consummate act of evasion; it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."⁴⁴ Nevertheless, the Court ruled that flight will not *automatically* establish grounds to detain. Instead, there must have been at least one additional suspicious circumstance; i.e., "flight plus."⁴⁵ For example, the courts have ruled that the following additional circumstances were sufficient to establish grounds to detain:

- Flight in a high-crime area.⁴⁶
- Flight in the early morning hours.⁴⁷
- Flight from near a crime scene.⁴⁸
- Flight after having been observed hiding.⁴⁹
- Flight after making a hand-to-hand transaction in high-drug area.⁵⁰
- Flight after making a gesture as if to retrieve a weapon or discard evidence.⁵¹
- Flight plus matching a general description of a wanted suspect.⁵²

³⁹ *People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1091.

⁴⁰ (1984) 152 Cal.App.3d 1073.

⁴¹ *Flores v. Superior Court* (1971) 17 Cal.App.3d 119, 224.

⁴² (7th Cir. 1989) 876 F.2d 1359, 1360.

⁴³ See *People v. Dickey* (1994) 21 Cal.App.4th 952, 956, fn.2.

⁴⁴ *Illinois v. Wardlow* (2000) 528 U.S. 119, 124.

⁴⁵ *People v. Souza* (1994) 9 Cal.4th 224, 235-36.

⁴⁶ *Illinois v. Wardlow* (2000) 528 U.S. 119, 124; *People v. Magee* (2011) 194 Cal.App.4th 178, 191, fn.12.

⁴⁷ *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 724; *People v. Superior Court (Johnson)* (1971) 15 Cal.App.3d 146.

⁴⁸ *People v. Souza* (1994) 9 Cal.4th 224, 235-36.

⁴⁹ *People v. Superior Court (Johnson)* (1971) 15 Cal.App.3d 146; *Sibron v. New York* (1968) 392 U.S. 40, 67.

⁵⁰ *People v. McGriff* (1990) 217 Cal.App.3d 1140, 1144; *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250.

⁵¹ *People v. Souza* (1994) 9 Cal.4th 224, 240; *People v. Johnson* (1991) 231 Cal.App.3d 10, 12.

⁵² *People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1544; *In re Rafael V.* (1982) 132 Cal.App.3d 977, 982-83.

Note that if officers already have grounds to detain the suspect, his flight may convert reasonable suspicion into probable cause to arrest, or at least provide grounds to arrest him for obstructing an officer in the performance of his duties.⁵³

ATTEMPTING TO HIDE FROM OFFICERS: Like flight, a person's attempt to hide from officers—including "slouching, crouching, or any other arguably evasive movement"⁵⁴—is a highly suspicious circumstance.⁵⁵

Here are some examples:

- Upon seeing the officers, a young man standing between two parked cars in an alley "stepped behind a large dumpster and then continued to move around it in such a fashion that he blocked himself from the officers' view."⁵⁶
- Officers saw the suspect hide behind a fence and peer out toward the street.⁵⁷
- When their parked car was spotlighted by an officer, two people in the front seat "immediately bent down toward the floorboard."⁵⁸

ATTEMPTING TO AVOID OFFICERS: Although not as suspicious as an obvious attempt to hide, it is relevant that, upon observing officers, the suspect attempted to avoid them by, for example, walking away or quickly changing direction. As the Third Circuit observed, although walking away from officers "hardly amounts to headlong flight," it is "a factor that can be considered in the totality of the circumstances."⁵⁹ Some examples:

- Suspects "suddenly changed course" and "increased their pace" as the officers' vehicle came into view.⁶⁰
- Suspects split up."⁶¹
- At 4 A.M., as officers arrived at a business in which a silent burglary alarm had been triggered, a man standing next to the business walked away.⁶²
- As a murder suspect drove up to his girlfriend's house and started to pull into the driveway, he saw that sheriff's deputies were there, at which point he backed up and drove off.⁶³
- When a driver saw a patrol car late at night, he "accelerated his vehicle and made two quick turns and an abrupt stop, hurriedly dousing his auto lights."⁶⁴
- When a man who was suspected of selling drugs to a passing motorist saw an officer, he "abruptly withdrew from the [buyer's] car window" and the driver of the car drove off.⁶⁵

WARNING TO ACCOMPLICE: If two or more suspects were standing together when one of them apparently spotted an officer, his immediate warning to the other is considered highly suspicious; e.g., "Jesus Christ, the cops,"⁶⁶ "Oh shit. Don't say anything,"⁶⁷ "Police!"⁶⁸ "Rollers!"⁶⁹ "The man is across the street."⁷⁰ Exclamations such as these naturally become even more suspicious if there was an immediate avoidance response; e.g., "Let's get out of here,"⁷¹ "Bobby, Bobby, run, it's the narcs."⁷²

⁵³ See Pen. Code § 148; *People v. Allen* (1980) 109 Cal.App.3d 981, 987; *People v. Johnson* (1991) 231 Cal.App.3d 1, 13, fn.2; *People v. Mendoza* (1986) 176 Cal.App.3d 1127, 1131.

⁵⁴ *U.S. v. Woodrum* (1st Cir. 2000) 202 F.3d 1, 7.

⁵⁵ See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 ["evasive behavior" is a "pertinent factor in determining reasonable suspicion"].

⁵⁶ *In re Michael S.* (1983) 141 Cal.App.3d 814, 816.

⁵⁷ *U.S. v. Thompson* (D.C. Cir. 2000) 234 F.3d 725, 729.

⁵⁸ *People v. Souza* (1994) 240. Also see *People v. Overten* (1994) 28 Cal.App.4th 1497, 1504.

⁵⁹ *U.S. v. Valentine* (3rd Cir. 2000) 232 F.3d 350, 357.

⁶⁰ *U.S. v. Briggs* (10th Cir. 2013) 720 F.3d 1281, 1286; *People v. Manis* (1969) 268 Cal.App.2d 653, 660.

⁶¹ See *People v. Boissard* (1992) 5 Cal.App.4th 972, 975; *People v. Profit* (1986) 183 Cal.App.3d 849, 882; *People v. Divito* (1984) 152 Cal.App.3d 1, 13; *In re Stephen L.* (1984) 162 Cal.App.3d 257, 260; *People v. Brown* (1990) 216 Cal.App.3d 1442, 1450.

⁶² *People v. Lloyd* (1992) 4 Cal.App.4th 724, 734.

⁶³ *People v. Turnage* (1975) 45 Cal.App.3d 201, 205.

⁶⁴ *In re Eduardo G.* (1980) 108 Cal.App.3d 745, 754.

⁶⁵ *U.S. v. Lopez-Garcia* (11th Cir. 2009) 565 F.3d 1306, 1314. Also see *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224.

⁶⁶ *People v. Bigham* (1975) 49 Cal.App.3d 73, 78. Also see *U.S. v. Mays* (6th Cir.2011) 643 F.3d 537, 543.

⁶⁷ *People v. Vasquez* (1983) 138 Cal.App.3d 995, 999.

⁶⁸ *People v. Mims* (1992) 9 Cal.App.4th 1244, 1250. Also see *Sanderson v. Superior Court* (1980) 105 Cal.App.3d 264, 271 ["Cops!"].

⁶⁹ *People v. Lee* (1987) 194 Cal.App.3d 975, 980.

⁷⁰ *People v. Wigginton* (1973) 35 Cal.App.3d 732, 736.

⁷¹ *Florida v. Rodriguez* (1984) 469 U.S. 1, 3.

⁷² *Pierson v. Superior Court* (1970) 8 Cal.App.3d 510, 516.

SUDDEN REACH: Any sudden—almost instinctive—reaching into a pocket or other container or place upon seeing an officer is highly suspicious because of the possibility that the suspect is reaching for a weapon or disposable evidence. The following are examples that have been noted by the courts:

- When a suspected drug dealer saw a patrol car, he suddenly put his hand inside his jacket.⁷³
- The suspect “put his hands in his pockets and started ‘digging’ in them.”⁷⁴
- The suspect made “a sudden gesture with his right hand to his left T-shirt pocket.”⁷⁵
- “Just after [the officer] started the search around defendant’s waistband, defendant abruptly grabbed for his outside upper jacket pocket.”⁷⁶
- The suspect “reached towards the front of his pants several times.”⁷⁷
- The suspect “shoved his hand into his right trouser pocket quite rapidly.”⁷⁸

ATTEMPT TO HIDE, CONCEAL, OR DISCARD: An apparent attempt to hide an unknown object upon seeing an officer is certainly suspicious because it is usually reasonable to infer that the item was a weapon, contraband, or other evidence of a crime.⁷⁹ Although such an attempt is especially relevant if officers could see that there was, in fact, an object of some sort that the suspect was attempting to conceal, the important thing is that the suspect’s actions were reasonably interpreted as such.

The following are examples of actions that reasonably indicated the suspect was attempting to hide, conceal, or discard something:

- As officers approached a car they had stopped, they saw the driver “pushing a white box under the front seat.”⁸⁰
- The officers saw appellant “reach into the back of his waistband and secrete in his hands an object which he had retrieved.”⁸¹
- Upon seeing officers, the suspect “threw a small plastic bag onto the ground.”⁸²
- The suspect “was holding his hands clasped together in front of a bulge in the waistband in the middle of his waist.”⁸³
- After officers lit up the car, the backseat passenger started moving around and looked back several times at the patrol car.⁸⁴
- Upon seeing the officers, the suspect quickly made a “hand-to-mouth movement, as though secreting drugs.”⁸⁵
- A suspected drug dealer sitting inside his car kept his left hand hidden from the officer who had detained him.⁸⁶
- As the suspect was looking in her purse for ID, she “attempted to obstruct [the officer’s] view.”⁸⁷

EXTREME ATTENTION TO OFFICERS: A person’s extreme or unusual attention to officers may be noteworthy, especially if accompanied by some physical response and if officers could provide detailed testimony as to what the suspect did and why it appeared suspicious. Here are some examples:

- Defendant was “constantly checking the [rear view] mirrors and talking on his mobile phone as he looked back at the unmarked car behind them.”⁸⁸

⁷³ *People v. Lee* (1987) 194 Cal.App.3d 975, 983. Also see *People v. Flores* (1979) 100 Cal.App.3d 221, 226.

⁷⁴ *U.S. v. Mays* (6th Cir. 2011) 643 F.3d 537, 543.

⁷⁵ *People v. McLean* (1970) 6 Cal.App.3d 300, 306.

⁷⁶ *People v. Atmore* (1970) 13 Cal.App.3d 244, 246.

⁷⁷ *People v. Lopez* (2004) 119 Cal.App.4th 132, 134.

⁷⁸ *People v. Ochoa* (1970) 9 Cal.App.3d 500, 502. Also see *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189.

⁷⁹ See *People v. Miller* (1976) 60 Cal.App.3d 849, 854 [it was reasonable for the officer to conclude “that defendant feared discovery of the book or notebook because it contained or would lead to incriminating evidence”].

⁸⁰ *People v. Superior Court (Vega)* (1969) 272 Cal.App.2d 383, 387.

⁸¹ *In re John C.* (1978) 80 Cal.App.3d 814, 819.

⁸² *U.S. v. Stigler* (8th Cir. 2009) 574 F.3d 1008, 1009.

⁸³ *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956.

⁸⁴ *People v. Hunter* (2005) 133 Cal.App.4th 371, 379, fn.5.

⁸⁵ *People v. Johnson* (1991) 231 Cal.App.3d 1, 12.

⁸⁶ *People v. Butler* (2003) 111 Cal.App.4th 150.

⁸⁷ *U.S. v. Burnette* (9th Cir. 1983) 698 F.2d 1038, 1048.

