Investigative Detentions

"It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." [1]

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

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

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

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

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

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

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

(1) **Grounds to detain**: Officers must have had sufficient grounds to detain the suspect; i.e., reasonable suspicion.

(2) **Procedure**: The procedures that officers utilized to confirm or dispel their suspicion and to protect themselves must have been objectively reasonable.

Taking note of these requirements, the Court in *Terry* pointed out that "our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[5]

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

[1] *Terry* v. *Ohio* (1968) 392 U.S. 1, 16.
[2] *People* v. *Manis* (1969) 268 Cal.App.2d 653, 665.
[3] (1968) 392 U.S. 1.
[4] See *Florida* v. *Royer* (1983) 460 U.S. 491, 498 ["Prior to *Terry* v. *Ohio*, any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause."].
[5] *Terry* v. *Ohio* (1968) 392 U.S. 1, 19-20.

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

Reasonable Suspicion

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

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

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

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

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

We covered the subject of reasonable suspicion in the 2008 article entitled "Probable Cause to Arrest" which can be downloaded on Point of View Online (www.le.alcoda.org).

Detention Procedure

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

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[6] See *People* v. *Hubbard* (1970) 9 Cal.App.3d 827, 833 ["[T]he violator is, during the period immediately preceding his execution of the promise to appear, under arrest."]; *People* v. *Hernandez* (2008) 45 Cal.4th 295, 299 [traffic stops "are treated as detentions"].
[7] *Terry* v. *Ohio* (1968) 392 U.S. 1, 9.
[8] *Terry* v. *Ohio* (1968) 392 U.S. 1, 14, fn.11.
[9] *United States* v. *Cortez* (1981) 449 U.S. 411, 417.
[10] See *Safford Unified School District* v. *Redding* (2009) __ U.S. __ [2009 WL 1789472] [Reasonable suspicion "could as readily be described as a moderate chance of finding evidence of wrongdoing."].
[11] *U.S.* v. *Fiasche* (7th Cir. 2008) 520 F.3d 694, 697.
[12] *Alabama* v. *White* (1990) 496 U.S. 325, 330. Edited.
[13] *People* v. *Manis* (1969) 268 Cal.App.2d 653, 659.
[14] *People* v. *Celis* (2004) 33 Cal.4th 667, 674. ALSO SEE *Terry* v. *Ohio* (1968) 392 U.S. 1, 21.
[15] *United States* v. *Sokolow* (1989) 490 U.S. 1, 7.
[16] *People* v. *Souza* (1994) 9 Cal.4th 224, 233.

General principles

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

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

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

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

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

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

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

[18] (5th Cir. 1999) 178 F.3d 345, 348-9

[19] *Meredith* v. *Erath* (9th Cir. 2003) 342 F.3d 1057, 1062.

[20] *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1515.

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

[22] (5th Cir. 1993) 993 F.2d 431, 436.

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

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

[25] (7th Cir. 1994) 19 F.3d 1221, 1224.

whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course."[26]

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

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

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

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

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

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

> Based on unfolding events, the trooper's attention shifted away from the equipment violations that prompted the initial stop toward a belief that the detainees were engaged in more serious skullduggery. Such a shift in focus is neither unusual not impermissible.[33]

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[26] *U.S.* v. *Acosta-Colon* (1st Cir. 1998) 157 F.3d 9, 15.

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

[28] *U.S.* v. *Romain* (1st Cir. 2004) 393 F.3d 63, 71.

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

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

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

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

[33] (1st Cir. 1998) 136 F.3d 24, 27.

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

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

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

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

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

Using force to detain

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

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

How much force is permitted? All that can really be said is that officers may use the amount that a "reasonably prudent" officer would have believed necessary under the circumstances.[38]

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

Officer-safety precautions

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

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

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[34] *U.S.* v. *Tilmon* (7th Cir. 1994) 19 F.3d 1221, 1226.
[35] *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 13.
[36] (7th Cir. 1994) 19 F.3d 1221, 1226.
[37] (1st Cir. 1988) 844 F.2d 898, 905.
[38] See *Graham* v. *Connor* (1989) 490 U.S. 386, 396 ["[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."]; *Scott* v. *Harris* (2007) 550 U.S. 372; *People* v. *Brown* (1985) 169 Cal.App.3d 159, 167 ["A police officer may use reasonable force to make an investigatory stop."].
[39] *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 12.
[40] (9th Cir. 1977) 558 F.2d 522, 524.
[41] See Penal Code § 148(a)(1); *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 13, fn. 2 ["Given their right to forcibly detain, California precedent arguably would have allowed the officers to *arrest* for flight which unlawfully delayed the performance of their duties."]; *People* v. *Allen* (1980) 109 Cal.App.3d 981, 987 ["[Running and hiding] caused a delay in the performance of Officer Barton's duty."].
[42] *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 110.
[43] *Michigan* v. *Long* (1983) 463 U.S. 1032, 1052.

