The Inquisitive Prosecutor's Guide

A Publication of the Santa Clara County District Attorney's Office

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July 12, 2021 **2021-IPG-50 (*LANGE V. CALIFORNIA* – SCOTUS ON HOT PURSUIT)**

This edition of the Inquisitive Prosecutor's Guide discusses the recent United States Supreme Court decision in ***Lange* v. *California*** (2021) 141 S.Ct. 2011, a case deciding the issue of whether the flight of a suspected misdemeanant will *always* justify a warrantless entry by police into a home when they are in hot pursuit of a suspected misdemeanant who has just fled inside a home.

IPG attempts to figure out what the current state of the law is regarding the "hot pursuit" exception to the warrant requirement and provide answers to some questions left open or unclear by the decision in ***Lange***.

Our guest on the podcast accompanying this IPG is Sonoma County Deputy District Attorney Robert Maddock. DDA Maddock argued the case of ***Lange*** when it was still in the superior court appellate division and subsequently wrote an amicus brief on behalf of his office and the California District Attorney's Association when the case got to the High Court.

This podcast will provide **75 minutes of (self-study) MCLE general credit** and may be accessed at: http://sccdaipg.podbean.com/

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The Flight of a Misdemeanant into a Home Does Not, By Itself, *Always* Permit Police to Enter the Home in Hot Pursuit When There is Time to Obtain a Warrant. However, a Warrantless Entry to Pursue a Fleeing Misdemeanant Will Generally be Permissible When Necessary to Prevent the Imminent Harms of Violence, Destruction of Evidence, or Escape from the Home. *Lange* v. *California* (2021) 141 S.Ct. 2011

Facts and Procedural Background

The defendant drove past a highway patrol officer while listening to loud music with his windows down and repeatedly honking his horn. The officer began following the defendant and signaled for him to pullover. However, the defendant did not stop. Instead, he drove toward his home (which was about a hundred feet away) and into his attached garage. The officer followed the defendant into the garage and began questioning him. The questioning evolved into an arrest for driving under the influence. (***Id***. at p. 2016.)

The defendant was charged with misdemeanor of driving under the influence of alcohol and with a noise infraction. The defendant was not charged with the misdemeanor of failing to comply with a police signal. But when the defendant moved to suppress all evidence obtained after the officer entered his garage, the People countered that entry was permissible because the officer had probable cause to arrest defendant for the misdemeanor of failing to comply with a police signal in violation of Vehicle Code section 2800(a) and that "the pursuit of a suspected misdemeanant *always* qualifies as an exigent circumstance authorizing a warrantless home entry." (***Ibid***, emphasis added.)

The trial court denied the motion to suppress under the People's theory. Both the Superior Court appellate division, and the California Court of Appeal agreed with the trial court. (***Ibid***.) The California Supreme Court denied review. However, the High Court granted review to decide the question of whether the Fourth Amendment always permits an officer to enter a home without a warrant in pursuit of a fleeing misdemeanor suspect or whether a "case-specific showing of exigency" is required. (***Id***. at pp. 2016-2017.)

***Editor's note:** Although the California Attorney General's office initially defended the case in the Court of Appeal, it abandoned its defense of the categorical rule in its response to the defendant's petition for review in the United States Supreme Court. This forced the High Court to appoint another attorney as amicus curiae to defend the Court of Appeal's judgment.

Holding and Analysis

1. "The flight of a suspected misdemeanant does not *always* justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled." (***Id***. at p. 2024, emphasis added by IPG.)

2. The Fourth Amendment "'generally requires the obtaining of a judicial warrant' before a law enforcement officer can enter a home without permission." (***Id***. at p. 2017.) However, the warrant requirement is subject to an exception for "exigent circumstances." (***Ibid***.)

   The exigent circumstances exception applies when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." (***Ibid***.) "The exception enables law enforcement officers to handle 'emergenc[ies]'—situations presenting a 'compelling need for official action and no time to secure a warrant.'" (***Ibid***.)

3. Exigent circumstances that permit law enforcement entry into the home identified by the High Court include the need to:

   (i) "'render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury,' or to ensure his own safety";

   (ii) "prevent the imminent destruction of evidence"; and

   (iii) "prevent a suspect's escape."

   "In those circumstances, the delay required to obtain a warrant would bring about 'some real immediate and serious consequences'—and so the absence of a warrant is excused." (***Id***. at pp. 2017-2018.)

4. "Under the usual case-specific view, an officer can follow the misdemeanant when, but only when, an exigency—for example, the need to prevent destruction of evidence—allows insufficient time to get a warrant." (***Id***. at p. 2018.)

5. The majority opinion noted that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a

minor offense" is involved (***id***. at p. 2020), "misdemeanors can target minor, non-violent conduct" (***id***. at p. 2021), and "[t]hose suspected of minor offenses may flee for innocuous reasons and in non-threatening ways" (***id***. at p. 2021). Thus, not every case of misdemeanor flight poses an exigency such as imminent harm, loss of evidence, or escape. (***Ibid***.) "When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant." (***Id***. at p. 2022.)

However, the majority opinion also recognized that "flight" of a suspect is a circumstance that enhances the likelihood that an exigency permitting entry will be found: "We have no doubt that in a great many cases flight creates a need for police to act swiftly. A suspect may flee, for example, because he is intent on discarding evidence. Or his flight may show a willingness to flee yet again, while the police await a warrant." (***Id***. at p. 2021.) "When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself." (***Ibid***.) Thus, even under a "case by case" approach, a warrantless home entry will be allowed "in many, if not most, cases." (***Id***. at p. 2021.)

Indeed, the "only" cases in which the majority would reach a different result than dictated by the approach urged in the concurring opinion of Justice Roberts "are cases involving flight alone, without exigencies like the destruction of evidence, violence to others, or escape from the home." (***Id***. at p. 2022, fn. 3; **see also** this IPG, at p. 5 [discussing that concurring opinion].)

6. The majority opinion did not dispute that in ***United States* v. *Santana*** (1976) 427 U.S. 38, the High Court had upheld the entry into a home where officers with probable cause to believe the defendant was dealing drugs (a felony) entered the defendant's home in hot pursuit once the defendant retreated into her home upon seeing the police. Moreover, the majority opinion acknowledged that a number of later decisions described ***Santana*** in dicta as allowing warrantless home entries when police are "in 'hot pursuit' of a fugitive" or "a fleeing suspect." (***Id***. at p. 2019.) Nevertheless, the majority observed that ***Santana*** involved a chase of a person suspected of having committed a felony and held that ***Santana*** did not establish a categorical rule when it came to fleeing misdemeanants. (***Id***. at p. 2019.)

Editor's note:** The majority opinion assumed that ***Santana treated fleeing-felon cases categorically (that is, as always presenting exigent circumstances allowing warrantless entry) and declined to consider the defendant's argument that ***Santana*** did not establish any categorical rule—even one for fleeing felons. (***Id***. at p. 2019.)

7. Because the California Court of Appeal applied the categorical rule rejected by the majority opinion, the High Court vacated the judgment and remanded "the case for further proceedings not inconsistent with this opinion." (***Id***. at pp. 2024-2025.)