⁸⁸ *U.S. v. Sloan* (7th Cir. 2011) 636 F.3d 845, 850.

- Upon seeing a police car, the suspect “did not give it the passing glance of the upright, law abiding citizen. His eyes were glued on that car.”⁸⁹
- The suspect “appeared to be startled by [the officer], had a ‘look of fear in his eyes’ and then quickly looked away.”⁹⁰
- All six suspects inside a moving vehicle turned to look at an officer as they drove past him.⁹¹

Instead of paying inordinate attention to officers, a suspect will sometimes pretend that he didn’t see them. This, too, can be relevant, especially if officers can explain why it appeared to be a ploy. For example, in *U.S. v. Arvizu* the Supreme Court ruled it was somewhat suspicious that a driver, as he passed a patrol car, “appeared stiff and his posture very rigid. He did not look at [the officer] and seemed to be trying to pretend that [the officer] was not there.”⁹²

Suspicious Activities

Officers sometimes see people doing things that, although not illegal, are suspicious or at least consistent with criminal activity.⁹³ While such conduct will seldom constitute probable cause to arrest, it is frequently sufficient for a detention.⁹⁴ However, the extent to which an activity can reasonably be deemed “suspicious” will often depend on the officer’s training and experience and the setting in which it occurred; e.g., the time of day or night, the location, and anything else that adds color or meaning to it. As the Court of Appeal observed, “Running down a street is in itself indistinguishable from the action of a citizen engaged in a program of physical fitness. Viewed in context of immediately preceding gunshots, it is highly suspicious.”⁹⁵

EXCESSIVE ALERTNESS: Before, during, and after committing a crime, people instinctively tend to look around a lot to see if anyone is watching. This is especially true of robbers, burglars, and people who sell or buy drugs on the street. As the Court of Appeal noted, “Those involved in the narcotics trade are a skittish group—literally hunted animals to whom everyone is an enemy until proven to the contrary.”⁹⁶ Here are some examples of suspicious alertness:

- As a suspected drug purchaser left a drug house, he quickly looked “side to side.”⁹⁷
- A suspected drug dealer “scouted the area before entering the apartment.”⁹⁸
- A suspected drug dealer “loitered about and looked furtively in all directions.”⁹⁹
- A suspected burglar “alighted from the vehicle and looked around apprehensively for quite some period of time.”¹⁰⁰
- Two men leaving a jewelry store (after robbing it) kept looking back at the store.¹⁰¹

COUNTERSURVEILLANCE: Another common and suspicious activity of paranoid or merely vigilant criminals is countersurveillance walking or driving, which generally consists of tactics that make it difficult for officers to follow them or at least force the officers to engage in conspicuous surveillance. Here are some examples of countersurveillance driving by suspected drug traffickers:

- Suspect began “weaving in and out of traffic at a high rate of speed in an apparent attempt to evade surveillance.”¹⁰²
- Suspect went to two houses “which the officers associated with drugs, and drove in and out of the parking lots of those buildings several times.”¹⁰³

⁸⁹ *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 224.

⁹⁰ *People v. Fields* (1984) 159 Cal.App.3d 555, 564.

⁹¹ *People v. Soun* (1995) 34 Cal.App.4th 1499, 1513.

⁹² (2002) 534 U.S. 266, 270.

⁹³ *In re Elisabeth H.* (1971) 20 Cal.App.3d 323, 327.

⁹⁴ See *People v. Souza* (1994) 9 Cal.4th 224, 233.

⁹⁵ *People v. Juarez* (1973) 35 Cal.App.3d 631, 636.

⁹⁶ *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 223.

⁹⁷ *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1577.

⁹⁸ *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1668.

⁹⁹ *People v. Moore* (1970) 13 Cal.App.3d 424, 431.

¹⁰⁰ *People v. Dolliver* (1986) 181 Cal.App.3d 49.

¹⁰¹ *People v. Green* (1994) 25 Cal.App.4th 1107, 1109, 1111.

¹⁰² *U.S. v. Fiasche* (7th Cir. 2008) 520 F.3d 694, 695. Also see *United States v. Sharpe* (1985) 470 U.S. 675, 682, fn.3.

¹⁰³ *U.S. v. Johnson* (8th Cir. 1995) 64 F.3d 1120, 1125.

- Suspect would “make U-turns in the middle of streets, slow down at green lights, and then accelerate through intersections when the lights turned yellow.”¹⁰⁴
- Suspect “pulled to the curb, allowing a surveillance unit to pass [then] drove to a residence after first going past it and making a U-turn.”¹⁰⁵
- Suspect drove “up and down side streets, making numerous U-turns, stopping, backing up, and finally arriving at the Ganesha Street property.”¹⁰⁶

LATE NIGHT ACTIVITY: Some crimes are typically committed late at night when there are usually fewer potential witnesses; e.g., robberies, commercial burglaries. Consequently, the time of night in which an activity occurred can add meaning to it. Examples:

- 11:40 P.M.: Officer saw three people inside a car parked “in front of a darkened home” in a neighborhood in which two to three burglaries had been occurring each week.¹⁰⁷
- Midnight: Officer saw two occupied cars parked behind the sheriff’s warehouse; there were no homes or places of business in the area.¹⁰⁸
- Midnight: On a dark and secluded road, an officer saw an occupied pickup truck “nosed into the driveway of a fenced construction storage area,” and there was a big box in the back of the truck.¹⁰⁹
- 12:15 A.M.: Officers saw two men “peering” into the window of a closed radio shop”; when the men saw the officers, they started to walk away.¹¹⁰
- 2:30 A.M.: Officers saw “three people in a car driving around a high crime area” and “the car proceeded along two residential blocks, slowing intermittently in a manner that an observing officer thought consistent with preparing for a burglary or drive-by shooting.”¹¹¹
- 2:35 A.M.: Officer saw a man “exiting from darkened private property where valuable merchandise was located.”¹¹²

- 3:30 A.M.: Two men who were walking in a business area started running when they saw a patrol car approaching.¹¹³

CASING: Conduct that is indicative of casing a location for a crime (typically robbery or burglary) is, of course, highly suspicious. In fact, such conduct resulted in one of the most important cases in criminal law: *Terry v. Ohio*.¹¹⁴ In *Terry*, an officer noticed two men standing together in downtown Cleveland, Ohio at about 2:30 P.M. As the officer watched, he noticed one of the men walk over to a nearby store and look in the window. The man then “rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions.” The two men “repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips.” At this point, the officer detained the men because, as he testified, he suspected they were “casing a job, a stick-up” and that he “considered it his duty” to investigate. The U.S. Supreme Court agreed that the men’s conduct warranted a detention.

HAND-TO-HAND EXCHANGES: Hand-to-hand exchanges are common occurrences and are therefore not, in and of themselves, suspicious.¹¹⁵ But they can easily become so depending on a combination of surrounding circumstances, such as:

NATURE OF ITEM EXCHANGED: The object of the exchange looked like illegal drugs; e.g., “two small, thin, white, filterless cigarettes.”¹¹⁶

PACKAGING OF ITEM EXCHANGED: The object was packaged in a manner consistent with drug packaging; e.g., a baggie,¹¹⁷ a “flat waxed paper package of the size and appearance used for the sale of marijuana in small quantities.”¹¹⁸

LOCATION OF TRANSACTION: The transaction occurred in an area where street sales of drugs, stolen property, or weapons commonly occur.¹¹⁹

¹⁰⁴ *U.S. v. Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1390.

¹⁰⁵ *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 546.

¹⁰⁶ *People v. Campbell* (1981) 118 Cal.App.3d 588, 592.

¹⁰⁷ [NOTE: Multiple footnotes follow] *People v. Schoennauer* (1980) 103 Cal.App.3d 398, 407. ¹⁰⁸ *People v. Lovejoy* (1970) 12 Cal.App.3d 883, 886. ¹⁰⁹ *U.S. v. Mattarolo* (9th Cir. 1999) 191 F.3d 1982. ¹¹⁰ *People v. Koelzer* (1963) 222 Cal.App.2d 20. ¹¹¹ *U.S. v. Rice* (10th Cir. 2007) 483 F.3d 1079. ¹¹² *People v. Allen* (1975) 50 Cal.App.3d 896, 901. ¹¹³ *Crofoot v. Superior Court* (1981) 121 Cal.App.3d 717, 724. ¹¹⁴ (1968) 392 U.S. 1, 6.

¹¹⁵ See *Cunha v. Superior Court* (1970) 2 Cal.3d 352, 357; *People v. Jones* (1991) 228 Cal.App.3d 519, 524.

¹¹⁶ *People v. Stanfill* (1985) 170 Cal.App.3d 420, 423.

¹¹⁷ See *People v. Mims* (1992) 9 Cal.App.4th 1244, 1248; *U.S. v. Bustos-Torres* (8th Cir. 2005) 396 F.3d 935, 945.

¹¹⁸ See *In re Frederick B.* (1987) 192 Cal.App.3d 79, 86; *Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 223.

¹¹⁹ See *People v. Limon* (1993) 17 Cal.App.4th 524, 532; *In re Frederick B.* (1987) 192 Cal.App.3d 79, 86.

MONEY EXCHANGE: The suspected buyer gave money to the suspected seller.¹²⁰

FURTIVENESS: The parties acted in a manner indicating they did not want to be seen; e.g., seller “looked about furtively,”¹²¹ seller “walked over to an apparent hiding place before and after the exchange,”¹²² the buyer hid the object of the transaction in a cigarette case which he then placed in his pocket,¹²³ when the parties saw an approaching police car “their conversation ceased and their hands went into their pockets very rapidly.”¹²⁴

PANICKY REACTION TO OFFICERS: Upon observing the officers, one or both of the suspects displayed signs of panic. This subject was covered in the section “Reaction to Seeing Officers,” above.

MULTIPLE EXCHANGES: The apparent seller engaged in several such transactions with various buyers.¹²⁵

PRIOR ARRESTS: The seller or buyer had prior arrests for selling or possessing contraband.¹²⁶

ADVANCING ON OFFICERS: A suspect’s act of quickly approaching officers who are about to contact or detain him is a suspicious (and worrisome) response. Thus, in *People v. Hubbard* the following testimony by an officer established reasonable suspicion for a pat search: “Like I said, all three suspects alighted from the vehicle almost simultaneously. They all got out on us.”¹²⁷ Similarly, *U.S. v. Mattarolo*, the court upheld a pat search because “[t]he defendant’s swift

approach caused the officer to get out of his squad car quickly so as not to be trapped with the means of protecting himself consequently limited.”¹²⁸

“UNUSUAL” ACTIVITY: A detention may be based, at least in part, on activity that is “so unusual, so far removed from everyday experience that it cries out for investigation,” even if “there is no specific crime to which it seems to relate.”¹²⁹

Nervousness

Although a suspect’s nervousness upon being contacted or detained is a relevant factor,¹³⁰ its significance usually depends on whether it was extreme or unusual.¹³¹ The following fall into that category:

- The suspect’s “neck started to visibly throb.”¹³²
- “[V]isibly elevated heart rate, shallow breathing, and repetitive gesticulations, such as wiping his face and scratching his head.”¹³³
- “[P]erspiring and shaking.”¹³⁴
- “[P]erspiring, swallowing and breathing heavily, and constantly moving his feet or fingers.”¹³⁵

Although less significant, the following indications of nervousness have been noted: suspect looked “shocked,”¹³⁶ suspect appeared “nervous and anxious to leave the area,”¹³⁷ and suspect appeared nervous and was hesitant in answering questions.¹³⁸ Much less significant—but not irrelevant¹³⁹—is a suspect’s failure to make eye contact with officers.¹⁴⁰

¹²⁰ *People v. Garrett* (1972) 29 Cal.App.3d 535, 538.