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

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

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

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

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

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

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

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

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

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

[45] See *Courson* v. *McMillian* (11th Cir. 1991) 939 F.2d 1479, 1496.

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

[47] (2009) 129 S.Ct. 781, 787. ALSO SEE *Maryland* v. *Wilson* (1997) 519 U.S. 408, 414.

[48] *U.S.* v. *Vega* (7th Cir. 1995) 72 F.3d 507, 515.

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

[50] *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123.

[51] *U.S.* v. *Sanders* (5th Cir. 1993) 994 F.2d 200, 206-7.

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

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

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

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

PAT SEARCHING: Officers may pat search a detainee if they reasonably believed that he was armed or otherwise presented a threat to officers or others. Although the courts routinely say that officers must have reasonably believed that the detainee was armed *and* dangerous, either is sufficient. This is because it is apparent that a suspect who is armed with a weapon is necessarily dangerous to any officer who is detaining him, even if he was cooperative and exhibited no hostility.[55] For example, pat searches are permitted whenever officers reasonably believed that the detainee committed a crime in which a weapon was used, or a crime in which weapons are commonly used; e.g., drug trafficking. A pat search is also justified if officers reasonably believed that the detainee posed an immediate threat, even if there was no reason to believe he was armed.[56]

We covered the subject of pat searches in the Winter 2008 edition which can be downloaded on Point of View Online at www.le.alcoda.org.

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

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

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

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

[55] See *Terry* v. *Ohio* (1968) 393 U.S. 1, 28; *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 112.

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

[57] *Muehler* v. *Mena* (2005) 544 U.S. 93, 100.

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

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

[60] *People* v. *Osborne* (2009) 175 Cal.App.4th 1052, 1062.

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

Three other points. First, if there was reason to believe that handcuffing was necessary, it is immaterial that officers had previously pat searched the detainee and did not detect a weapon. This is because a patdown "is not an infallible method of locating concealed weapons."[73] Second, in close cases it is relevant that the officers told the detainee that, despite the handcuffs, he was not under arrest and that the handcuffs were only a temporary measure for everyone's safety.[74]