Concurring Opinion of Justice Roberts (Joined by Justice Alito)

Justice Roberts took issue with the majority opinion's conclusion that "flight, on its own, can never justify a warrantless entry into a home (including its curtilage)." (***Id***. at p. 2028.) In Justice Roberts' opinion, "hot pursuit is not merely a setting in which other exigent circumstances justifying warrantless entry might emerge. It ***is itself*** an exigent circumstance." (***Ibid***, emphasis added.)

Moreover, Justice Roberts did not believe the question of whether a hot pursuit entry was lawful turned on the nature of the offense. "We have never held that whether an officer may enter a home to complete an arrest turns on what the fleeing individual was suspected of doing before he took off, let alone whether that offense would later be charged as a misdemeanor or felony. It is the flight, not the underlying offense, that has always been understood to justify the general rule: 'Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect.'" (***Ibid***.)

> ***Editor's note:** In many ways, Justice Roberts' opinion feels a lot more like a dissenting opinion than a concurring opinion. However, while "flight" itself is not an adequate exigent circumstance under the majority opinion, flight that could result in the suspect escaping or in the loss of evidence (e.g., the identification of a suspect) *is*. The inability to chase a suspect into a home with more than one door or window could easily result in the suspect escaping or in the loss of evidence. As noted in Justice Roberts' concurring opinion a "warrantless entry into a home in hot pursuit of a fleeing misdemeanant would presumably be permissible, as long as the officer reasonably believed the home had another exit" and that "[i]f that reasonable belief is an exigency, then it is present in almost every case of hot pursuit into the home. Perhaps that is why Lange's counsel admitted that 'nine times out of ten or more' warrantless entry in hot pursuit of misdemeanants would be reasonable." (***Id***. at p. 2037 [albeit also noting the majority opinion does not answer the question].)

Concurring Opinion of Justice Kavanaugh

Justice Kavanaugh concurring opinion primarily was used to highlight that "there is almost no daylight in practice between the Court's opinion and THE CHIEF JUSTICE's opinion concurring in the judgment." (***Id***. at p. 2025.) In Justice Kavanaugh's opinion, "the difference between THE CHIEF JUSTICE's approach and the Court's approach will be academic in most cases. That is because cases of fleeing misdemeanants will almost always also involve a recognized exigent

circumstance—such as a risk of escape, destruction of evidence, or harm to others—that will still justify warrantless entry into a home. [Citations omitted]. As Lange's able counsel forthrightly acknowledged at oral argument, the approach adopted by the Court today will still allow the police to make a warrantless entry into a home 'nine times out of 10 or more' in cases involving pursuit of a fleeing misdemeanant." (***Ibid***.)

Justice Kavanaugh also used his concurring opinion to point out that the majority opinion "does not disturb the long-settled rule that pursuit of a fleeing felon is itself an exigent circumstance justifying warrantless entry into a home." (***Ibid***.)

Concurring Opinion of Thomas (Joined by Justice Kavanaugh)

Justice Thomas's concurring opinion focused on making two points.

First, Justice Thomas opined that "the general case-by-case rule that the Court announces today is subject to historical, *categorical* exceptions" (***id***. at p. 2025) or at least "does not foreclose historical, categorical exceptions (***id***. at p. 2026). These categorical exceptions include: (i) "when a person is arrested and escapes"; (ii) "when in hot pursuit of a person who committed an affray"; (iii) when in hot pursuit of a person who committed certain "pre-felonies"; and "when in pursuit of a person who had breached the peace." (***Id***. at p. 2026.)

> ***Editor's note:** Justice Thomas did not purport to identify the "contours of any of these historical exceptions" but joined the majority opinion with the understanding that those contours were not being settled by the majority opinion. (***Id***. at p. 2026.)

Second, Justice Thomas opined that "the federal exclusionary rule does not apply to evidence discovered in the course of pursuing a fleeing suspect." (***Id***. at p. 2025.) Thus, "even if the state courts on remand conclude that the officer's entry here was unlawful, the federal exclusionary rule does not require suppressing any evidence. (***Id***. at p. 2026.) "Officers cannot chase a fleeing person into a home simply because that person is suspected of having committed any misdemeanor, but if the officer nonetheless does so, exclusion under the Fourth Amendment is improper." (***Id***. at p. 2028.)

Justice Thomas observed that the exclusionary rule "does not apply when the costs of exclusion outweigh its deterrent benefits." (***Id***. at p. 2027.)

On the benefits side, the "sole" factor courts can consider when assessing its benefits is deterring "intentional conduct that was patently unconstitutional." (***Id***. at p. 2027 [and noting over the past

two decades the High Court has "declined to exclude evidence where exclusion would not substantially deter 'intentional' and 'flagrant' behavior."].) On the costs side, in contrast, *all* costs must be considered, including that excluding evidence always obstructs the "'truth-finding functions of judge and jury'" and "creates a downstream risk that 'some guilty defendants may go free or receive reduced sentences.'" (***Id***. at p. 2027.)

The cost of exclusion by itself "makes exclusion under our precedent rarely appropriate." (***Id***. at p. 2027.) "When additional costs are present, the balance tips decisively against exclusion." (***Ibid***.) "Cases of fleeing suspects involve more than enough added costs to render the exclusionary rule inapplicable" for two reasons. (***Ibid***.)

First, "the exclusionary rule does not apply when it would encourage bad conduct by criminal defendants." (***Ibid***.) "Here, exclusion is inappropriate because it would encourage suspects to flee. (***Ibid***.)

"Second, our precedents similarly make clear that criminal defendants cannot use the exclusionary rule as "a shield against" their own bad conduct. (Citation omitted.) In most—if not all—States, fleeing from police after a lawful order to stop is a crime. All the evidence that petitioner seeks to exclude is evidence that inevitably would have been discovered had he complied with the officer's order to stop. A criminal defendant should "not … be put in a better position than [he] would have been in if no illegality had transpired." (***Ibid***.)

Questions an Inquisitive Prosecutor Might Have After Reading *Lange* v. *California* (2021) 141 S.Ct. 2011

1. Under the rule announced in *Lange*, what circumstances will permit entry into a home when a defendant suspected of a misdemeanor flees into the home while an officer is in hot pursuit?

As discussed above, the majority opinion identified at least three circumstances that would create an exigency sufficient to justify a warrantless entry into the home in hot pursuit of a fleeing misdemeanant. These would include situations where it is necessary to (i) "'render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury,' or to ensure his own safety"; (ii) "prevent the imminent destruction of evidence"; or (iii) "prevent a suspect's escape." (***Lange*** at p. 2017.) "In those circumstances, the delay required to obtain a warrant

would bring about 'some real immediate and serious consequences'—and so the absence of a warrant is excused." (***Id***. at pp. 2017-2018.)

Although the identified circumstances cover the gamut of the most common exigencies, "there is no immutable list of exigent circumstances; they may include "'some other consequence improperly frustrating legitimate law enforcement efforts."'" (***United States* v. *Struckman*** (9th Cir. 2010) 603 F.3d 731, 743.)