¹²¹ *U.S. v. Tobin* (11th Cir. 1991) 923 F.2d 1506, 1510.

¹²² *People v. Limon* (1993) 17 Cal.App.4th 524, 532. Also see *People v. Maltz* (1971) 14 Cal.App.3d 381, 392.

¹²³ *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743.

¹²⁴ *People v. Handy* (1971) 16 Cal.App.3d 858, 860.

¹²⁵ See *People v. Maltz* (1971) 14 Cal.App.3d 381, 393.

¹²⁶ *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743.

¹²⁷ (1970) 9 Cal.App.3d 827, 830.

¹²⁸ (9th Cir. 1999) 191 F.3d 1082, 1087.

¹²⁹ *People v. Foranyic* (1998) 64 Cal.App.4th 186, 190.

¹³⁰ See *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [“nervous, evasive behavior is a pertinent factor”].

¹³¹ See *U.S. v. White* (8th Cir. 1989) 890 F.2d 1413, 1418; *U.S. v. Wood* (10th Cir. 1997) 106 F.3d 942, 948.

¹³² *People v. Rogers* (2009) 46 Cal.4th 1136, 1159.

¹³³ *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763.

¹³⁴ *People v. Methey* (1991) 227 Cal.App.3d 349, 358.

¹³⁵ *U.S. v. Bloomfield* (8th Cir. 1994) 40 F.3d 910, 913.

¹³⁶ *People v. Garcia* (1981) 121 Cal.App.3d 239, 245. Also see *U.S. v. Davis* (3rd Cir. 2013) 726 F.3d 434, 440.

¹³⁷ *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1743.

¹³⁸ *People v. Russell* (2000) 81 Cal.App.4th 96, 103.

¹³⁹ See *U.S. v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1136; *Nicacio v. INS* (9th Cir. 1986) 797 F.2d 700, 704.

¹⁴⁰ See *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 828; *U.S. v. Mallides* (9th Cir. 1973) 473 F.2d 859, 861, fn.4; *U.S. v. Brown* (7th Cir. 1999) 188 F.3d 860, 865.

Lies and Evasions

When a suspect lies, evades a question, gives conflicting statements or tells an unbelievable story it is ordinarily reasonable to infer that the truth would incriminate him. Consequently, the following are all suspicious circumstances:

MATERIAL LIES: The most incriminating lie is one that pertains to a material issue of guilt.¹⁴² Said the court in *People v. Williams*, “Deliberately false statements to the police about matters that are within a suspect’s knowledge and materially relate to his or her guilt or innocence have long been considered cogent evidence of consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances.”¹⁴³ In fact, when a suspect lies about a material matter, the jury at his trial may be instructed that such an act may properly be deemed a demonstration of guilt.¹⁴⁴

LIES ABOUT PERIPHERAL ISSUES: Although less indicative of guilt than a lie about a material issue, lies about peripheral issues, such as the following, may also be viewed as incriminating:

- Suspect lied about his name, address, or DOB.¹⁴⁵
- Suspect lied about his travel plans, destination, or point of origin.¹⁴⁶
- Suspect lied that he wasn’t carrying ID.¹⁴⁷
- Suspect lied that he didn’t have a key to his trunk.¹⁴⁸
- Suspect lied that he didn’t own a car that was registered to him.¹⁴⁹
- Suspect lied that he and the murder victim were not married.¹⁵⁰
- Suspect lied when he said he didn’t know his accomplice.¹⁵¹

SUSPECT GIVES INCONSISTENT STATEMENT: A suspect who is making up a story while being questioned will frequently give conflicting information, often because he forgot what he said earlier or because he learned that his old story did not fit with the known facts. This is an especially significant circumstance if the conflict pertained to a material issue. For example, in *People v. Memro* the California Supreme Court pointed out that “patently inconsistent statements to such a vital matter as the whereabouts of [the murder victim] near the time he vanished had no discernible innocent meaning and strongly indicated consciousness of guilt.”¹⁵²

SUSPECTS GIVE CONFLICTING STORIES: When two or more suspects are being questioned separately, they will often give conflicting stories because they do not know what the other had said. For example, in a stolen property case, *People v. Garcia*, one suspect said the stolen TV he was carrying belonged to some dude, but his companion said it belonged to the suspect. The court said it sounded fishy.¹⁵³

Inconsistencies often frequently occur when officers stop a car and briefly question the occupants separately about where they came from, where they were going and why. Although these inconsistencies will not necessarily establish grounds to arrest or prolong the detention, they may naturally generate some suspicion. For example, in *U.S. v. Guerrero*¹⁵⁴ one of two suspected drug couriers said they had come to Kansas City “to work construction,” while the other said they were just visiting for the day. In ruling that the officers had grounds to detain the pair further, the court said that their “differing renditions of their travel plans” was “most important to the overall evaluation.”

¹⁴¹ *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1670.

¹⁴² See *People v. Osslo* (1958) 50 Cal.2d 75, 93.

¹⁴³ (2000) 79 Cal.App.4th 1157, 1167.

¹⁴⁴ See CALCRIM No. 362 (Spring 2013 ed.).

¹⁴⁵ See *Florida v. Rodriguez* (1984) 469 US 1, 6; *People v. Turner* (1994) 8 Cal.4th 137, 186.

¹⁴⁶ See *People v. Suennen* (1980) 114 Cal.App.3d 192, 199; *People v. Juarez* (1973) 35 Cal.App.3d 631, 635.

¹⁴⁷ See *People v. Daugherty* (1996) 50 Cal.App.4th 275, 286; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1005.

¹⁴⁸ See *People v. Hunter* (2005) 133 Cal.App.4th 371, 379, fn.5. ALSO SEE *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1238.

¹⁴⁹ See *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1668-71.

¹⁵⁰ See *U.S. v. Raymond Wong* (9th Cir. 2003) 334 F.3d 831.

¹⁵¹ See *U.S. v. Holzman* (9th Cir. 1989) 871 F.2d 1496, 1503. Also see *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133.

¹⁵² (1995) 11 Cal.4th 786, 843. Also see *People v. Gravatt* (1971) 22 Cal.App.3d 133, 137 [suspect claimed at first that item belonged to his brother-in-law, then said he won it in a crap game]; *People v. Shandloff* (1985) 170 Cal.App.3d 372, 382.

¹⁵³ (1981) 121 Cal.App.3d 239, 246.

¹⁵⁴ (10th Cir.2007) 472 F.3d 784, 788. Also see *U.S. v. Gill* (8th Cir. 2008) 513 F.3d 836, 844-45.

INDEPENDENT WITNESS GAVE DIFFERENT STORY: Officers might reasonably believe that a suspect was lying if his statement was in material conflict with that of an independent witness who appeared to be believable. Some examples:

- The suspect denied reports of several witnesses who had told officers they had seen him arguing with a woman who was later raped and killed.¹⁵⁵
- A murder suspect told officers that he left home at 8 A.M. (after his employer had been killed), but his mother said he left well before then.¹⁵⁶
- A man suspected of having murdered a woman told officers that the woman had only been missing a week or so, but the woman's mother said her daughter had been missing 3-4 weeks.¹⁵⁷

UNBELIEVABLE STORIES: Although not a provable lie, the suspect's story may generate suspicion because it didn't make sense, or because it didn't fit with the known facts.¹⁵⁸

- A suspected drug dealer who was stopped for a traffic violation said he was driving from New Jersey to San Jose to fix a computer server for a company. "Yet if this were true," said the court, "it was surely curious that the San Jose company would be willing to wait for Mr. Ludwig to drive cross-country."¹⁵⁹ Plus there are lots of people in San Jose (of all places) who can fix a server.
- A man who was found inside the locked apartment of a robbery suspect claimed he was not the suspect, but he couldn't explain his presence there.¹⁶⁰
- A suspected car thief said the car belonged to a friend, but he didn't know his friend's last name.¹⁶¹

- When questioned by DEA agents at San Diego International Airport, a woman who was carrying \$42,500 in cash inside a bag told them she had obtained the bag from a man named "Samuel," a man she had just met at the airport and whose last name she didn't know.¹⁶²
- A burglary suspect told officers she was waiting for a friend, but she didn't know her friend's name; plus she said her friend would be arriving on a BART train from San Jose, but there are no BART stations in San Jose (at least until 2017).¹⁶³
- A suspected rapist claimed he had been jogging, but he wasn't perspiring or breathing hard, nor did he have a rapid pulse.¹⁶⁴

AMBIGUOUS ANSWERS: Even though a suspect technically answered the officer's questions, his answers may be suspicious because they were ambiguous or bewildering.¹⁶⁵

- Suspect "gave vague and evasive answers regarding his identity."¹⁶⁶
- Suspect gave an "unsatisfactory explanation" for being where he was detained.
- Suspects could not explain what they were doing in a residential area at 1:30 A.M.¹⁶⁷
- Suspect gave "vague or conflicting answers to simple questions about his itinerary."¹⁶⁸
- Suspect gave "vague" description of her travel plans and she "could not remember the flight details"

WITHHOLDING INFORMATION: A suspect's act of withholding material information from officers is a suspicious circumstance; e.g., murder suspect withheld information about his relationship with the victim.¹⁶⁹

¹⁵⁵ *People v. Davis* (1981) 29 Cal. 3d 814, 823.

¹⁵⁶ *People v. Spears* (1991) 228 Cal.App.3d 1.

¹⁵⁷ *People v. Rogers* (2009) 46 Cal.4th 1136, 1159.

¹⁵⁸ See *People v. Memro* (1995) 11 Cal.4th 786, 843; *In re Richard T.* (1978) 79 Cal.App.3d 382, 388.

¹⁵⁹ *U.S. v. Ludwig* (10th Cir. 2011) 641 F.3d 1243, 1249.

¹⁶⁰ *Hill v. California* (1971) 401 U.S. 797, 803, fn.8.

¹⁶¹ *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1364 ["Any experienced officer hearing this frequently used but almost literally incredible tale—provided by a driver who had no identification, no proof of registration, and a car with tabs which Department of Motor Vehicles records showed did not belong to it—would have entertained a robust suspicion the car was stolen."].

¹⁶² *U.S. v. \$42,500* (9th Cir. 2002) 283 F.3d 977, 981.

¹⁶³ *People v. Harris* (1980) 105 Cal.App.3d 204, 212-13.

¹⁶⁴ *People v. Fields* (1984) 159 Cal.App.3d 555, 564.

¹⁶⁵ See *U.S. v. Holzman* (9th Cir. 1989) 871 F.2d 1496, 1504 [suspect "gave evasive responses to simple questions"].

¹⁶⁶ *People v. Adams* (1985) 175 Cal.App.3d 855, 861.

¹⁶⁷ *People v. Hart* (1999) 74 Cal.App.4th 479, 493.

¹⁶⁸ *U.S. v. Riley* (8th Cir. 2012) 684 F.3d 758, 763. Also see *U.S. v. Torres-Ramos* (6th Cir. 2008) 536 F3 542, 552.

¹⁶⁹ *U.S. v. Wong* (9th Cir, 2003) 334 F.3d 831, 836.

KNOWING TOO MUCH: A favorite of mystery writers for generations, a suspect's act of providing officers with information that could only have been known by the perpetrator is so devastating that scores of fictional murderers, upon realizing their error, have felt compelled to immediately confess. Although he did not immediately do so, the defendant in *People v. Spears* was caught in exactly such a trap.¹⁷⁰ Spears, an employee of a Chili's restaurant in Cupertino, shot and killed the manager in the manager's office shortly before the restaurant was to open for the day. When other employees arrived for work and Spears "discovered" the manager's body, he exclaimed, "He's been shot!" The manager had, in fact, been shot—three times to the head—but the damage to his skull was so extensive that only the killer would have known he had been shot, not bludgeoned. Spears was convicted.