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

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

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

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[61] See *U.S.* v. *Dykes* (D.C. Cir. 2005) 406 F.3d 717, 720 ["Dykes had kept his hands near his waistband, resisting both the officers' commands and their physical efforts to remove his hands into plain view"].
[62] See *U.S.* v. *Thompson* (9th Cir. 1979) 597 F.2d 187, 190.
[63] See *U.S.* v. *Purry* (D.C. Cir. 1976) 545 F.2d 217, 219-20. *People* v. *Johnson* (1991) 231 Cal.App.3d 1, 14.
[64] *People* v. *Osborne* (2009) 175 Cal.App.4th 1052, 1062.
[65] See *U.S.* v. *Bautista* (9th Cir. 1982) 684 F.2d 1286, 1289 [detainee "kept pacing back and forth and looking, turning his head back and forth as if he was thinking about running"]. ALSO SEE *People* v. *Brown* (1985) 169 Cal.App.3d 159, 167 [detainee "started to run"]; *U.S.* v. *Wilson* (7th Cir. 1993) 2 F.3d 226, 232 ["very actively evading"]; *U.S.* v. *Meadows* (1st Cir. 2009) 571 F.3d 131, 142 [detainee "fled from a traffic stop"].
[66] See *Haynie* v. *County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 [detainee "became belligerent"].
[67] See *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123 ["uncooperative persons . . . and uncertainty prevailed"].
[68] See *U.S.* v. *Meadows* (1st Cir. 2009) 571 F.3d 131, 142; *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123 ["weapons had been found (and more weapons potentially remained hidden)"].
[69] See *People* v. *Celis* (2004) 33 Cal.4th 667, 676 [handcuffing "may be appropriate when the stop is of someone suspected of committing a felony"]; *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1517 [murder suspect]; *People* v. *Brown* (1985) 169 Cal.App.3d 159, 166 [bank robbery suspect]; *U.S.* v. *Johnson* (9th Cir. 2009) 581 F.3d 993 [bank robbers].
[70] See *U.S.* v. *Meza-Corrales* (9th Cir. 1999) 183 F.3d 1116, 1123 ["A relatively small number of officers was present"].
[71] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385; *Gallegos* v. *City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 991.
[72] See *People* v. *Bowen* (1987) 195 Cal.App.3d 269, 274 [handcuffing a purse snatch suspect while awaiting the victim's arrival for a showup "does not mean that appellant was under arrest during this time"].
[73] *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385.
[74] See *U.S.* v. *Bravo* (9th Cir. 2002) 295 F.3d 1002, 1011 [telling detainee that the handcuffs "were only temporary" was a factor that "helped negate the handcuffs' aggravating influence and suggest mere detention, not arrest"].
[75] See *Muehler* v. *Mena* (2005) 544 U.S. 93, 100; *Haynie* v. *County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077.
[76] *Stainback* v. *Dixon* (7th Cir. 2009) 569 F.3d 767, 772. ALSO SEE *Heitschmidt* v. *City of Houston* (5th Cir. 1998) 161 F.3d 834, 839-40 ["no justification for requiring Heitschmidt to remain painfully restrained"]; *Burchett* v. *Kiefer* (6th Cir. 2002) 310 F.3d 937, 944 ["applying handcuffs so tightly that the detainee's hands become numb and turn blue certainly raises concerns of excessive force"].
[77] *Palmer* v. *Sanderson* (9th Cir. 1993) 9 F.3d 1433, 1436.

United States Supreme Court ruled that officers may look for weapons inside the passenger compartment if they reasonably believed that a weapon—even a "legal" one—was located there.[78]

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

Note that a protective vehicle search may be conducted even though the detainee had been handcuffed or was otherwise restrained.[80]

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

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

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

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

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

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

[79] (1989) 211 Cal.App.3d 1429.

[80] See *Michigan* v. *Long* (1983) 463 U.S. 1032, 1051-52.

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

[82] *U.S.* v. *Sanders* (5th Cir. 1993) 994 F.2d 200, 205.

[83] *U.S.* v. *Serna-Barreto* (7th Cir. 1988) 842 F.2d 965, 968.

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

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

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

UTILIZING TASERS: Officers may employ a taser against a detainee if the detainee "poses an immediate threat to the officer or a member of the public."[87]

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

Controlling the detainee's movements

Throughout the course of investigative detentions and traffic stops, officers may position the detainee and his companions or otherwise control their movements. While this is permitted as an officer-safety measure (as noted earlier), it is also justified by the officers' need to conduct their investigation in an orderly fashion.[88] As the Supreme Court explained, it would be unreasonable to expect officers "to allow people to come and go freely from the physical focal point of [a detention]."[89]

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

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

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

SEPARATING DETAINEES: If officers have detained two or more suspects, they may separate them to prevent the "mutual reinforcement" that may result when a suspect who has not yet been questioned is able to hear his accomplice's story.[100]