Note that, in addition to having probable cause to arrest the defendant, "[t]he United States Supreme Court has indicated that entry into a home based on exigent circumstances requires ***probable cause to believe that the entry is justified by one of these factors*** such as the imminent destruction of evidence or the need to prevent a suspect's escape." (***People* v. *Thompson*** (2006) 38 Cal.4th 811, 818 citing to ***People* v. *Celis*** (2004) 33 Cal.4th 667, 676, emphasis added by IPG.)

> ***Editor's note:** Because the case-by-case approach adopted in ***Lange*** takes a more global approach to what circumstances permit an entry when following a misdemeanant, a potential argument could be made that a reasonable possibility (i.e., something less than probable cause) that evidence will be destroyed, harm will come to someone, or the suspect will escape suffices - so long as there is probable cause to make the arrest. However, in light of the language in ***Thompson*** and ***Celis***, convincing a court of this argument will likely be an uphill battle.

A. How significant is it that an officer knows whether there is more than one exit to a home in assessing whether an exigency exists?

In his concurring opinion, Justice Roberts observed that "[w]hen a suspect flees into a dwelling there typically will be another way out, such as a back door or fire escape. See Cal. Code Regs., tit. 24, §§ 1113.2, 1114.8 (2019) (apartments, floors of high-rise buildings, and many other homes must have access to at least two means of egress)." (***Id***. at p. 2036.) In light of this observation, Justice Roberts believed that "[i]f the officer reasonably believes there are multiple exits, then surely the officer can conclude that the suspect might well "escape from the home," . . . by running out the back, rather than "slowing down and wiping his brow' while the officer attempts to get a warrant." (***Id***. at pp. 2036-2037.) Justice Roberts then speculated that, given those observations, "[u]nder the Court's rule warrantless entry into a home in hot pursuit of a fleeing misdemeanant would presumably be permissible, as long as the officer reasonably believed the home had another exit." (***Id***. at p. 2037.) However, Justice Roberts then went on to point out that the majority opinion does not answer this question, "leaving it to the officer to figure out in the midst of hot pursuit." (***Ibid***.)

Ironically, notwithstanding his criticism of the majority opinion for failing to give guidance, Justice Roberts then implies that opinion *does* provide an answer to the question: "The answer apparently depends on whether the police 'believe anything harmful will happen in the time it takes to get a warrant,' ante, at 2021 - 2022, n. 3, but again, what the police reasonably believe will happen is of course that the suspect will continue his flight and escape out the back. If that reasonable belief is an exigency, then it is present in almost every case of hot pursuit into the home. Perhaps that is why Lange's counsel admitted that 'nine times out of ten or more" warrantless entry in hot pursuit of misdemeanants would be reasonable.'" (***Id***. at p. 2037.)

It is interesting to note that in one of the cases *cited by the majority* as an example of what circumstances will likely not permit entry into a home when a defendant suspected of a misdemeanor flees into the home while an officer is in hot pursuit, the fact the suspect "had fled into his family home *from which there was only one exit*" was one of the reasons for finding exigent circumstances did not permit the entry. (**See *Mascorro* v. *Billings*** (10th Cir. 2011) 656 F.3d 1198, 1207 [discussed in this IPG at pp. 10-11]; **see also *Gutierrez* v. *Cobos*** (10th Cir. 2016) 841 F.3d 895, 904 [discussing ***Mascorro***]; ***Fuller* v. *State*** (Wyo. 2021) 481 P.3d 1131, 1137 [finding entry improper because, inter alia, "the intended arrest in this case was for non-violent misdemeanors committed by an individual who fled to his *single-exit* apartment"], emphasis added by IPG.)

> ***Editor's note:** Prosecutors seeking to justify a warrantless entry into a home under an exigent circumstance theory, should be sure to ask the officer if the officer knew or did not know whether the home afforded an avenue of escape other than through the door or window entered by the suspect.

B. How significant is it that an officer cannot tell if the suspect entered his own home or a home belonging to someone else?

The fact an officer knows (or does not know one way or the other) whether the home into which the suspect fled is not the suspect's home should weigh in favor of finding an exigent circumstance – as the risk of harm to others is increased in this circumstance. (**See e.g**., ***State* v. *Ramirez*** (Utah Ct. App. 1991) 814 P.2d 1131, 1135 [finding entry into home by officer in hot pursuit justified as exigent circumstance where, inter alia, the officer "could not be certain that the house into which the chase led was appellant's residence"]; United ***States* v. *Thompson*** (W.D. Okla., July 13, 2016, No. CR-16-45-D) 2016 WL 3881099, at *4 [exigent circumstances justified entry into apartment belonging to someone other than suspect because, inter alia, of potential danger to the apartment's occupants].)

Of course, if the home does not belong to the defendant, the defendant would have no reasonable expectation of privacy in the location and would be precluded from challenging the entry. (**See *People* v. *Magee*** (2011) 194 Cal.App.4th 178, 180 [even entry into the home of a friend in order to evade police did not give defendant a reasonable expectation of privacy in the home].) Albeit the owner of the home could challenge the entry if, for example, contraband attributed to the homeowner was observed in the home and the homeowner was being prosecuted. Moreover, if exigent circumstances did not exist, the officer could potentially be successfully sued by the homeowner. (**See e.g.**, ***Bratt* v. *Genovese*** (11th Cir. 2016) 660 Fed.Appx. 837, 838.)

2. Under the rule announced in *Lange*, what circumstances will likely *not* permit entry into a home when a defendant suspected of a misdemeanor flees into the home while an officer is in hot pursuit?

In attempting to come up with examples of the admittedly "atypical" situation where entry should not automatically be deemed constitutional based simply on flight of a suspect (i.e., where "officers can probably take the time to get a warrant"), the majority cited to two cases involving persons suspected of minor offenses who fled "for innocuous reasons and in non-threatening ways": ***Carroll* v. *Ellington*** (5th Cir. 2015) 800 F.3d 154 and ***Mascorro* v. *Billings*** (10th Cir. 2011) 656 F.3d 1198.) We discuss those cases in greater depth below for guidance.

Carroll was case involving whether police were entitled to qualified immunity for seizure of a man suffering from paranoid schizophrenia and subsequent entry into the man's home that unfortunately resulted in a fatal struggle. (***Id***. at pp. 161-162.) A deputy on patrol spotted the man (Barnes) standing near a set of mailboxes belonging to a community's home-owner's association. The deputy was aware of complaints from the association about "criminal mischief or vandalism in the neighborhood to the[ ] mailboxes" where Barnes was standing while smoking a cigarette. (***Id***. at p. 162.) The deputy noticed Barnes "possibly fidgeting with the mail box." (***Ibid***.) As the deputy drove past, he saw Barnes stop doing what he had been doing and move toward the side of the mailboxes. At this point, the deputy turned his car around and drove toward Barnes. As his car approached Barnes, the deputy and Barnes made eye contact. Barnes immediately walked away from the mailbox in a hurried manner. "Suspicious that Barnes was either vandalizing the mailboxes or selling narcotics or drugs, [the deputy] decided to stop and speak with Barnes "to ascertain if he lived … in the neighborhood and … if he had any business[ ] with those mailboxes as well." (***Ibid***.) The deputy followed Barnes to a nearby residence and stopped his patrol car in