Possession of Evidence

Another classic indication of guilt is that the suspect possessed the fruits or instrumentalities of the crime under investigation. But this one is a little more complicated because there are actually two independent legal issues: (1) Was the evidence "incriminating"? (2) Did the suspect actually "possess" it?

Types of incriminating evidence

There are essentially two types of incriminating evidence that a suspect may possess: contraband and circumstantial evidence of guilt. "Contraband" is anything that is illegal to possess, e.g., stolen property, child pornography, certain drugs, and illegal weapons.¹⁷¹ Possession of contraband automatically results in probable cause.

The other type of incriminating evidence, circumstantial evidence of guilt, is any evidence in the suspect's possession that tends to—but does not directly—establish probable cause. The following are examples of circumstantial evidence of guilt:

- A suspected burglar possessed burglar tools.¹⁷²
- A suspected drug dealer possessed a "bundle of small plastic baggies,"¹⁷³ or a "big stack or wad of bills."¹⁷⁴
- A murder suspect possessed bailing wire; bailing wire had been used to bind the victims.¹⁷⁵
- A murder suspect possessed "cut-off panty hose"; officers knew the murderers had worn masks and that cut-off panty hose are often used as masks.¹⁷⁶
- A man who had solicited the murder of his estranged wife possessed a hand-drawn diagram of his wife's home and lighting system.¹⁷⁷
- A robbery suspect possessed a handcuff key; the victim had been handcuffed.¹⁷⁸
- A suspected car thief possessed a car with missing or improperly attached license plates, indications of VIN plate tampering, switched plates, a broken side window, or evidence of ignition tampering.¹⁷⁹

Types of "possession"

In addition to having probable cause to believe the evidence is incriminating, officers must be able to establish probable cause to believe the suspect "possessed" it. There are types of possession: actual and constructive. Actual possession occurs if the evidence "is in the defendant's immediate possession or control."¹⁸⁰ Examples include evidence in the suspect's pockets or evidence that officers saw him discard or try to hide.¹⁸¹

¹⁷⁰ (1991) 228 Cal.App.3d 1.

¹⁷¹ See *U.S. v. Harrell* (9th Cir. 2008) 530 F.3d 1051, 1057.

¹⁷² See *People v. Koelzer* (1963) 222 Cal.App.2d 20, 25; *People v. Stokes* (1990) 224 Cal.App.3d 715, 721; *People v. Mack* (1977) 66 Cal.App.3d 839, 859; *People v. Taylor* (1975) 46 Cal.App.3d 513, 518.

¹⁷³ *People v. Nonnette* (1990) 221 Cal.App.3d 659, 666.

¹⁷⁴ *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1505.

¹⁷⁵ *People v. Easley* (1983) 34 Cal.3d 858, 872.

¹⁷⁶ *People v. Hill* (1974) 12 Cal.3d 731, 763.

¹⁷⁷ *People v. Miley* (1984) 158 Cal.App.3d 25, 35-36.

¹⁷⁸ *Horton v. California* (1990) 496 U.S. 128, 130-1, 142.

¹⁷⁹ See *People v. James* (1969) 1 Cal.App.3d 645, 648-49; *People v. Russell* (2000) 81 Cal.App.4th 96, 103.

¹⁸⁰ *In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.

¹⁸¹ See *People v. Martino* (1985) 166 Cal.App.3d 777, 790; *Frazzini v. Superior Court* (1970) 7 Cal.App.3d 1005, 1016.

In contrast, constructive possession exists if, although officers did not see the suspect physically possess the item, there was sufficient circumstantial evidence that he had sole or joint control over it.¹⁸² In the words of the Court of Appeal:

Constructive possession means the object is not in the defendant's physical possession, but the defendant knowingly exercises control or the right to control the object.¹⁸³

The question, then, is what constitutes sufficient circumstantial evidence of sole or joint control? The following circumstances are frequently cited by the courts:

CONTRABAND IN SUSPECT'S RESIDENCE: It is usually reasonable to infer that a suspect had control over contraband or other evidence in common areas of his home and in rooms over which he had joint or exclusive control; e.g., the kitchen,¹⁸⁴ in a light fixture,¹⁸⁵ in a bedroom.¹⁸⁶

CONTRABAND IN A VEHICLE: The driver and all passengers in a vehicle are usually considered to be in control of items to which they had immediate access or which were in plain view; e.g., on the floorboard,¹⁸⁷ behind an armrest,¹⁸⁸ on a tape deck,¹⁸⁹ behind the back seat.¹⁹⁰

COMPANION IN POSSESSION: When officers have probable cause to believe a person possesses contraband, they may also have probable cause to arrest his companion for possession if there were facts that reasonably indicated they were acting in concert.¹⁹¹

INDICIA: A suspect's control over a certain place or thing may be established by the presence of docu-

ments or other indicia linking him to the location; e.g., rent receipts, utility bills, driver's license.¹⁹²

Other Relevant Circumstances

Apart from circumstances that are too obvious to require discussion (e.g., confessions, fingerprint match,¹⁹³ DNA hit,¹⁹⁴ showup or lineup ID¹⁹⁵), the following circumstances are frequently cited in establishing probable cause and reasonable suspicion:

SUSPECT'S PHYSICAL CONDITION: The fact that the suspect was injured, dirty, out-of-breath, sweating, or had torn clothing is highly suspicious if officers reasonably believed that the perpetrator would have been in such a condition.¹⁹⁶

SUSPECT'S RAP SHEET: While it is somewhat significant that the suspect had been arrested or convicted in the past, it is highly significant that the crime was similar to the one under investigation.¹⁹⁷

GANG CLOTHING: Depending on the nature of the crime, it may be relevant that the suspect was wearing clothing that is associated with a street gang.¹⁹⁸

ELECTRONIC COMMUNICATION RECORDS: More and more, electronic communications records are providing officers with important information that establishes or helps to establish probable cause. Examples include phone numbers dialed and the length of the calls, cell site contact information (e.g., near scene of the crime when the crime occurred), date and time that a certain computer accessed a certain internet site, the identity of the sender and receiver of an email and when the communication occurred, the IP address assigned to a particular computer.¹⁹⁹ POV

¹⁸² See *Maryland v. Pringle* (2003) 540 U.S. 366, 372; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1176.

¹⁸³ *In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.

¹⁸⁴ See *Ker v. California* (1963) 374 U.S. 23, 36-37.

¹⁸⁵ See *People v. Magana* (1979) 95 Cal.App.3d 453, 464.

¹⁸⁶ See *People v. Gabriel* (1986) 188 Cal.App.3d 1261, 1265-66; *Frazzini v. Superior Court* (1979) 7 Cal.App.3d 1005, 1016.

¹⁸⁷ See *In re James M.* (1977) 72 Cal.App.3d 133, 137-38; *People v. Schoennauer* (1980) 103 Cal.App.3d 398, 410.

¹⁸⁸ See *Maryland v. Pringle* (2003) 540 U.S. 366, 372-73.

¹⁸⁹ See *People v. Newman* (1971) 5 Cal.3d 48, 53.

¹⁹⁰ See *Rideout v. Superior Court* (1967) 67 Cal.2d 471, 473-75; *People v. Hill* (1974) 12 Cal.3d 731, 749.

¹⁹¹ See *People v. Vermouth* (1971) 20 Cal.App.3d 746, 756; *People v. Fourshey* (1974) 38 Cal.App.3d 426, 430.

¹⁹² See *People v. Nicolaus* (1991) 54 Cal.3d 551, 575; *People v. Williams* (1992) 3 Cal.App.4th 1535.

¹⁹³ See *People v. Anderson* (1983) 149 Cal.App.3d 1161, 1165.

¹⁹⁴ See *People v. Arevalo* (2014) 225 Cal.App.4th 612; *People v. Nelson* (2008) 43 Cal.4th 1242, 1257-60.

¹⁹⁵ See *People v. Price* (1991) 1 Cal.4th 324, 410.

¹⁹⁶ See *People v. Manis* (1969) 268 Cal.App.2d 653, 661; *People v. Kaurish* (1990) 52 Cal.3d 648, 676.

¹⁹⁷ See *Brinegar v. United States* (1949) 338 U.S. 160, 172; *People v. Lim* (2000) 85 Cal.App.4th 1289, 1298.

¹⁹⁸ See *U.S. v. Guardado* (10th Cir. 2012) 699 F.3d 1220, 1223.

¹⁹⁹ See *People v. Andrino* (1989) 210 Cal.App.3d 1395, 1401.

Recent Cases

Riley v. California

(2014) __ U.S. __ [2014 WL 2864483]

Issue

If officers arrest a person who possesses a cell phone, may they search the digital contents of the phone as a routine incident to the arrest, or must they obtain a warrant?

Facts

In the course of a car stop, San Diego police officers arrested Riley for possessing two concealed and loaded firearms. They also discovered a “smart phone” in his pants pocket.¹ Having reason to believe that Riley was a member of the Bloods street gang, an officer “accessed information on the phone” and noticed that some words (apparently in text messages or in lists of contacts) were preceded by the letters “CK” which, the officer testified, stands for “Crip Killers” which is slang for members of the Bloods. No further search of a phone was conducted at the scene but, about two hours later at the police station, a gang detective testified that he “went through” Riley’s phone “looking for evidence, because gang members will often video themselves with guns.” He found “a lot of stuff” in the phone, including photos of Riley standing in front of a car that officers suspected had been involved in a shooting a few weeks earlier.

Riley was subsequently charged with the shooting, and the charge included a gang enhancement. In the trial court, Riley filed a motion to suppress the evidence in the phone that linked him to the Bloods and the vehicle used in the shooting. The motion was denied, Riley was found guilty, and the gang enhancement was affirmed. The California Court of Appeal ruled the search of the phone was lawful pursuant to the California Supreme Court’s ruling in *People v. Diaz* that a cell phone may be searched

incident to an arrest because it is an object that is closely associated with the person of the arrestee.² Riley appealed to the United States Supreme Court.

Discussion

As a general rule, officers who have arrested a person may, as a routine incident to the arrest, search all property in the arrestee’s possession to which he had immediate access or which was “immediately associated with the person of the arrestee,” such as clothing that had been removed earlier.³ These searches are permitted because (1) the property might contain something that poses a threat to officers or others; or (2) it might contain evidence that could be destroyed, or its evidentiary value compromised, if officers delayed the search until a warrant could be issued.

The Court in *Riley* noted, however, that the justification for an immediate warrantless search of this sort vanishes, or is at least weakened, in situations where officers, instead of searching a physical object (such as a wallet or purse) are searching digitally-stored information. For one thing, said the Court, such information “cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.” As the First Circuit observed in *Riley’s* companion case, *U.S. v. Wurie*, the officers “knew exactly what they would find therein; data. They also knew that the data could not harm them.”⁴

The Court also concluded there was little justification for cell phone searches under the “destruction of evidence” rationale. Although it conceded that it might be possible for an accomplice of the arrestee to remotely destroy the data via “remote wiping,” it noted there are “at least two simple ways” to prevent that: (1) turn the phone off or remove the battery, or (2) place the phone in a “Faraday bag” which is “an enclosure [essentially an aluminum sandwich bag] that isolates the phone from radio waves.”⁵

¹ NOTE: The Court defined a “smart phone” as a “cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity.”

² (2011) 51 Cal.4th 84.

³ See *Arizona v. Gant* (2009) 556 U.S. 332; *United States v. Edwards* (1974) 415 U.S. 800, 805.