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[85] (1995) 34 Cal.App.4th 1499, 1519. ALSO SEE *People* v. *Celis* (2004) 33 Cal.4th 667, 676 [detention for drug trafficking].
[86] (9th Cir. 1995) 66 F.3d 1052, 1057.
[87] See *Bryan* v. *McPherson* (9th Cir. 2009) 590 F.3d. 767, 775. **NOTE**: See the report on *Bryan* in the Recent Cases section.
[88] See *Arizona* v. *Johnson* (2009) 129 S.Ct. 781; *U.S.* v. *Williams* (9th Cir. 2005) 419 F.3d 1029, 1034.
[89] *Brendlin* v. *California* (2007) 551 U.S. 249, 250.
[90] See *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 111, fn.6; *Maryland* v. *Wilson* (1997) 519 U.S. 408, 415.
[91] See *U.S.* v. *Williams* (9th Cir. 2005) 419 F.3d 1029, 1032, 1033; *U.S.* v. *Sanders* (8th Cir. 2007) 510 F.3d 788, 790.
[92] *Pennsylvania* v. *Mimms* (1977) 434 U.S. 106, 110.
[93] See *People* v. *Celis* (2004) 33 Cal.4th 667, 676; *People* v. *Vibanco* (2007) 151 Cal.App.4th 1, 12.
[94] See *People* v. *Natale* (1978) 77 Cal.App.3d 568, 572; *U.S.* v. *Stewart* (7th Cir. 2004) 388 F.3d 1079, 1084.
[95] *People* v. *Craig* (1978) 86 Cal.App.3d 905, 913 ["awaiting the victim"].
[96] *People* v. *Gorak* (1987) 196 Cal.App.3d 1032, 1038 ["awaiting the arrival of another officer"].
[97] See *U.S.* v. *Jackson* (7th Cir. 2004) 377 F.3d 715, 717; *U.S.* v. *Rodriguez* (7th Cir. 1987) 831 F.2d 162, 166.
[98] *Haynie* v. *County of Los Angeles* (9th Cir. 2003) 339 F.3d 1071, 1077 [detainee "uncooperative and continued to yell"].
[99] See *People* v. *Lloyd* (1992) 4 Cal.App.4th 724, 734.
[100] See *People* v. *Nation* (1980) 26 Cal.3d 169, 180.

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

Identifying the detainee

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

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

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

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

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

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

Also note that a detainee's refusal to furnish ID is a suspicious circumstance that may be a factor in determining whether there was probable cause to arrest him.[111]

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

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[101] (1988) 206 Cal.App.3d 1004, 1010.
[102] *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002. ALSO SEE *People* v. *Long* (1987) 189 Cal.App.3d 77, 89 [court notes the "law enforcement need to confirm identity"].
[103] *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 186.
[104] See *People* v. *Long* (1987) 189 Cal.App.3d 77, 86; *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002.
[105] *People* v. *Rios* (1983) 140 Cal.App.3d 616, 621.
[106] *People* v. *Monroe* (1993) 12 Cal.App.4th 1174, 1186. Also see *People* v. *McKay* (2002) 27 Cal.4th 601, 620.
[107] See *People* v. *Monroe* (1993) 12 Cal.App.4th 1174, 1187.
[108] See *People* v. *McKay* (2002) 27 Cal.4th 601, 622 ["[W]e do not intend to foreclose the exercise of discretion by the officer in the field in deciding whether to accept or reject other evidence—including oral evidence—of identification."].
[109] *People* v. *Long* (1987) 189 Cal.App.3d 77, 87. Edited. ALSO SEE *U.S.* v. *Christian* (9th Cir. 2004) 356 F.3d 1103, 1107 ["Narrowly circumscribing an officer's ability to persist [in determining the detainee's ID] until he obtains the identification of a suspect might deprive him of the ability to relocate the suspect in the future."]; *U.S.* v. *Martin* (7th Cir. 2005) 422 F.3d 597, 602 ["Here, failure to produce a valid driver's license necessitated additional questioning"].
[110] See Penal Code § 148(a)(1); *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 188.
[111] See *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002.

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

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

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

Duration of the detention

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

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

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

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

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[112] See *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002; *People* v. *Long* (1987) 189 Cal.App.3d 77, 89.

[113] See *People* v. *Garcia* (2007) 145 Cal.App.4th 782, 788.

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

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

[116] See *People* v. *Hart* (1999) 74 Cal.App.4th 479, 490.

[117] See *People* v. *Faddler* (1982) 132 Cal.App.3d 607, 610.

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

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

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

[121] *United States* v. *De Hernandez* (1985) 473 U.S. 531, 543.