front. Because the deputy noticed that there was a different set of mailboxes in front of that house, the deputy's suspicion regarding why Barnes was over by the community mailboxes was raised. When the deputy contacted Barnes to ask him his address and what he was doing beside the mailboxes, Barnes was unable to answer the deputy's question about the address of his house. Barnes insisted he was from California. (***Ibid***.) The deputy was not aware of Barnes' mental illness and did not think defendant had a mental illness but thought he might be on medication or illegal drugs based on Barnes' demeanor and language. Still inside his patrol car, the deputy questioned Barnes about his name and address. At this point, Barnes turned and walked at a "steady walk pace" toward the house." Barnes then manually opened the garage door of his house. The deputy did not think that Barnes lived at that residence and so he repeatedly ordered Barnes to stop and walk back toward the deputy's patrol car, but Barnes did not comply. Barnes' lack of compliance provided the officer reasonable suspicion that Barnes had committed the offense of evading detention. The deputy then pursued Barnes into the garage and before Barnes could open an interior door from the garage into the home, the deputy grabbed Barnes's arm. (***Id***. at pp. 162-163.) In the subsequent civil suit, the deputy attempted to justify his warrantless entry into Barnes' home under the exigent-circumstances exception. Without deciding the constitutionality of the entry, the Fifth Circuit held the deputy was entitled to qualified immunity, relying on the pre-***Lange*** decision of ***Stanton* v. *Sims*** (2013) 134 S.Ct. 3, which held "an officer who entered a home in 2008 in hot pursuit of a suspected misdemeanant was therefore entitled to qualified immunity because the law was not clearly established at the time of the officer's conduct." (***Carroll*** at p. 173, citing to ***Stanton*** at 3, 5–7.)

Mascorro* v. *Billings (10th Cir. 2011) 656 F.3d 1198 was also a civil suit brought against law enforcement, asserting claims of, inter alia, unlawful entry. In that case (viewing the facts as alleged by the plaintiff) a deputy sheriff spotted Burchett (a 17-year-old) driving at 11:30 p.m. without taillights. The deputy recognized Burchett because he previously had contact with him for drug violations and because Burchett was also a neighbor of the deputy. The deputy attempted to pull Burchett over, but Burchett did not stop and drove two blocks to his parents' house, ran inside, and hid in the bathroom. (***Id***. at pp. 1202, 1207.) The deputy then went to the parents' house (the Mascorros) and began kicking the door in a rage, swearing, threatening, and ordering someone to open it and come outside. When Mr. Moscorro opened the door, the deputy drew his gun, pointed it at Mr. Moscorro, and ordered him to his knees. During the course of the very contentious interactions with the Moscorros, the deputy sprayed both Moscorros and their daughter with pepper spray. Other officers arrived at the scene. When the deputy informed them that Burchett had locked himself in the bathroom, the officers ordered Burchett to come out and,

when he refused, one of the officers kicked down the bathroom door, and took Burchett into custody. (***Id***. at pp. 1202–1203.) The Tenth Circuit held the entry into the home was not justified as there was "nothing to indicate the sort of 'real immediate and serious consequences' of postponing action to obtain a warrant required for a showing of exigent circumstances." (***Ibid***.) The Tenth Circuit observed "[t]he intended arrest was for a traffic misdemeanor committed by a minor, ***with whom the officer was well acquainted***, who had fled into his family home from ***which there was only one exit***." (***Id***. at p. 1207, emphasis added by IPG.) Moreover, the Tenth Circuit pointed out: (i) "the risk of flight or escape was somewhere between low and nonexistent"; (ii) "there was no evidence which could have potentially been destroyed"; and "there were no officer or public safety concerns." (***Ibid***.)

3. Did *Lange* alter what constitutes a "hot pursuit?"

Not all "pursuits" are necessarily "hot pursuits" (sometimes referred to as "fresh pursuits"). The majority opinion in ***Lange*** focused on what constitutes an "exigency" and not on what constitutes a "hot pursuit." However, in the concurring opinion of Justice Roberts, a few of the requirements for a pursuit to qualify as a "hot pursuit" were noted: "While the flight need not be reminiscent of the opening scene of a James Bond film, there must be "some sort of a chase." [Citation omitted.] The pursuit must be "immediate or continuous." [Citation omitted.] And the suspect should have known the officer intended for him to stop. [Citation omitted.] Where a suspect, for example, chooses to end a voluntary conversation with law enforcement and go inside her home, that does not constitute flight. [Citation omitted.]." (***Lange*** at p. 2034, conc. opn, Roberts, J.)

4. Did the *Lange* decision alter the rule that an officer may enter a home without a warrant when in hot pursuit of a fleeing felon?

The majority opinion appeared to accept the continuing validity of an absolute rule that police may enter the home of a fleeing felon without a warrant. However, the opinion was not as forthright as it could (and perhaps should) have been.

The majority rejected the argument that ***United States* v. *Santana*** (1976) 427 U.S. 38 supported "a flat rule permitting warrantless home entry when police officers (with probable cause) are pursuing any suspect—whether a felon or a *misdemeanant*." (***Lange*** at p. 2019, emphasis added.) But then assumed that "***Santana*** treated fleeing-felon cases categorically (that is, as always presenting exigent circumstances allowing warrantless entry)," citing to several of its

previous decisions including ***Stanton* v. *Sims*** (2013) 571 U.S. 3, 8 which described ***Santana*** as "holding that hot pursuit of a fleeing felon justifies an officer's warrantless entry." (***Lange*** at p. 2019.) Significantly, the majority distinguished ***Santana***, finding it did not control the outcome in ***Lange*** ***because*** ***Santana*** "said nothing about fleeing ***misdemeanants***." (***Id***. at p. 2019.)

In addition, the majority declined to consider the defendant's "counterargument that ***Santana*** did not establish any categorical rule—even one for fleeing felons." (***Id***. at p. 2019.) And in support of its conclusion that there should be a case-by-case approach rather than a categorical approach, the majority pointed out that the case-by-case approach was consistent with the common law – which *also* drew a distinction between felonies and misdemeanors in creating an exception to the warrant requirement for entry into a home. (**See *Lange*** at p. 2023 [noting that the exception to the warrant when officers were in hot pursuit "was indeed a *felony* exception. All their rules applied to felonies as a class, and to no other whole class of crimes. ¶ In the misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home."].)

Lastly, Justice Kavanaugh's concurring opinion was without any ambiguity: "Importantly, moreover, the Court's opinion does not disturb the long-settled rule that pursuit of a fleeing felon is itself an exigent circumstance justifying warrantless entry into a home. (Citations omitted.) In other words, the police may make a warrantless entry into the home of a fleeing felon regardless of whether other exigent circumstances are present." (***Lange*** at p. 2025, concurring opinion of Kavanaugh, J.)

> ***Editor's note:** The bottom line is that, at least for now, binding precedent dictates that officers have the right to make entry into the home to pursue a fleeing felon. (**See also *People* v. *Thompson*** (2006) 38 Cal.4th 811, 817–818 ["The presumption of unreasonableness that attaches to a warrantless entry into the home "can be overcome by a showing of one of the few 'specifically established and well-delineated exceptions' to the warrant requirement (citation omitted), such as '"hot pursuit of a fleeing felon . . ."'].)