⁴ (1st Cir. 2013) 728 F.3d 1, 10.

⁵ NOTE: The Court said that, while these precautions may not be “a complete answer” to the problem, they provide a “reasonable response.” Some officers who have actual experience in such matters have expressed skepticism.

In addition to the lack of an overriding justification for warrantless searches of cell phones, the Court emphasized the potential intrusiveness of these searches. Said the Court, “Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person. The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”

For these reasons, the Court ruled—and it was unanimous—that officers may not search an arrestee’s cell phone as a routine incident to the arrest.⁶ Instead, if they think they have probable cause for a search, they should seize the phone and promptly apply for a warrant.⁷ As the Court put it, “Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”

The Court indicated, however, that officers could conduct an immediate warrantless search of an arrestee’s cell phone if they could articulate specific facts which reasonably indicated that access was necessary to eliminate a threat to lives or property, or if there was specific and persuasive reason to believe the data would be destroyed if they waited for a warrant. Finally, the Court said that, because of the possibility that a weapon (such as a knife or taser) might be disguised as a cell phone, or because a phone case might contain a weapon, officers do not need a warrant to “examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case.” The Court concluded by saying:

We cannot deny that our decision today will have an impact of the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communications among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Comment

Riley is undoubtedly an important case. But we think it is even more important than it first appears. That is because, until now, the Supreme Court has been very hesitant about taking a position on the privacy of digitally-stored communications. For example, in a case from 2010, *City of Ontario v. Quon*,⁸ the Court decided not to decide whether a police officer could reasonably expect privacy in text messages that he was sending and receiving over a departmental pager. The Court said the reason for its indecision was that the “judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” In the Fall 2010 *POV* we said we thought this remark was unwise because, “if the ‘emerging’ character of a government activity were to stand as a barrier to ‘elaborating’ constitutional standards for its use, there might never be a ruling on privacy in digital communications because the technology will be emerging for decades, probably centuries.”

Well, at least that’s no longer a problem. In *Riley*, the Court shed its timidity and essentially announced that the role of cell phones (and undoubtedly computers and tablets as well) has become so clear, and that the threat to the privacy of their contents has become so disconcerting, that increased controls have become necessary.

It will be interesting to see how the lower courts interpret *Riley* in the coming years. But in light of *Riley* and the Court’s recent decisions on obtaining blood samples from DUI arrestees,⁹ and installing electronic tracking devices on vehicles,¹⁰ it is possible that the Court’s historical “preference” for search warrants is becoming—or has already become—more akin to a requirement, subject to certain exceptions that require specific facts, not mere generalized concerns. If this is so, it will be more important than ever that law enforcement officers become adept at writing, applying for, and executing search warrants.

⁶ **NOTE:** The Court’s ruling implicitly overturned the California Supreme Court’s ruling in *People v. Diaz* (2011) 51 Cal.4th 84 that cell phones could be searched incident to arrest.

⁷ See *Riley v. California* (2014) __ U.S. __ [2014 WL 2864483] [“Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. That is a sensible concession.”].

⁸ (2010) 560 U.S. 746.

⁹ See *Missouri v. McNeely* (2013) __ U.S. __ [133 S.Ct. 1552].

¹⁰ See *United States v. Jones* (2012) __ U.S. __ [132 S.Ct. 945].

Fortunately, this comes at a time when modern technology is making the process much easier and quicker by allowing officers to apply for and obtain warrants over secure internet sites via their desktop and patrol car computers, and even iPads. But modern technology does not yet have the ability to write an effective affidavit. That still requires a human brain.

Finally, the question has arisen whether *Riley* changes the general rule that officers may search a suspect's cell phone or similar devices if he was on probation or parole with a search clause that authorized searches of personal property in his possession or control. Although this issue was not addressed in *Riley*, it is at least conceivable that a court could rule that a warrant was required unless the terms of probation or parole specifically authorized a search of such devices. That is because the Court in *Riley* emphasized that searches for digitally-stored data are potentially much more intrusive than any other searches of personal property. So, until the courts resolve the issue, officers should consider seeking a warrant if they think they have probable cause. Otherwise, they should be aware that the legality of a warrantless search of the device may be litigated.

Navarette v. California

(2014) __ U.S. __ [134 S.Ct. 1683]

Issue

Under what circumstances can a 9-1-1 caller provide officers with grounds for a traffic stop?

Facts

A woman phoned 9-1-1 in Humboldt County and told the CHP that another vehicle had just “run her off the road” and that (1) both vehicles were traveling southbound on Highway 1, (2) the incident occurred at mile marker 88, (3) the responsible vehicle was a Ford 150 pickup truck, and (4) its license number was 8D94925. This information was immediately broadcast to CHP units in the vicinity.

About 12 minutes later, a CHP officer spotted the truck near mile marker 69 and pulled it over. As he approached the truck, he could smell the odor of

marijuana coming from it, so he searched the vehicle and found 30 pounds of marijuana in the truck bed. The driver, Lorenzo Navarette, was arrested and later filed a motion to suppress the evidence on grounds the officer lacked reasonable suspicion to stop his truck. The motion was denied by both the trial court and the California Court of Appeal. Navarette appealed to the United States Supreme Court.

Discussion

At the outset, it should be noted that, although the caller had identified herself by name, the Court was required to view her as an anonymous caller for technical reasons. (As a practical matter, all 9-1-1 callers are essentially “anonymous” because, even if the call was traced and the caller had given a name, he or she would be nothing more than a voice on the telephone.) Thus, the issue before the Supreme Court was whether a tip from a 9-1-1 caller about a traffic infraction or other crime can, in and of itself, provide officers with grounds for a car stop to investigate the matter.¹¹

It is settled that a traffic stop requires only reasonable suspicion to believe the driver committed a traffic infraction. Although reasonable suspicion is usually based on an officer's observation of the violation, it may also be based solely on information from another motorist—even an anonymous one—but only if the officer had reason to believe the information was reliable.¹² As the First Circuit put it, “The test, of course, does not hinge on the definition of ‘anonymous’ but, rather, on whether the 911 call possessed sufficient indicia of reliability.”¹³

Over the years, the courts have taken note of various circumstances that are relevant in determining whether information from an anonymous caller is sufficiently reliable to warrant a car stop. The most common circumstances are the following:

CALLING 9-1-1: That the caller phoned 9-1-1 instead of a non-emergency line is some indication of reliability because it is widely known that 9-1-1 calls are traced and recorded, and therefore callers are, to some extent, leaving themselves vulnerable to being identified even if they gave a false name.¹⁴

¹¹ **NOTE:** A traffic infraction is a “crime.” See Pen. Code § 16.

¹² See *Florida v. J.L.* (2000) 529 U.S. 266, 271 [a “moderate indicia of reliability” is “essential”].

¹³ *U.S. v. Ruidiaz* (1st Cir. 2008) 529 F.3d 25, 31.

¹⁴ See *People v. Dolly* (2007) 40 Cal.4th 458, 467; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1398.

CALLER IDENTIFIED HIMSELF OR HIS WHEREABOUTS: Although the caller's identity could not be confirmed, it is relevant that he voluntarily gave his name or phone number,¹⁵ or that he disclosed his whereabouts or furnished information from which his whereabouts might have been determined; e.g., caller said he was following the suspect on a certain street.¹⁶

CALLER PROVIDED DETAILS: The courts often note whether the caller provided a detailed account of what he had seen or heard, as opposed to vague generalities.¹⁷

DEMEANOR: The caller's manner of speaking—his "tone, demeanor, or actual words"¹⁸—may add to his reliability if it was consistent with the nature of his report; e.g., a caller who was reporting an emergency sounded upset.¹⁹

TIME LAPSE: It is relevant that the caller was reporting something that had just occurred.²⁰

MULTIPLE CALLERS: It is significant that other 9-1-1 callers reported the same or similar information.²¹

In addition (although it has no bearing on the reliability of the caller), the fact that he was reporting a situation that constituted an imminent threat will also be considered in determining the reasonableness of the stop.²²

Applying these circumstances to the facts of the case, the Court in *Navarette* took note of the following: (1) the caller had phoned 9-1-1 which "has some features that allow for identifying and tracing callers, and thus provides some safeguards against making false reports with immunity"; (2) the caller identified the responsible vehicle by make, model, and license plate number; (3) the caller described the incident in some detail; (4) the caller immediately reported the incident; and (5) the officer stopped the truck about 18 minutes after the woman phoned 9-1-1, and the stop occurred "roughly 19 miles south of the location reported in the 911 call." The Court also noted that the caller was reporting a dangerous situation in that

"[r]unning another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues."

Taking these circumstances into account, the Court ruled that "the call bore adequate indicia of reliability for the officer to credit the caller's account" and that the officer "was therefore justified in proceeding from the premise that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway."

U.S. v. Medunjanin

(2nd Cir. 2014) 752 F.3d 576

Issue

Did FBI agents and NYPD detectives violate a terrorist's *Miranda* rights?

Facts

A Joint Terrorism Task Force (JTTF) in New York City, composed of FBI agents and NYPD detectives, obtained information that two local residents, Medunjanin and Zazi, had traveled to Pakistan for the purpose of fighting U.S. forces in Afghanistan. The agents later learned that, while there, Medunjanin had been persuaded by al-Qaeda to undergo weapons training and participate in a coordinated suicide bombing attack on the New York City subway system. When Medunjanin returned to New York, task force agents executed a warrant to search his apartment for explosive devices but they didn't find any.

While the search was underway, an FBI agent and an NYPD detective asked Medunjanin if he would be willing to speak with them. He said yes and the three of them walked outside to talk. Before asking any questions, the agent told Medunjanin that he was not under arrest and that he could leave whenever he wished. In the course of the interview, which lasted

¹⁵ See *Massachusetts v. Upton* (1984) 466 U.S. 727, 734; *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1174.

¹⁶ See *U.S. v. Woods* (8th Cir. 2014) __ F.3d __ [2014 WL 1282292]; *U.S. v. Chavez* (10th Cir. 2011) 660 F.3d 1215, 1222.

¹⁷ See *People v. Dolly* (2007) 40 Cal.4th 458, 46; *People v. Wells* (2006) 38 Cal.4th 1078, 1088.

¹⁸ *People v. Dolly* (2007) 40 Cal.4th 458, 467, fn.2.

¹⁹ See *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1176 [the caller was "laboring under the stress of recent excitement"].

²⁰ See *People v. Jordan* (2004) 121 Cal.App.4th 544, 557; *U.S. v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1177.

²¹ See *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58; *People v. Hirsch* (1977) 71 Cal.App.3d 987, 991, fn.1.

²² See *Florida v. J.L.* (2000) 529 U.S. 266, 273-74; *People v. Wells* (2006) 38 Cal.4th 1078, 1083.

over two hours, Medunjanin vouched for Zazi's character and spoke about such things as Islam, American-Israeli relations, American-Islamic relations, and the 9/11 attacks on New York City. He also claimed that the purpose of his trip to Pakistan was to find a wife but that he had been unable to locate one.

Three days later, Medunjanin agreed to accompany the same agents to the U.S. Attorney's Office in Brooklyn for a second interview. Although the interview lasted about ten hours, it appears the officials learned nothing new except that Medunjanin was "evasive" about his trip.

Two days later, JTTF agents arrested Zazi. After learning of the arrest, Medunjanin retained a lawyer to represent him in the matter. The lawyer, Gottlieb, then notified an FBI agent assigned to the case and an Assistant U.S. Attorney that he was Medunjanin's lawyer and that he did not want anyone to speak with his client unless Gottlieb was present. Medunjanin remained free but was kept under surveillance.