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

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

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

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

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

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

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

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

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[123] *United States* v. *Sharpe* (1985) 470 U.S. 675, 686.
[124] (1982) 129 Cal.App.3d 188, 196. ALSO SEE *People* v. *Soun* (1995) 34 Cal.App.4th 1499, 1520 [officer "full accounted" for the 30-minute detention].
[125] (9th Cir. 2002) 308 F.3d 987, 992. Edited.
[126] *U.S.* v. *Hernandez* (11th Cir. 2005) 418 F.3d 1206, 1212, fn.7.
[127] See *Johnson* v. *Arizona* (2009) __ U.S. __[2009 WL 160434].
[128] *Courson* v. *McMillian* (11th Cir. 1991) 939 F.2d 1479, 1493 [detention by single officer of three suspects, one of whom was unruly].
[129] See *United States* v. *Sharpe* (1985) 470 U.S. 675, 687, fn.5 ["[A]s a highway patrolman, he lacked Cooke's training and experience in dealing with narcotics investigations."]; *People* v. *Gorak* (1987) 196 Cal.App.3d 1032, 1038 [inexperienced officer awaited arrival of officer with experience in DUI-drugs].
[130] See *People* v. *Avalos* (1996) 47 Cal.App.4th 1569, 1577; *U.S.* v. *Rivera* (8th Cir. 2009) 570 F.3d 1009, 1013.
[131] See *U.S.* v. *Bloomfield* (8th Cir. 1994) 40 F.3d 910, 917.
[132] See *People* v. *Grant* (1990) 217 Cal.App.3d 1451, 1459; *U.S.* v. *Ellis* (6th Cir. 2007) 497 F.3d 606, 614; *U.S.* v. *$109,179* (9th Cir. 2000) 228 F.3d 1080, 1086; *U.S.* v. *Long* (7th Cir. 2005) 422 F.3d 597, 602.
[133] See *U.S.* v. *Brigham* (5th Cir. 2004) 382 F.3d 500, 508 [OK to "verify the information provided by the driver"].
[134] See *U.S.* v. *Rutherford* (10th Cir. 1987) 824 F.2d 831, 834.
[135] See *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228; *U.S.* v. *Ellis* (6th Cir. 2007) 497 F.3d 606, 614.
[136] See *People* v. *Bowen* (1987) 195 Cal.App.3d 269, 273-74.
[137] See *People* v. *Soun* (1995) 34 Cal.App.4th 1499 [six detainees]; *U.S.* v. *Shareef* (10th Cir. 1996) 100 F.3d 1491, 1506.
[138] See *Muehler* v. *Mena* (2005) 544 U.S. 93, 100 ["[T]his case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons."]; *People* v. *Castellon* (1999) 76 Cal.App.4th 1369, 1374 ["At the point where Castellon failed to follow [the officer's] order to remain in the car and [the officer] became concerned for his safety, the . . . focus shifted from a routine investigation of a Vehicle Code violation to officer safety."].
[139] (1995) 34 Cal.App.4th 1499, 1524.

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

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

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

Questioning the detainee

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

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

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

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

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

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

[141] (1985) 470 U.S. 675, 687-88.

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

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

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

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

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

become "sustained and coercive,"[147] or if there were other circumstances that would have caused a reasonable person in the suspect's position to believe that he was under arrest. As the U.S. Supreme Court pointed out in *Berkemer* v. *McCarty:*

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

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

A further question: Is a suspect "in custody" for *Miranda* purposes if he was initially detained at gunpoint? It appears not if, (1) the precaution was warranted, (2) the weapon was reholstered before the detainee was questioned, and (3) there were no other circumstances that indicated the detention had become an arrest. As the court said in *People* v. *Taylor,* "Assuming the citizen is subject to no other restraints, the officer's initial display of his reholstered weapon does not require him to give *Miranda* warnings before asking the citizen questions."[152]

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

In 2009, however, the Supreme Court resolved the issue in the case of *Arizona* v. *Johnson* when it ruled that unessential or off-topic questioning is permissible if it did not "measurably extend" the duration of the stop. Said the Court, "An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."[154] Although decided before *Johnson*, the case of *United States* v. *Childs* contains a good explanation of the reasons for this rule:

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

[148] (1984) 468 U.S. 420, 440.

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

[150] *People* v. *Pilster* (2006) 138 Cal.App.4th 1395, 1406.

[151] See *U.S.* v. *Cervantes-Flores* (9th Cir. 2005) 421 F.3d 825, 830.