5. Does the exigent circumstance exception allowing entry when officers are in hot pursuit of a fleeing misdemeanant or felon require that the police simply have probable cause to arrest the suspect, or must the officer be intending to make an actual physical arrest of the suspect?

It appears that the officers must not only have probable cause to arrest the suspect but must be pursuing the suspect to complete the arrest. (**See *United States* v. *Santana*** (1976) 427 U.S.

38, 43 ["a suspect may not defeat an arrest *which has been set in motion* in a public place . . . by the expedient of escaping to a private place."]; ***People* v. *Lloyd*** (1989) 216 Cal.App.3d 1425, 1428 ["One type of exigent circumstances has been recognized where an arrest or detention based on probable cause *is begun* in a public place, but the suspect retreats into a private place in an attempt to thwart the arrest."].) However, this does not mean the hot pursuit exception is inapplicable just because the intent to arrest the defendant does not develop until after the defendant has fled. (**See *United States* v. *Cruz*** (10th Cir. 2020) 977 F.3d 998, 1006.)

> ***Editor's note:** Considering whether an officer actually intended to arrest the suspect in this regard does not mean that consideration of the officer's intent in other regards is relevant to whether an exigency exists. "Generally, a court will find a warrantless entry justified if the facts available to the officer at the moment of the entry would cause *a person of reasonable caution* to believe that the action taken was appropriate. [Citation.]" ***(People* v. *Rogers*** (2009) 46 Cal.4th 1136, 1157, emphasis added by IPG.)

Of course, it would be the rare occasion where an officer chases a suspect for whom there is probable cause to arrest without an intent to arrest the suspect. Although, presumably, a variant of the exigent circumstances exception would apply if an officer entered the home in hot pursuit of a suspect (without intending to arrest the suspect) in order to prevent the loss or destruction of evidence even if the officer did not intend to effectuate an arrest.

6. Can an officer *always* enter a home if the suspect has been *physically* arrested, but breaks away, and then flees into the home?

The majority in ***Lange*** did not expressly state that the case-by case approach would be inapplicable if the suspect fled *after having been taken into custody*. However, the majority opinion noted that the "common law in place at the Constitution's founding . . . may be 'instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable" and that "the Framers' view provides a baseline for our own day." (***Id***. at p. 2022.) The majority opinion then went on to acknowledge that under the common law in place at the Constitution's founding, no distinction was drawn between felonies and misdemeanors when a person escaped from a physical arrest: "[I]f a person had already been arrested and then escaped from custody, an officer could always search for him at home." (***Id***. at p. 2024, fn. 5.)

Justice Thomas, in his concurring opinion, more directly addressed the issue. Justice Thomas first observed "[t]he majority sets out a general rule requiring a case-by-case inquiry when an officer enters a home without a warrant in pursuit of a person suspected of committing a misdemeanor."

(***Id.*** at p. 2025.) But Justice Thomas then went on to point out that "history suggests several categorical exceptions to this rule. First, warrantless entry is categorically allowed when a person is arrested and escapes." (***Id***. at pp. 2025-2026.) Indeed, Justice Thomas only joined the opinion "on the understanding that its general case-by-case rule does not foreclose historical, categorical exceptions." (***Id***. at p. 2026.)

Considering the observations of the majority and Justice Thomas, it appears the High Court would be amenable to endorsing a categorical approach when a suspect flees from custody *regardless* of whether the original offense for which the defendant was arrested was a misdemeanor or a felony.

Note that if the person has escaped through use of force or violence after being arrested, it is a violation of Penal Code section 69. (**See *People* v. *Redmond*** (1966) 246 Cal.App.2d 852, 863.) Section 69 is a felony and thus the categorical rule should apply in this circumstance regardless of whether a categorical or case-by-case approach is dictated when a person flees after having been arrested for a misdemeanor. (**But see** this IPG, at p. 21 [discussing which approach applies when a crime is a wobbler].)

7. Does the exigent circumstance exception allowing entry when officers are in hot pursuit of a fleeing misdemeanant (and an exigency is present) or a fleeing felon (in all cases) apply when the suspect is merely fleeing a *detention*, i.e., where police only have reasonable suspicion to temporarily detain the suspect?

The High Court has never held that an officer may enter a home merely to effectuate a detention based on reasonable suspicion. Moreover, an arrest cannot be made without probable cause. Courts are split as to whether the ***Santana*** rationale may be extended allow an entry into a home based on reasonable suspicion, where the hot pursuit begins in a public place and continues across the threshold of a home. (**See *State* v. *Lala*** (La. Ct. App. 2008) 1 So.3d 606, 611 [discussing split and cases]; ***Hopkins* v. *State*** (Ala. Crim. App. 1994) 661 So.2d 774, 778-779 [same]; ***State* v. *Beavers*** (Utah Ct. App. 1993) 859 P.2d 9, 14-17 [same].) The High Court did not address this question in ***Lange*** and it is *possible* for an argument to be crafted that the level of suspicion (like the severity of the crime being investigated) should be treated simply as factor in deciding whether a warrantless entry may be excused under exigent circumstances exception. (**See *Lange* v. *California*** (2021) 141 S.Ct. 2011, 2017 ["the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"].)

However, regardless of whether the suspect is fleeing from an attempted detention, rather than an attempted arrest, once the suspect flees from a lawful detention, the reasonable suspicion will ripen into probable cause to arrest for violating Penal Code section 148 or Vehicle Code section 2800. And, *assuming other exigent circumstances are present*, this should permit entry into the home to effectuate the arrest for violating one of those sections. (**See *In re Lavoyne M.*** (1990) 221 Cal.App.3d 154, 159; ***People* v. *Lloyd*** (1989) 216 Cal.App.3d 1425, 1429; ***People* v. *Abes*** (1985) 174 Cal.App.3d 796, 806–807.)

8. May police enter a home when in hot pursuit of a person who has committed an infraction?

Considering that infractions are even less serious violations of the law than misdemeanors, courts will be even less likely to permit entry into a home in hot pursuit of an individual who has committed an infraction than when the individuals has committed a misdemeanor. The necessity of preventing escape, harm to others, or loss of evidence is less likely to be present when the only offense the person is suspected of having committed is an infraction. Nevertheless, just as flight converts reasonable suspicion to detain into probable cause to arrest for a misdemeanor, so does flight from an infraction convert probable cause to arrest* for an infraction into probable cause to arrest for a misdemeanor. (**See** this IPG, at pp. 15-16.)

> ***Editor's note:** While a person being cited for an infraction is technically under "arrest," such a non-custodial arrest does not ordinarily permit a search incident to arrest. (**See** 2020-IPG-43(*Lopez* Terminates *Arturo D*. Searches for Personal ID) at p. 23 [for a discussion of citation arrests versus custodial arrests].) Whether a person is being chased in order to make a non-custodial arrest versus a custodial arrest may also play a role in deciding whether an officer's entry into a home in hot pursuit of a person suspected of committing an infraction will be deemed valid under the case-by-case approach adopted in *Lange*.