About four months later, FBI agents and NYPD officers searched Medunjanin's apartment for his passports, which they seized. During the search, Medunjanin asked the agents if his attorney had been notified about the search and they said no. Having been informed that Medunjanin had recently adopted the al-Qaeda name "Muhammad," an agent asked if that was true. He denied it but was "visibly shaken by the question." He also became upset when he learned that the crimes the agents were investigating included conspiracy to commit murder. In fact, this news disturbed him so much that he decided to kill himself and others in a high-speed traffic collision on the Whitestone Expressway in Queens.

Driving at speeds of up to 90 m.p.h. and weaving in and out of traffic, Medunjanin phoned 9-1-1 and announced, "there is no God but Allah and Muhammad is His messenger." He then crashed head-on into an oncoming car. Medunjanin survived the crash and ran from the scene but was arrested by one of the agents who had been following him. (The conditions of the occupants of the other car were not reported.)

Medunjanin was taken to a hospital where agents were told that he was alert and had not been medicated, so they sought to question him. They informed

him they knew he was represented by an attorney but that it was "up to him" to decide whether or not to talk to them, that he could avoid any topics he wished, and that he could stop at any time. Medunjanin then read and signed a *Miranda* waiver.

During subsequent questioning, he admitted he had gone to Pakistan to fight with the Taliban against United States forces in Afghanistan, and he admitted he had undergone weapons training at an al-Qaeda camp. Although he was "almost boastful" as he described the types of weapons he had been trained to use, he became "defensive and evasive" when asked about any impending attacks on the United States and whether he knew of any other terrorist activity. Finally, he admitted that the car crash he had caused was his "final act of jihad."

Medunjanin was subsequently charged with two counts of receiving military-type training from al-Qaeda and conspiring to commit murder in a foreign country. His motion to suppress his statements was denied and he was convicted.

Discussion

Medunjanin asserted that his conviction should be overturned because his incriminating statements were obtained in violation of *Miranda*. Specifically, he argued that Gottlieb had effectively invoked his *Miranda* right to counsel when he told the agents that he represented Medunjanin and did not want them to talk with his client unless he was present. The court rejected the argument for two reasons.

First, a suspect cannot invoke rights he does not have, and a suspect does not have *Miranda* rights unless (1) he was "in custody," and (2) he was being "interrogated" or was about to be. As the Supreme Court pointed out, it has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'"²³ Although Medunjanin was clearly in custody (having been arrested), Gottlieb's purported invocation occurred long before the agents sought to question Medunjanin. Consequently, because none of the agents were questioning or about to question Medunjanin when Gottlieb attempted to invoke his client's *Miranda* rights, the attempt failed.

²³ *McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn.3.

The second reason that Gottlieb's instructions did not constitute an invocation was that the only person who can invoke a suspect's *Miranda* rights is the suspect himself—not his parents, spouse, girlfriend, or attorney.²⁴ As the court explained, "That right [*Miranda*] was personal to Medunjanin. Only he could waive it; only he could properly invoke it." Accordingly, even if Medunjanin had been "in custody" for *Miranda* purposes, Gottlieb's attempt to invoke his rights would have been ineffective. For these reasons, the court ruled that the agents had not violated Medunjanin's *Miranda* rights and it affirmed his conviction.

U.S. v. Davis

(11th Cir. 2014) __ F.3d __ [2014 WL 2599917]

Issue

Is a search warrant required to obtain cell site data from a service provider?

Facts

In the course of an investigation into a series of robberies in Florida, officers obtained a "D Order" which compelled the suspect's cell phone provider to furnish them with records showing the location of the suspect's cell phone at the time the robberies occurred. These records were used in court to prove that the suspect and his accomplices had placed and received cell phone calls in close proximity to the locations of each of the robberies and at about the time the robberies were committed. Davis was convicted.

Discussion

This case from the Eleventh Circuit was issued too late for us to provide a full report. But it is sufficiently important to explain the court's ruling which was as follows: A search warrant is required to obtain cell site records from a provider if the records reveal the location of a person's cell phone. In other words, a "D Order" is not sufficient because it can be issued based on a bare allegation that the cell site data is relevant to an ongoing criminal investigation. Said the court:

In short, we hold that cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data without a warrant is a Fourth Amendment violation.

Although this issue will ultimately be decided by the United States Supreme Court, the Eleventh Circuit's opinion was supported by some precedent and it seemed to reflect much of the current thinking on this subject. So, as we have said before, until this issue is resolved, officers who have probable cause to obtain these types of records would be wise to seek a search warrant.

People v. Suff

58 Cal.4th 1013

Issues

(1) Did an officer have sufficient grounds to make a traffic stop on a suspected serial killer? (2) Did a detective violate *Miranda* in obtaining an incriminating statement from him?

Facts

Between June 1989 and December 1991 a serial killer murdered twelve suspected prostitutes in Riverside County. The perpetrator was believed to be driving a late model, two-tone, blue over gray Chevrolet Astro van. At about 9:30 P.M. on January 9, 1992 Riverside motor officer Frank Orta saw a man driving such a vehicle on a street in an area of "much prostitution activity." So he followed the van intending to stop it if he observed a traffic violation. When the driver stopped for a red light, Officer Orta stopped behind him. When the driver turned right without signaling, Orta stopped him for violating Vehicle Code section 22107 which requires that drivers signal a turn whenever another vehicle may be affected by the movement.

The driver identified himself as Bill Suff and Officer Orta noticed that Suff "resembled" a police artist's sketch of the serial killer. Then, as he examined Suff's license, he noticed that Suff had lived at two addresses in Lake Elsinore and one address in Rialto. This was significant because he knew that some of the victims' bodies had been found in Lake Elsinore and one body had been found near Rialto. So, after he returned to his motorcycle to write a citation, he notified his dispatcher of the situation. Shortly thereafter, he was joined by three investigators from the serial killer task force.

²⁴ See *Moran v. Burbine* (1986) 475 U.S. 412, 433, fn.4; *People v. Beltran* (1999) 75 Cal.App.4th 425, 430.

Meanwhile, Officer Orta had learned that Suff's driver's license was suspended and that his van had not been registered for over two years. Consequently, he decided to impound it pursuant to Vehicle Code section 22651(o) and conduct an inventory search of it pursuant to departmental policy. Among other things, the search netted wire-rimmed glasses, a black notebook that looked like a Bible, blankets, numerous pieces of cord, and a knife. These items were significant to the task force officers because they knew the perpetrator might have worn wire-rimmed glasses, that a witness saw what appeared to be a Bible in the perpetrator's van, that the victims had been tied up or otherwise restrained, and that they had been stabbed. There also appeared to be blood on the knife. Two other things: the left side front tire on Suff's van and the perpetrator's van were similar in brand and wear pattern, and fibers in the van were consistent with fibers found at some of the crime scenes.

At the police station, Det. Christine Keers obtained a *Miranda* waiver from Suff and asked some background questions. Then she started talking about the murders of prostitutes and the knife in Huff's van. She also asked him about his Converse tennis shoes because their shoeprints seemed to match a set found at the scene of one of the murders. But throughout the first three hours of the interrogation, Suff said nothing incriminating.

Then Det. Keers asked him if he would consent to a search of his home. He replied, "I need to know, am I being charged with this, because if I'm being charged with this I think I need a lawyer." The detective responded, "Well, at this point, no you're not being charged with this," so Suff consented to the search and continued to answer questions. In response to one question, he admitted that he had been in the orange grove in which one of the victims had been killed and that he had seen a woman's body there. When asked for specifics, Suff said "I better get a lawyer now. I better get a lawyer, because you think I did it and I didn't." Nevertheless, Det. Keers continued to question him and he eventually admitted that he had removed a knife in the body and had put the knife in his van.

Prior to trial, the court denied Suff's motion to suppress the evidence in his van and his statement that he had seen a body in the orange grove. The court did, however, suppress his statement that he had removed

the knife from the body because Suff made the statement after he had clearly invoked his *Miranda* right to counsel. But because the statement was relatively insignificant in light of the overwhelming amount of other incriminating evidence the officers had accumulated in the course of the investigation, Suff was convicted of 12 counts of first-degree murder and sentenced to death.

Discussion

Suff argued that his conviction should be overturned because (1) the evidence discovered in his van was obtained as the result of an illegal traffic stop, and (2) the incriminating statement that was used against him was obtained in violation of *Miranda*.

THE TRAFFIC STOP: Suff claimed the evidence in his van should have been suppressed because Officer Orta lacked grounds to stop him for violating Vehicle Code section 22107. As noted, this section prohibits a driver from making a turn without signaling if the turn may affect any other vehicle. Suff argued that he did not violate the statute for two reasons. First, he pointed to Vehicle Code section 21453 which describes the circumstances in which a driver stopped at a red light may make a turn. And because the statute does not state that the driver must signal the turn, he argued he was not required to do so. The court disagreed, concluding that the legislative intent of both statutes does not demonstrate a legislative intent to "require a signal only if the driver decides to turn before reaching a red light." In other words, the turn signal requirement applies regardless of whether the driver made the turn before or after he stopped at a stoplight.

Second, Suff argued that he did not violate section 22107 because, as noted, it requires a signal only if another vehicle would be affected by the turn. And, according to Suff, the only other motorist in the vicinity was Officer Orta, and he could not have been affected by the turn because he was stopped *behind* him. Again the court disagreed, pointing out that the officer "was clearly in a position to be affected by defendant's turn" because, if the officer had also decided to make a right turn, "he would have done so without knowing that defendant was planning to turn right into the same path."

MIRANDA: Suff's more substantial argument was that the detective violated *Miranda* when she contin-

ued to question him after he said, “if I’m being charged with this I think I need a lawyer.” Before going further, there are two central *Miranda* principles that should be noted. First, an invocation of either the right to counsel or the right to remain silent can occur only if the suspect said something that clearly and unambiguously demonstrated an intent to invoke.²⁵ Second, a suspect may make a limited or conditional invocation which consists of a statement that reasonably indicated he will talk to officers *if* a certain condition is met. For example, a suspect may agree to talk with officers on the condition that they not discuss a certain subject.²⁶ So, if they will abide by the condition, they may continue to question him.

Citing these principles, Suff argued that his statement that he wanted an attorney if he was “charged” with the crimes constituted a conditional invocation, and that the triggering event had occurred because it was “virtually certain” that the district attorney would “charge” him. Although it was plainly true that the DA would charge Suff with the crimes, the court ruled that his remark did not constitute an invocation because that had not yet happened.

Accordingly, because the trial court had properly suppressed the only statement that was obtained in violation of *Miranda*, and because Officer Orta had grounds to make the traffic stop (Suff did not challenge the legality of the inventory search), the court affirmed his conviction and death sentence.

In re J.D.

(2014) 225 Cal.App.4th 709

Issue

Did school officers have sufficient grounds to search a high school student’s locker?

Facts

A student at Richmond High School in Contra Costa County notified campus security officers that she had witnessed a shooting the day before. The shooting had occurred on an AC Transit bus and the shooter was

another student whom she knew. Because the shooter was a minor, he was identified in the court’s opinion only as “T.H.”

After notifying school administrators, school security officers were directed to detain T.H. and determine if he was armed. Richmond PD officers were also notified and responded. Having determined that T.H. does not ordinarily use the locker assigned to him, officers learned that he usually “hangs around” the area of locker 2499. So they went there and saw T.H. talking with his girlfriend while facing a set of lockers, one of which was 2499. The officers were aware that students “often shared their assigned locker with other students” for the purpose of “concealing contraband such as drugs.” So, after T.H. and his girlfriend left, they searched locker 2499 but found no weapons or drugs.