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

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

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

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

Warrant checks

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

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

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

Showups

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

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

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

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

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

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[155] (7th Cir. 2002) 277 F.3d 947, 954.
[156] **NOTE**: The California Supreme Court's opinion in *People* v. *McGaughran* (1979) 25 Cal.3d 577 has been widely interpreted as imposing strict time requirements on traffic stops. Not only would such an interpretation be contrary to the U.S. Supreme Court's "measurably extend" test (*Arizona* v. *Johnson* (2009) __ U.S. __), the Court of Appeal recently ruled that *McGaughran* was abrogated by Proposition 8. *People* v. *Branner* (2009) __ Cal.App.4th __ [2009 WL 4858105].
[157] See *People* v. *Stoffle* (1991) 1 Cal.App.4th 1671, 1679; *U.S.* v. *Nichols* (6th Cir. 2008) 512 F.3d 789, 796.
[158] See *U.S.* v. *Hensley* (1985) 469 U.S. 221, 229; *U.S.* v. *Villagrana-Flores* (10th Cir. 2006) 467 F.3d 1269, 1277.
[159] See *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 186; *U.S.* v. *Holt* (10th Cir. 2001) 264 F.3d 1215, 1221-22.
[160] *U.S.* v. *Christian* (9th Cir. 2004) 356 F.3d 1103, 1107.
[161] See *Carpio* v. *Superior Court* (1971) 19 Cal.App.3d 790, 792.
[162] See *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412.
[163] See *People* v. *Irvin* (1968) 264 Cal.App.2d 747, 759; *People* v. *Dampier* (1984) 159 Cal.App.3d 709, 712-13.
[164] (1990) 220 Cal.App.3d 372, 387.
[165] *People* v. *Nash* (1982) 129 Cal.App.3d 513, 518. ALSO SEE *People* v. *Craig* (1978) 86 Cal.App.3d 905, 914.
[166] (1977) 70 Cal.App.3d 73, 85.

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

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

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

REDUCING SUGGESTIVENESS: As noted earlier, showups are inherently suggestive because the witness is not required to identify the perpetrator from among other people of similar physical appearance. Furthermore, some witnesses might assume that, because officers do not go around detaining people at random in hopes that someone will ID them, there must be a good reason to believe that the person they are looking at is the culprit. This assumption may be inadvertently bolstered if the witness sees the detainee in handcuffs or if he is sitting behind the cage in a patrol car.

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

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

(If two or more witnesses will view the detainee)

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

Transporting the detainee

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

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[167] (1987) 195 Cal.App.3d 269.

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

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

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

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

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

For example, if a hostile crowd had gathered it would be reasonable to take the detainee to a place where the detention could be conducted safely.[174] Or it might be necessary to drive the detainee to the crime scene or a hospital for a showup if the victim had been injured.[175] Thus, in *People* v. *Harris*, the court noted, "If, for example, the victim of an assault or other serious offense was injured or otherwise physically unable to be taken to promptly view the suspect, or a witness was similarly incapacitated, and the circumstances warranted a reasonable suspicion that the suspect was indeed the offender, a 'transport' detention might well be upheld."[176]

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

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

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

[172] *People* v. *Harris* (1975) 15 Cal.3d 384, 391.

[173] *U.S.* v. *Charley* (9th Cir. 2005) 396 F.3d 1074, 1080.

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

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

[176] (1975) 15 Cal.3d 384, 391.

[177] (1995) 34 Cal.App.4th 1499.

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

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

Other procedures

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

Note, however, that consent may be deemed invalid if a court finds that it was obtained after the officers had completed all of their duties pertaining to the stop, and were continuing to detain the suspect without sufficient cause.[182] Officers may, however, seek consent to search if they converted the detention into a contact. (See "Converting detentions into contacts," next page.)

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

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

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

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

PHOTOGRAPHING THE DETAINEE: A detainee may, of course, be photographed if he consented.[185] But

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[178] (1st Cir. 1998) 157 F.3d 9, 17.

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

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

[181] (1991) 501 U.S. 429, 434.

[182] See *People* v. *Lingo* (1970) 3 Cal.App.3d 661, 663-64.

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

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

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

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

Terminating the detention

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

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

Converting detentions into contacts

Many of the procedural problems that officers encounter during detentions can be avoided by converting the detention into a consensual encounter or "contact." After all, if the suspect knows he can leave at any time, and if he says he doesn't mind answering some more questions, there is no reason to prohibit officers from asking more questions.

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

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

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

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

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

[188] *U.S.* v. *Watts* (8th Cir. 1993) 7 F.3d 122, 126.

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

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

[191] *U.S.* v. *Sandoval* (10th Cir. 1994) 29 F.3d 537, 540.

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

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

[194] (1986) 183 Cal.App.3d 849, 877.

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