9. May police enter a home in hot pursuit of a person who the police seek to arrest for driving under the influence under the rationale that the dissipation of the blood alcohol provides a sufficient exigency over and above the flight?

In ***Missouri* v. *McNeely*** (2013) 569 U.S. 141, the Supreme Court discussed whether the exigent circumstances would *automatically* permit an officer to force a defendant suspected of having driven a vehicle under the influence of alcohol to submit to a *warrantless blood draw*. The High Court "recognized that in some circumstances law enforcement officers may conduct a search

without a warrant to prevent the imminent destruction of evidence." (***Id***. at p. 149.) And that "because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. (***Id***. at p. 152.) Using an analysis somewhat similar to analysis adopted in ***Lange*** regarding whether flight always creates an exigency permitting entry into a home in hot pursuit of a suspect, the ***McNeely*** court held "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency ***in every case*** sufficient to justify conducting a blood test without a warrant." (***Id***. at p. 165, emphasis added by IPG.) The Court stated: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." (***Id***. at p. 152.) On the other hand, the Court also stated: "We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." (***Id***. at pp. 152–153.) Moreover, the Court emphasized that "the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that ***must*** be considered in deciding whether a warrant is required." (***Id***. at p. 165, emphasis added by IPG.) Indeed, the Court expressed certainty that "cases will arise when anticipated delays in obtaining a warrant* will justify a blood test without judicial authorization, ***for in every case the law must be concerned that evidence is being destroyed***." (***Ibid***, emphasis added by IPG.)

*__Editor's note:__ For a discussion of the how realistic it is that officers will be able to obtain a warrant in the time necessary to avoid the risks posed by the exigencies attendant when a suspect flees, **see** this IPG, at p. 22.)

In ***Mitchell* v. *Wisconsin*** (2019) 139 S.Ct. 2525, the Court addressed whether a warrantless blood draw from an unconscious suspect following an accident was permissible under the exigent circumstances exception. There, the High Court characterized its holding in ***McNeely*** as standing for the proposition that the "the fleeting quality of BAC evidence alone is not enough" by itself to justify a warrantless blood draw. (***Id***. at 156.) But after doing so, the Court observed that in ***Schmerber* v. *California*** (1966) 384 U.S. 757, the loss of BAC evidence "***did*** justify a blood test of a drunk driver who had gotten into a car accident that gave police other pressing duties, for then the 'further delay' caused by a warrant application really 'would have threatened the destruction of evidence.'" (***Mitchell*** at p. 2533 citing to ***McNeely*** at 152.)

The ***Mitchell*** court stated: "Like ***Schmerber***, this case sits much higher than ***McNeely*** on the exigency spectrum. ***McNeely*** was about the minimum degree of urgency common to all drunk-driving cases. In ***Schmerber***, a car accident heightened that urgency. And here Mitchell's medical condition did just the same." (***Mitchell*** at p. 2533.) "Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." (***Id***. at p. 2537.)

In ***Welsh* v. *Wisconsin*** (1984) 466 U.S. 740, a case involving "a warrantless, nighttime entry into the [defendant's] home to arrest him for a civil traffic offense," the High Court stated: "a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." (***Id***. at p. 754.) However, the entry and arrest did not involve a hot pursuit, which was one of the reasons ***Welsh*** held the entry invalid. (**See *State* v. *Ramirez*** (Utah Ct. App. 1991) 814 P.2d 1131, 1134.)

In ***Lange***, the majority hinged its analysis that "flight" alone will not automatically justify an entry into a home in hot pursuit in part by observing "that when a minor offense (***and no flight***) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry." (***Id***. at p. 2013 citing to ***Welsh* v. *Wisconsin*** (1984) 466 U.S. 740, 742–743, emphasis added.) The majority in ***Lange*** followed that comment up, however, by stating: "Add a suspect's flight ***and the calculus changes***" just "not enough to justify a categorical rule." (***Id***. at p 2013, emphasis added by IPG.) That is, in many circumstances, "flight creates a need for police to act swiftly. But no evidence suggests that every case of misdemeanor flight creates such a need." (***Ibid***.)

In ***People* v. *Thompson*** (2006) 38 Cal.4th 811, a case pre-dating all the aforementioned High Court decisions except ***Welsh***, the California Supreme Court upheld an entry into a home to prevent the loss of a suspect's blood alcohol level where officers had probable cause to arrest for driving under the influence under the exigent circumstances exception – even though the ***Thompson*** court assumed the officers were ***not*** in hot pursuit. (***Thompson*** at pp. 828-829.)

The ***Thompson*** court distinguished the ***Welsh*** case, finding it did not provide a categorical bar to a warrantless entry to effect an arrest for driving under the influence. The ***Thompson*** court observed that under ***Welsh***, while "an important factor to be considered in determining whether an exigency exists is the gravity of the underlying offense for which the arrest is being made," the gravity of the offense is assessed by the classification and punishment the state attaches to it. (***Thompson*** at pp. 820-821.) The ***Thompson*** court noted that in Wisconsin, at the time ***Welsh***

was decided, a first-time DUI offense was treated a noncriminal, civil forfeiture offense for which no imprisonment was possible. (***Id***. at p. 821.) Whereas, in California, the offense of DUI is treated more seriously as a misdemeanor criminal offense that is punishable by up to 6 months in jail and by no less than 96 hours in jail. (***Ibid***; **but see *Lange***, at p. 2020, fn. 2 [stating "The concurrence is wrong to say that ***Welsh*** applies only to nonjailable offenses, and not to minor crimes that are labeled misdemeanors."].)

The ***Thompson*** court reasoned that entry into the home was justified given (i) the serious nature of, and potential incarceration for, offense of driving under the influence (DUI); (ii) the probable cause to believe the crime had occurred very recently; and (iii) the exigent circumstances of dissipation of alcohol in defendant's blood, the possibility of defendant's ingesting more alcohol to mask blood-alcohol content while driving, and the possibility that "defendant, who had attempted to flee out the back door upon learning of their presence, would escape again or otherwise act to conceal his intoxication if given the opportunity." (***Id***. at pp. 825-827.)

In ***Hopkins* v. *Bonvicino*** (9th Cir. 2009) 573 F.3d 752, the Ninth Circuit cited to ***Welsh*** in support of its conclusion the exigent circumstances exception would *not* permit officers to enter a home to prevent the loss of a suspect's blood alcohol level *where there was no hot pursuit* and disagreeing with ***Thompson*** that ***Welsh*** could be distinguished on the ground that it involved a "nonjailable" offense. (***Hopkins*** at p. 768.)

Taking all the aforementioned cases together, the following principles emerge:

1. The potential loss of some BAC evidence from a person arrested for driving under the influence of alcohol is an exigent circumstance - but not one that, by itself, will permit a warrantless blood draw. There must be an additional evidence that a warrant cannot be obtained in sufficient time to capture the BAC.

2. The potential loss of some BAC evidence from a person for whom probable cause exists to believe the person was driving under the influence will probably not be a sufficient exigent circumstance, *by itself*, to allow entry into a home to arrest the person – when the officers are not in hot pursuit of the person.