Nevertheless, because they did not know for sure that T.H. was using locker 2499 (they only knew that he “hangs around” it) they decided to search the adjacent lockers. One of the adjacent lockers was 2501 which was registered to a student identified as J.D., the defendant in this case. When the officers searched it they found a sawed-off shotgun and some of J.D.’s papers. A Richmond PD officer then questioned J.D. who admitted that the shotgun belonged to him. (At about this time, Richmond officers who were investigating the shooting had detained T.H. on campus and recovered a handgun from his backpack.) J.D. was subsequently charged with felony possession of a firearm in a school zone. After denying his motion to suppress the gun, the juvenile court sustained the charge against him.

Discussion

Because of the overriding need to provide students with a safe environment in which to learn, the Supreme Court ruled that school security officers and administrators may search a student’s locker if (1) they had reasonable suspicion to believe the student committed a crime or violated a school rule for which there might be physical evidence; and (2) the search was

²⁵ See *Davis v. United States* (1994) 512 U.S. 452, 459; *Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2260].

²⁶ *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126 [“On its face, defendant’s statement was conditional; he wanted a lawyer if he was going to be charged.”]. Compare *Smith v. Endell* (9th Cir. 1988) 860 F.2d 1528, 1531 [limited invocation resulted when the defendant told officers he wanted a lawyer if “you’re looking at me as a suspect” (and they were)].

reasonable in its scope.²⁷ As the California Supreme Court explained, “[S]earches of students by public school officials must be based on a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute). There must be articulable facts supporting that reasonable suspicion.”²⁸

Although it is not possible to quantify the amount of proof that is required for such a search, the court in *J.D.* explained that some flexibility must be given in situations where, as here, there exists an urgent need to take immediate action. Said the court:

Recent events have demonstrated the increased concern school officials must have in the daily operation of public schools. Sites such as Columbine, Sandy Hook Elementary, and Virginia Tech have been discussed in our national media not because of their educational achievements, but because of the acute degree of violence visited on these and other campuses—hostility often predicated on killings with firearms.

With these principles in mind, the court ruled that the search of *J.D.*’s locker was justified because of the overriding need to locate the weapon that *T.H.* had used the day before, and their reasonable belief that the weapon was located in or near locker 2499. As the court explained, the initial tip from a student about the shooting on the bus “triggered two responsible initiatives” by the school security officers: (1) to determine if *T.H.* was on the school property with a weapon, and (2) to inspect lockers that could be used by *T.H.* to conceal such an item. Consequently, the court rejected *J.D.*’s argument that the officers needed a warrant to search a locker assigned to anyone other than *T.H.* Said the court:

Even if another student validly had the assigned use of a particular locker at the school, that fact did not make the official behavior here suspecting an alleged shooter also had access to the same lockers unreasonable. Privacy concerns needed to be balanced against the official need to address school safety.

Accordingly, the court ruled that the seizure of the shotgun in *J.D.*’s locker was lawful.

In re S.F.

(2014) 224 Cal.App.4th 1575

Issue

Did an officer have probable cause to arrest a minor for possessing a graffiti device with intent to commit vandalism?

Facts

While detaining a 17-year old boy for jaywalking, an officer in the city of Orange asked him if he “had anything illegal on him.” The minor, who was identified by the court as *S.F.*, responded that he had a “streaker” which, according to the court, is “an oil-based marker commonly used as a graffiti tool.” *S.F.* told the officer that “he knew it was illegal to have” streakers and that “people use them to vandalize property.” So, after seizing the streaker, the officer arrested *S.F.* for violating Penal Code section 594.2(a) which, among other things, makes it a misdemeanor to possess such a device with the intent to “commit vandalism or graffiti.” The officer then drove *S.F.* to his home so that he could be released to his parents. En route, the officer asked him if he had “anything illegal in his bedroom” and he said yes.

When they arrived at the house, the officer explained the situation to *S.F.*’s father, including the fact that *S.F.* had admitted there was something illegal in his bedroom. *S.F.*’s father then consented to a search of the bedroom in which the officer found (in addition to more graffiti materials) marijuana and over \$1,200 in cash. *S.F.* was subsequently charged with possession of marijuana for sale and, after the trial court denied his motion to suppress, he was found guilty.

Discussion

On appeal, *S.F.* claimed the officer lacked probable cause to arrest him and therefore the marijuana and cash discovered in his bedroom should have been suppressed as the fruit of an unlawful arrest. Although the court acknowledged that *S.F.* possessed a graffiti device, and although *S.F.* admitted he was using it for an illegal purpose, the court ruled the officer did not have probable cause because there was insufficient proof that *S.F.* actually intended to use the streaker to

²⁷ See *Safford Unified School District v. Redding* (2009) 557 US 364, 373; *New Jersey v. T.L.O.* (1985) 469 US 325, 342; *In re K.S.* (2010) 183 Cal.App.4th 72, 77; *People v. Lisa G.* (2005) 125 Cal.App.4th 801, 806.

²⁸ *In re William G.* (1985) 40 Cal.3d 550, 564.

commit graffiti vandalism. Here are the court's words, "In this case, no evidence was presented at the suppression hearing to support a finding that [the officer] could reasonably infer S.F. posed the stalker with the intent to commit vandalism or graffiti."

Consequently, the court ruled that, even if the officer had grounds to detain S.F., he "did not have probable cause to arrest S.F. for violating section 594.2(a)" and therefore the evidence found in his bedroom should have been suppressed.

Comment

In the article which began on page 1, we examined the subject of probable cause to arrest in much more detail. But the case of *In re S.F.* was not included in the discussion because we are fairly certain that the court's analysis was erroneous. The reason is that the court was able to reach its conclusion by blatantly ignoring the most basic principle of probable cause: *The circumstances must be evaluated by applying common sense, not hypertechnical analysis.* As the U.S. Supreme Court observed in the landmark case of *Illinois v. Gates*:

Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.²⁹

In total disregard of this principle, the court in *S.F.* ruled that despite all the relevant circumstances—specifically that S.F.'s stalker fell into the category of a "graffiti" device, that he admitted to the officer that he possessed it for an "illegal" purpose, and that stalkers are "commonly used as a graffiti tool"—no reasonable enforcement officer would have believed that S.F. actually possessed it to paint graffiti.

This conclusion might have been sustainable *if*—and only *if*—the court had been able to list so many other illegal uses for stalkers that it would have been objectively unreasonable for the officer to conclude that S.F. was using his for graffiti vandalism. But the court did not list even one. Not one. We also tried to think of something but the only other illegal uses we could imagine were just silly.

So we believe the court's ruling was incorrect, and the reason we spent so much time discussing it is that the subject of probable cause is so fundamental to the Fourth Amendment and to the criminal justice system that the error had to be exposed. This was especially so because officers need to be confident that, in determining whether they have probable cause, the courts will continue to analyze the various circumstances by applying common sense—not hypertechnical analysis—and that they will continue to require nothing more than a "fair probability."³⁰

The Aftermath of *Missouri v. McNeely*

By now you might have heard that many judges in California (and probably throughout the country) are unhappy about being awakened by officers at all hours of the night to review search warrant applications for DUI blood draws. And who can blame them? We would like to point out, however, that the fault for this fiasco lies not with the officers but with the U.S. Supreme Court. That is because the Court in *Missouri v. McNeely* made these nightly phone calls compulsory when it ruled that exigent circumstances caused by the natural elimination of alcohol and drugs from the arrestee's bloodstream are no longer sufficient to justify most warrantless DUI blood draws, and that a search warrant based on probable cause was now required.

As we noted then—and we think it is still true—the Court's ruling was unnecessary because, prior to *McNeely*, if a court concluded that an officer lacked probable cause for the arrest, the evidence in the arrestee's bloodstream would be suppressed as the fruit of an unlawful arrest. That's still the law under *McNeely*, except now officers and judges must also go through the motions of pondering a standardized and self-evident list of relevant circumstances, and then asking themselves a question that could be answered correctly by any sober adult and most teenagers: Does this information establish a "fair probability" that the driver was impaired? Not only did this requirement elevate form over substance, it continues to squander police and judicial resources which are already under severe budget pressure. Maybe if the Justices had to live with the real-life consequences of their decisions they would make better ones.

POV

²⁹ (1983) 462 U.S. 213, 231. Also see *United States v. Cortez* (1981) 449 U.S. 411, 418.

³⁰ See *Illinois v. Gates* (1983) 462 U.S. 213, 238; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.

The Changing Times

ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Chief of Inspectors **Brad Kearns** retired On June 28, 2014. Upon his retirement in 1999 as Deputy Chief of Oakland PD, Brad joined the DA's Office as an Inspector II. He left in 2000 when he was appointed chief of Moraga PD but returned in 2004 as the new Chief of Inspectors succeeding retired chief **Mike Harnett**. Brad's successor as Chief of Inspectors is Captain of Inspectors **Robert Chenault** who also started at Oakland PD where he served for 28 years and retired as a captain. Robert joined the DA's Office in 2006. Capt. of Inspectors **Craig Chew** was appointed to fill the new position of Assistant Chief of Inspectors.

Other promotions: Lt. **Jon Kennedy** was promoted to captain, Insp. III **Jim Taranto** was promoted to lieutenant, and Insp. II **Mike Foster** was promoted to Inspector III. New inspectors: **John Biletnikoff** (OPD), **Marte Strang** (Vallejo PD then El Cerrito PD), **Jim Rullamas** (OPD), **Brian Delahunty** (SFPD), and **Jim Gordon** (OPD).

DDA **Mike Roemer** retired after 29 years of service. Former San Francisco prosecutor **Nadim Hegazi** has joined the DA's Office. Retired judge **George Brunn** died on June 30, 2014 at the age of 90. Transferring in to the SAFE Task Force were **Katherine Evans** (OPD) and **Brian Salby** (ACSO). Transferring out: **Mike Tolero** (ACSO).

ALAMEDA COUNTY SHERIFF'S OFFICE

The following sergeants were promoted to lieutenant: **Kelly Cartwright**, **Matthew Farruggia**, **Anthony Lopez**, **Cheri Nobriga**. The following deputies were promoted to sergeant: **Robert Belz III**, **John Calegari**, **David Havens**, **Michael Ladner**, **James Larosa**, **John Souza**, and **Shawn Wilson**. The following deputies have retired: Asst. Sheriff **Brett Keteles** (27 years of service), Capt. **David Sanchas** (15 years of service), Lt. **Jason Arone** (25 years of service), Lt. **John Grasso** (17 years), Lt. **Joseph Hoeber** (27 years), Lt. **Phillip Weinstein** (26 years), Sgt. **Kennis Bass** (24 years), Sgt. **David Dickson** (30 years), Sgt. **James Garrigan** (20 years), Sgt. **Frederick Hamilton** (26 years), Sgt. **Damon**

Harris (26 years), Sgt. **James Nelson** (28 years), **Ricky Baker** (25 years), **Kristian Berlinn** (25 years), **Frank Buschhueter** (28 years), **Jeffrey Butler** (18 years), **Vincent Cervelli** (27 years), **Charles Foster** (19 years), **William Lam** (26 years), **Greg Landeros** (25 years), **David McKenzie** (26 years), **Jeff Reed** (30 years), **Mark Schlegel** (10 years), **Gary Stewart** (20 years), **Alvin Wilson** (18 years), and **Wellington Wong** (24 years).

ALAMEDA POLICE DEPARTMENT

New officer: **John Yu**.

BART POLICE DEPARTMENT

The following officers have retired: **Diane Jorgensen** (17 years) and **Rebecca Torres** (4 years). Lateral appointments: **Christian Guzman** and **Catherine Lahanas**. New police recruits: **Miguel Tellez** and **Matthew Campbell**. New revenue protection guard: **Denny Adams**. Sgt. **John Power** was transferred from Patrol to Detectives.

CALIFORNIA HIGHWAY PATROL

HAYWARD OFFICE: Transferring in: Lt. **Edward Dela Cruz** (Golden Gate Division); **Michael Azevedo** (Blythe), **Cary Martin** (Central Los Angeles), **Ryan Murakoshi** (Santa Fe Springs), **Nicholas Norton** (San Jose), and **Michael Randazzo** (West Los Angeles). Transferring out: Lt. **Aristotle Wolfe** (Marin), **Oscar Pacheco** (Headquarters), **Luis Garcia** (Contra Costa) **Jeramie Hernandez** (Stockton), **Timothy Lewis** (Coalinga), and **Mark Williamson** (Solano). New officers from the CHP Academy: **Brian Foltz** and **Whitney Howard**.

EAST BAY REGIONAL PARKS POLICE DEPARTMENT

Officer **Giorgio Chevez** was promoted to sergeant. Lateral appointment: **Brandon Wainwright** (Cal State Parks PD). Sgt. **Joseph Scott** was selected for the SEU assignment. Officer **Gary Wilva** was selected for the ACNTF assignment.

FREMONT POLICE DEPARTMENT

Sgt. **John Harnett** was promoted to lieutenant. Officer **Rafael Samayoa** was promoted to sergeant. The following officers have retired: Lt. **Mark Devine**

(34 years), Lt. **Tony Duckworth** (26 years), and Sgt. **Kevin Moran** (26 years). Lateral appointments: **Greg Oliveira**, **Christopher Weber**, and **Anthony Liu**. Entry police officers: **David Han**, **John Bordy**, **David Rodriguez**, **Troy Roberts**, and **Anthony Elope**. K9 **Timo** died of an emergency medical condition; he was six years old and served the department for five years.

HAYWARD POLICE DEPARTMENT

Sgt. **James Denholm** was promoted to lieutenant. Officers **Ryan Sill** and **Robert Farro** were promoted to sergeant. The following officers have retired: Lt. **Mark Stuart** (28 years), Sgt. **George Torres** (29 years), Insp. **John Paul Guimaraes** (18 years), Det. **Burt Hutchinson** (17 years), **Mike Sorensen** (31 years), and **Mike Edwards** (26 years). New police officers: **Ben Yarbrough**, **Daniel Gray**, **Kelly Head**, **David Cole**, and **Helen Leung**.

NEWARK POLICE DEPARTMENT

Sergeants **Jonathan Arguello** and **Chomnan Loth** were promoted to lieutenant. **Jolie Macias** was promoted to sergeant. **Pat Williams** retired after 21 years of service. The department reports that the following former officers have died: Sgt. **Harold Furtado** (NPD 1979-1999), **Ed Spadorcia** (NPD 1966-1971), and **Ed Spadorcio** (NPD 1966-1971). K9 **Henk** also passed away, having served the department from 2004-2011. Lateral appointment: **Andrew Musantry** (San Jose PD). Officer of the Year: School Resource Officer **Ryan Johnson**. Transfers: **Matt Warren** from School Liaison Officer to Patrol, and **Jennifer Bloom** from patrol to School Liaison Officer.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Newly appointed officers: **Phillip Chow**, **Denise Smith**, **Mason Cole**, **Sharon Ayala Gonzalez**, **Juan Ramirez**, **Jeffrey Delgado**, and **Brauli Rodriguez**. New reserve officer: **Mason Cole**. Newly appointed police service aides: **Lisette Elizalde** and **Maria Ventura Rios**. Officer **Terry Thomas** resigned to join the Richmond PD. The following people left the department: Police Service Aide **Daniel Alderete** (joined the Oakland Fire Department), **Leonides Navarro**, Chief's Assistant **Helga Garcia**, and Police Service Aide **Daniel Alderete**. Sgt. **Michael Morris**

was named 2013 Officer of the Year, and Communications and Records Supervisor **Jackie Mesterhazy** was named 2013 Employee of the Year.

OAKLAND POLICE DEPARTMENT

After serving for one year as interim chief, **Sean Whent** was appointed Chief of Police. New officers: **Matthew Perry**, **Keith O. Armstrong**, **Lorena Arreola**, **Omar Assad Jr.**, **Jonathan Cairo**, **Michael Camacho**, **Joseph A. Camarillo**, **Kyle L. Cardana**, **Danny Z. Cheng**, **Eric Esparza**, **James A. Garcia**, **Christopher Ryan Giacomini**, **Lance D. Hayley**, **Ty David Hawkins**, **Julio Jolivette**, **Matthew W. Jung**, **Christina Kazarian**, **Nigel W. Lawson**, **Courtney N. Lewis**, **Peni A. Likio**, **Kenneth R. Lindsey**, **Khyber Mangal**, **Vincente J. Morado II**, **Alejandro Navarro**, **Anh Nguyen**, **Chevalier K. Patterson**, **Brandon S. Perry**, **Moises Israel Polanco**, **Thomas Quezada**, **Daniel Quezada-Garcia**, **Miguel A. Ramos**, **Nicholas Vicente Ramos**, **Kathryn Reymundo**, **Mariza Rivera**, **Robert A. Rodriguez**, **Antonio E. Rushing II**, **Jaymie Salgado**, **Jerry S. Sanchez**, **John R. Shackford**, **Robert L. Smith**, **Terryl J. Smith**, **Blake L. Stephens**, **James Ta'ai Jr.**, **Travis Gregory Tompkins**, **Kevin P. Tran**, **Lester E. Urbina Jr.**, and **Karolina Zachoszcz**. Retired homicide division commander **Terry Green** died on May 21, 2014 at the age of 79.

SAN LEANDRO POLICE DEPARTMENT

New officers: **Paul Lemmons** and **Marco Becerra**. New police service technicians: **Michelle Silva** and **Erik Wilske**. New police department specialist: **Saima Selen Bertolozzi**. Dispatcher **Teresa Loconte** was promoted to Public Safety Supervisor. Community Compliance Supervisor **Bill Baptista** retired after 24 years of service.

UNION CITY POLICE DEPARTMENT

The following corporals were promoted to sergeant: **Stan Rodrigues**, **Lisa Graetz**, and **Jeff Stewart**. Sgt. **John Elissiry** retired after 29 years of service. Officer **Kevin Afonso** retired after 27 years of service. The following officers medically retired: **Javier Diaz** (27 years) and **Daniel Blum** (4 years). New officers: **Michael Bedford**, **Randy Stables**, **Jean Jimenez**, **Daniel Rivas**, **Steven Fong**, **Scott Jensen**, and **Steffen Parodi**.

POV

War Stories

The old “flying pickup truck” defense

A man stole a pickup truck in Berkeley and was driving around in it when he noticed a nice motor scooter parked in front of a fraternity house. So he stopped to steal it. But just as he was putting it in the back of the pickup, a bunch of fraternity members surrounded him. He escaped their grasp, got into the pickup and sped off. But he turned too sharply on the next block and the truck flipped over. When Berkeley officers arrived a few minutes later, they pulled the uninjured thief out of the cab and arrested him. The case went to trial and the thief knew it might be difficult explaining how he was apprehended under a stolen pickup (not to mention being ID’d by several fraternity members), but he gave it a go nevertheless. Here’s his testimony:

So I was walkin’ down the street. I wasn’t doin’ nothin’. All of a sudden I see this pickup truck flyin’ through the air. Yeah, it’s like this weird pickup is flyin’ through the air and it lands right on top of me! Bam!! The next thing I know, I’m arrested and goin’ to jail. Hey, I was just an innocent bystander.

A better story, but it also flopped

After arriving at the scene of a noninjury accident, CHP officers in Oakland arrested one of the drivers for DUI. At the driver’s trial, his attorney asked him to explain to the jury why there was such a strong odor of liquor on his breath:

Defendant: I was waiting for the CHP to arrive and I had a pint of Jim Beam in the car so I drank it.

Defense attorney: Why’d you do that?

Defendant: ‘Cause I knew I was gonna to spend the night in jail—and I didn’t want to do it sober.

Finally, someone tells the truth

A Pleasanton police officer arrested a man who had been standing in a roadway yelling at passing motorists. Suspecting that he was under the influence of something, the officer asked if he was taking any medications. The man replied, “If you consider crystal meth ‘medication,’ then yes I am.”

Culture and cannabis in Colorado

The Associated Press reports that the Colorado Symphony Orchestra has decided to schedule a series of “cannabis-friendly” fundraising concerts sponsored by the state’s new and thriving recreational marijuana industry. But organizers emphasize that no marijuana will be sold at the event. As one organizer explained, “This is strictly BYOC.”

Culture and corrections in McFarland

The fastest growing city in California is McFarland in Kern County. Why are so many people choosing to live in McFarland? Well, they don’t really have a choice. It seems most of the new arrivals are headed for the Golden State Correctional Facility whose population has recently undergone a growth spurt.

Practicing law in California

A lawyer in Ventura County was charged with selling LSD to a minor. In an interview with a reporter, he claimed he was not guilty because he was under the influence of LSD at the time and, therefore, he was “crazy.” The reporter asked if he was worried that he might lose his law license if the State Bar found out he was crazy. The lawyer responded, “No. Here in California you can practice law even if you’re insane.”

Revenge of the Circuit Court

Carlos Sevilla-Oyola was on a winning streak. Although he’d been convicted of drug trafficking in federal court in Puerto Rico and had been sentenced to life in prison, he had filed two motions to have his sentence reduced—and each one was granted! But Sevilla was greedy, so he appealed to the First Circuit and complained that the sentence should be reduced even further. Not only did the court disagree, it ruled that Sevilla should have been sentenced to “the first and most severe sentence imposed by the district judge.” At the conclusion of its opinion, the court observed that Sevilla, “who until today was facing a total sentence of 405 months,” will likely find himself “wishing he had left well enough alone.”

More sentencing merriment

After being sentenced to 90 days, the defendant asked, “May I address the court?” The judge said OK:

Defendant: What would you do if I called you a son of a bitch?

Judge: I’d hold you in contempt and assess an additional five days in jail.

Defendant: What if I just thought you were a son of a bitch?

Judge: I can’t do anything about that. There’s no law against thinking.

Defendant: In that case, I think you’re a son of a bitch.

Getting the last laugh

On his Facebook page, a man in Martin County, Florida posted a picture of himself in a car holding stacks of drugs and money. And the funny part was that the photo also showed a clueless Martin County sheriff’s deputy standing nearby. But the fun wasn’t over. Sheriff’s deputies sent in an undercover officer to buy drugs from the guy. Then, a few minutes after the sale went down and the man was arrested, the Sheriff’s Office gleefully posted a report of the arrest on its own Facebook page.

He’s 100. She’s 38?

Here’s another story from Florida: A 100-year old man was arrested for threatening to set fire to his 38-year old girlfriend. A Miami-Dade police officer told a reporter, “Apparently, he’s not quite ready for the nursing home.”

How to win the war on drugs

The owner of a small grocery store in East Oakland got fed up with all the drug dealers who kept gathering outside his store, so he installed a loud speaker over the front door and started playing nothing but Kenny G. records. The drug dealers fled en mass and have not returned.

A 9-1-1 call to LAPD

Caller: Send an ambulance. My wife is pregnant and her contractions are only two minutes apart!

Dispatcher: Is this her first child?

Caller: No, you idiot—this is her husband!

He also has problems

A man who robbed the U.S. Bank branch in Hayward is shown in a surveillance photo, below. The photo was published internationally in newspapers, TV stations, and on the internet because the man was wearing what seemed to be an appropriate T-shirt:



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