3. Flight to avoid arrest for a misdemeanor (e.g., a DUI) is not sufficient, by itself, to *always* authorize entry into the home to arrest a suspect under the hot pursuit exception. There must be additional evidence creating an exigent circumstance which establishes that there is no time to obtain a warrant allowing entry.

None of the cases cited above involve the situation where (i) officers have probable cause to arrest a suspect for DUI; (ii) the officers are in hot pursuit of the suspect; (iii) the suspect flees into a home; and (iv) the officers are concerned that obtaining a warrant before entering a home will result in the loss of BAC evidence (either through dissipation or ingestion of additional alcohol), the inability to identify the suspect, and/or the escape of the suspect who might even continue to drive. However, in light of these principles espoused in the cases cited above, when officers are in hot pursuit of a suspect for whom probable cause exists to believe the person was driving under the influence, the officers *should* ordinarily be able to enter a home to arrest the suspect.

The loss of evidence of BAC, the possibility of the suspect drinking additional alcohol, and/or the possibility the suspect will escape provides the additional exigency that makes obtaining a warrant unreasonable when a suspect flees to avoid arrest on a misdemeanor DUI charge as required under ***Lange***. This outcome is also *consistent with* the analysis in ***Mitchell*** that a warrantless *blood draw* is permissible when the BAC evidence is dissipating and "some other factor [e.g., the flight of the suspect into the home] creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." (***Id***. at p. 2537 [bracketed information added by IPG].)

10. For purposes of the exigent circumstances exception, is entry onto the *curtilage* treated the same as entry into the home?

The Supreme Court considers the "curtilage" of a home to be the "area adjacent to the home" . . . "to which the activity of home life extends" and includes "the front porch, side garden, or area 'outside the front window'." (***Collins* v. *Virginia*** (2018) 138 S.Ct. 1663, 1671.) It should be assumed that entry onto the *curtilage* of a home will be viewed in the same manner as entry into a home for purposes of determining of whether a warrantless hot pursuit entry will violate the Fourth Amendment.

This is because "[t]o give full practical effect to the [protection provided by the Fourth Amendment to the home]," the High Court "considers curtilage— 'the area "immediately surrounding and associated with the home"'—to be "'part of the home itself for Fourth Amendment purposes.'" (***Collins* v. *Virginia*** (2018) 138 S.Ct. 1663, 1670; **see also *Lange* v. *California*** (2021) 141 S.Ct. 2011, 2028 (conc. opn. Robert, J.) [describing the majority opinion as "[h]olding that flight, on its own, can never justify a warrantless entry into a home (*including its curtilage*)"], emphasis added by IPG.)

11. Which rule applies (the categorical or the case-by-case approach) when the police are in hot pursuit of a person suspected of committing a crime that is a wobbler?

One of the criticisms of adopting a case-by-case approach, instead of a categorical rule, that was made by Justice Roberts in his concurring opinion was that there are many crimes that are "wobblers" and thus an officer will be forced to decide whether an offense for which the arrest is sought is a felony (in which case entry would automatically be permissible) or a misdemeanor (in which case the entry would be fact dependent). After noting the majority approach would be "famously difficult to apply" because the distinction between misdemeanors and felonies is "esoteric," Justice Roberts stated: "Layer on top of this that for certain offenses the exact same conduct may be charged as a misdemeanor or felony depending on the discretionary decisions of the prosecutor and the judge (what California refers to as a 'wobbler'), and we have a recipe for paralysis in the face of flight." (***Id***. at p. 2035.)

So, if an offense is a wobbler, what rule applies? Certainly, an argument can be made that if the offense is sufficiently serious to be charged as a felony, it should be treated as sufficiently serious to be treated as a felony for purposes of determining whether entry into a home in hot pursuit of a fleeing offender should be categorically allowed. The rationale would be the same rationale for why the legislature and case law treat the statute of limitations for wobblers as if the crime were charged as a felony even if the crime is ultimately charged as a misdemeanor. (**See** Pen. Code, § 805 ["For the purpose of determining the applicable limitation of time pursuant to this chapter: [¶] An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed…."]; ***People* v. *Soni*** (2005) 134 Cal.App.4th 1510, 1515 ["wobblers, no matter how filed, enjoy the three-year statute of limitations applicable to most felonies"]; **accord *People* v. *Crabtree*** (2009) 169 Cal.App.4th 1293, 1310; ***People* v. *Superior Court (Ongley)*** (1987) 195 Cal.App.3d 165, 1169.)

***Editor's note:** If courts are inclined to apply the case-by-case approach in situations where the outcome would be different under a categorical approach based on how the offense is ultimately charged, then this should be a consideration in deciding whether to charge the case as a misdemeanor or a felony.

12. How long must obtaining a warrant take in order to meet the requirement under the exigent circumstance exception that there be insufficient time to obtain a warrant?

"Whether a 'now or never situation' actually exists—whether an officer has 'no time to secure a warrant'—depends upon facts on the ground." (***Lange* v. *California*** (2021) 141 S.Ct. 2011, 2018.) In ***Missouri* v. *McNeely*** (2013) 569 U.S. 141, a case addressing whether exigent circumstances would *automatically* permit an officer to force a defendant suspected of having driven a vehicle under the influence of alcohol to submit to a blood draw, the Court stated that because "[t]he police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction," . . . we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances." (***Id***. at p. 158, fn. 7 [and noting "[r]eviewing courts . . . should assess those judgments '"from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight'"].)

In most cases involving hot pursuit, it will be obvious that a warrant could not be obtained in a sufficiently timely fashion to address the exigency. For example, as recognized by the High Court in ***McNeely*** where a "suspect has control over easily disposable evidence," as in most destruction-of-evidence cases, the "police are truly confronted with a "'now or never'" situation." (***Missouri* v. *McNeely*** (2013) 569 U.S. 141, 153 [and distinguishing these situations in some regards from the situation where the exigency is based on a dissipating blood alcohol level.)

Nevertheless, in figuring out whether there is time to secure a warrant, **prosecutors should expect to place on the record what amount of time and effort would have to be expended if the pursuit were stopped while seeking a warrant**. In this regard, reference can be made to the concurring opinion of Justice Roberts, where the Chief Justice stated: "Only in the best circumstances can [a warrant] be obtained in under an hour, see Brief for Respondent 33, and it usually takes much longer than that, see Brief for Los Angeles County Police Chiefs' Association as Amicus Curiae 24–25. Even electronic warrants may involve "time-consuming formalities." *McNeely*, 569 U.S., at 155, 133 S.Ct. 1552." (***Lange*** at p. 2032.)*

Editor's note:** In ***Missouri* v. *McNeely (2013) 569 U.S. 141, there was evidence presented in the trial court that "in a typical DWI case, it takes between 90 minutes and 2 hours to obtain a search warrant following an arrest." (***Id***. at p. 163, fn. 11.) However, there was also evidence presented that there were shorter processing times. (***Ibid***.) One of the most frustrating aspects of the majority opinion in ***McNeely*** was the simultaneous indication that some loss of direct blood alcohol evidence will not necessarily create an exigency, but that, *at some unknown point*, the potential loss of direct blood alcohol evidence could create an exigency. (***Id***. at pp. 156, 164-165.)

13. Can the Fourth Amendment be violated if there exist exigent circumstances allowing an officer to enter a home in hot pursuit but the entry itself is done in an unreasonable manner?

The majority opinion in ***Lange*** did not discuss how an entry should be made when an officer enters a home in hot pursuit under the exigent circumstances exception. However, in the concurring opinion of Justice Roberts, the Chief Justice observed: "The officer must in all events effect a reasonable entry. *United States* v. *Ramirez*, 523 U.S. 65, 71 (1998) [alternate citations omitted]. As the lower courts have recognized, hot pursuit gives the officer authority to enter a home, but "it does not have any bearing on the constitutionality of the manner in which he enters the home." [Citation omitted.] And his authority to search is circumscribed, limited to 'those spaces where a person may be found' for 'no longer than it takes to complete the arrest and depart the premises.' *Maryland* v. *Buie*, 494 U.S. 325, 335–336 [alternate citation omitted.]. Finally, arrests conducted 'in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests' are subject to even more stringent review. *Whren v. United States*, 517 U.S. 806, 818 (1996) [alternate citations omitted.]."

A. Does an officer in hot pursuit have to comply with the knock-notice statutes?

Compliance with the knock-notice requirement "is not necessary when circumstances presen[t] a threat of physical violence, or if there is reason to believe that evidence would likely be destroyed if advance notice were given, or if knocking and announcing would be futile." (***Hudson v. Michigan*** (2006) 547 U.S. 586, 589–590.) It is required "only that police have a reasonable suspicion … under the particular circumstances that one of these grounds for failing to knock and announce exists, and . . . [t]his showing is not high." (***Id***. at 590.)

"When an officer is in hot pursuit of a suspect, compliance with the knock-notice statute is excused." (***In re Lavoyne M.*** (1990) 221 Cal.App.3d 154, 160; **see also *People* v. *Patino*** (1979) 95 Cal.App.3d 11, 20 ["a failure to comply with section 844 does not make an arrest illegal '"if the specific facts known to the officer before his entry are sufficient to support his good faith belief that compliance will increase his peril, frustrate the arrest, or permit the destruction of evidence.'"]; **see also *United States* v. *Flores*** (9th Cir. 1976) 540 F.2d 432, 435 ["entry in 'hot pursuit' has always been considered an exception to the knock and announce provisions of" the federal knock notice statute]; **but see *Ingram* v. *City of Columbus*** (6th Cir. 1999) 185 F.3d

579, 588 [the law "requires courts to conduct an independent, case-by-case analysis to determine whether noncompliance with the knock and announce rule is excusable"].)

In any event, a violation of the knock-notice requirement does not require suppression of evidence found during a search. (***Hudson* v. *Michigan*** (2006) 547 U.S. 586.)

14. Will the good faith exception preventing the exclusion of evidence when officers act upon established precedent apply to entries into a home occurring before *Lange* issued, i.e., when pursuit into the home would have been lawful under California appellate authority but not under the rule as laid out in *Lange*?

"[S]earches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the [Fourth Amendment] exclusionary rule." (***Davis* v. *United States*** (2011) 564 U.S. 229, 232; **see also *Lange*** (conc. opn., Thomas, J.) at p. 2026.) In California, binding appellate precedent prior to the decision in ***Lange*** established that the exception to the warrant requirement allowing entry into a home when a suspect was pursued into based on an arrest set in motion in a public place applied *categorically* regardless of whether the flight was from an attempted arrest for a felony or a misdemeanor. (**See *Stanton* v. *Sims*** (2013) 571 U.S. 3, 9; ***In re Lavoyne M.*** (1990) 221 Cal.App.3d 154, 159; ***People* v. *Lloyd*** (1989) 216 Cal.App.3d 1425, 1430.) Accordingly, if, prior to the decision in ***Lange***, officers entered a home under the exigent circumstances exception to arrest a defendant fleeing from an arrest for a misdemeanor, the entry should clearly be upheld under the rule announced in ***Davis***, even though the entry might be deemed impermissible if the case-by-case analysis of the majority in ***Lange*** were the governing law at the time of the entry.

15. Does the exclusionary rule apply to evidence seized from a defendant or seen in plain sight after entry into a home when the flight of a misdemeanant did not permit a warrantless entry into the home?

Although in many cases, evidence obtained following a breach of the Fourth Amendment must be suppressed, there is a credible argument that the exclusionary rule should not be applied when officers enter a home in order to arrest a suspect for whom probable cause to arrest exists. This

argument was articulated in the concurring opinion of Justice Thomas in ***Lange***, who concluded that even if the officer's entry in *Lange* is deemed unlawful on remand, "the federal exclusionary rule does not require suppressing ***any*** evidence." (***Id***. at p. 2026, emphasis added.) The argument is summarized in this IPG at pp. 6-7 [discussing the concurring opinion of Justice Thomas in ***Lange***].)

At a minimum, the exclusionary rule may not be applied to invalidate the arrest or require the suppression of any evidence obtained *from the defendant* following the arrest. "Where there is probable cause to arrest, the fact that police illegally enter a home to make a warrantless arrest neither invalidates the arrest itself nor requires suppression of any postarrest statements the defendant makes at the police station." (***People* v. *Watkins*** (1994) 26 Cal.App.4th 19, 29 [citing to ***People* v. *Marquez*** (1992) 1 Cal.4th 553, 568-569].) As stated in ***Watkins***:

> "The United States Supreme Court considered a similar situation in ***New York* v. *Harris*** (1990) 495 U.S. 14 [109 L.Ed.2d 13, 110 S.Ct. 1640], where police, without a warrant but with probable cause, arrested Harris in his apartment. The court noted that the purpose of the warrant requirement for an arrest in the home is to protect the home. Thus anything incriminating that the police gathered from arresting Harris in his home, rather than elsewhere, must be suppressed. The court refused to require suppression of statements made at the police station, explaining: 'Nothing in the reasoning of that case [***Payton* v. *New York***, ***supra***, 445 U.S. 573] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest. [Citation.] Nor is there any claim that the warrantless arrest required the police to release Harris or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given ***Miranda*** warnings and allowed to talk. ***For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his door step, illegally entered his home to search for evidence, and later interrogated Harris at the station house***. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible.' (Id. at p. 18 [109 L.Ed.2d at pp. 20-21].)" (***Marquez***, ***supra***, 1 Cal.4th at pp. 568-569, brackets in ***Marquez***.)

NEXT EDITION: THE IMPACT OF THE INTRODUCTION OF INADMISSIBLE EVIDENCE (INADVERTENTLY OR NOT) AND HOW TO MITIGATE THE DAMAGE *OR* A PRINT ONLY EDITION ON PROTECTING CONFIDENTIAL INFORMATION AND INFORMANTS.

Suggestions for future topics to be covered by the Inquisitive Prosecutor's Guide, as well as any other comments or criticisms, should be directed to Jeff Rubin at (408) 792-1065.