ADMJUS 110: PRINCIPLES AND PROCEDURES OF THE JUSTICE SYSTEM



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Administration of Justice 110

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Licensing

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CHAPTER OVERVIEW

1: Briefing Cases

1.1: Case Brief Nomenclature

1.2: Case Brief Sample - Miranda v. Arizona

1.3: Case Brief Template

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1.1: Case Brief Nomenclature

Case (1)
Case Cites (2)

Court: (3)

Judicial History: (4)

Facts: (5)

Issue: (6)

Holding: (7)

Reasoning: (8)

Decision: (9)

Concurrent Opinion: (10)

Dissenting Opinion: (11)

1. **Case**. The case identifies the parties involved in the controversy.
2. **Case Cites.** The citation shows where to find the case in various legal data bases such as case reporters, case digests, or through the use of legal research providers such as Lexis Nexis or Westlaw.
3. **Court.** This refers to the final court authority deciding the controversy.
4. **Judicial History.** This is the procedural judicial history of the case. It tells you which court decided what and shows how the case ended up in the final court's authority and jurisdiction.
5. **Facts.** Identifies the parties in the case. It also provides a summary of the legally relevant facts explaining what occurred between the parties before the case entered into the judicial system.
6. **Issue.** This is the question or rule of law being decided by the courts. It is typically posed in a question format. The issue is derived from the facts specific to each case.
7. **Holding.** The holding answers the question posed in the issue. It is usually answered positively or negatively, "yes" or "no."
8. **Reasoning.** The reasoning tells the reader why the court decided the issue the way it did. It provides the legal analysis of the legal arguments behind the case.
9. **Decision.** The decision of the court shows how the court disposed of the case. For example, the court can decide to sustain or reverse the decision of the lower court.
10. -11**. Concurrent / Dissenting Opinion.** A judge hearing a case may or may not agree with the majority of judges' decision. If so, he may write a separate concurring opinion if he agrees with the outcome of the case but for differing reasons as to why. Or, the judge may write a dissenting opinion detailing the reasons for refusing to join in the majority opinion.

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1.2: Case Brief Sample - Miranda v. Arizona

384 U.S. 436 (1966)

Court: United States Supreme Court.

Judicial History: Ernesto Miranda (D) was convicted for kidnapping, rape, and robbery by the Arizona criminal courts. D appealed to the Arizona Supreme Court but the conviction was sustained. The U.S. Supreme Court granted certiorari to determine the role police have in protecting the rights of the accused from issues arising in four different cases (Miranda v. Arizona; Vignera v. New York; Westover v. United Stated; and California v. Stewart).

Facts: D was a Mexican immigrant living in Phoenix, AZ. D had a history of mental instability and was a 9th grade drop out. D was identified as a suspect in the kidnapping and rape of an 18 year old girl. D was arrested by the Phoenix Police Department at his home and taken to the police station for questioning. D was not advised of his Constitutional guarantees of self-incrimination or to have attorney present. After two hours of police interrogation, D confessed to the crimes. D was convicted and sentenced concurrently to twenty years each. D appealed to the Arizona Supreme Court citing that his confession was not truly voluntary but the AZ Supreme Court sustained the conviction.

Issue: During custodial interrogation and before questioning, must the police (1) inform a suspect that he has a right to remain silent (2) warn him that any statements he makes may be used against him and (3) advise him that he has a right to an attorney?

Holding: Yes. Law enforcement officers must inform a person of his rights when that person is in *custody* and subject to an *interrogation.* Any incriminating statements obtained in violation of these rights are inadmissible at trial.

Reasoning: The Supreme Court scrutinized coercive conditions in which police were obtaining and introducing incriminating admissions obtained during police questioning which was in conflict with one of the Nation's most cherished principlesthe right against self-incrimination. In order to preserve Constitutional protections guaranteed by the 5th and 6th Amendments, the Court ruled that these protections would be extended from criminal trials to custodial interrogations. Statements or confessions would not be made admissible at trial unless a suspect was informed that (1) he has a right to remain silent (2) anything he says will be used against him in court (3) he has the right to consult with a lawyer and to have that lawyer present during questioning and (4) if he cannot afford and attorney, one will be appointed to him by the court.

Decision: 5-4. Miranda's conviction overturned and remanded back to state court.

Opinion: Chief Justice Warren, joined by Justices Black, Douglas, Brennan, and Fortas.

Dissenting Opinions: Written by Chief Justice Harlan and joined by Justices Stewart and White. These new rules do not discourage police brutality or coercion but rather negate police pressures and ultimately discourage any suspect confessions at all. Furthermore, the new rules do not discourage any officers already predisposed to corrupt practices. The court is taking a real risk with society's welfare as it relates to crime control and engaging in hazardous experimentation.

Dissenting in Part Opinion: Written by Justice White. There is no support in the history of the protection to support the majority findings. Furthermore, the language does not allow for such a basis in common law.

Follow-Up

After Miranda's conviction was overturned, the state court retired him. Miranda's confession was not introduced into evidence. The prosecution relied on witness testimony and Miranda was again convicted and sentenced to 20-30 years in prison.

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1.3: Case Brief Template

Case

Case Cites

Court:

Judicial History:

Facts:

Issue:

Holding:

Reasoning:

Decision:

Concurrent Opinion:

Dissenting Opinion:

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CHAPTER OVERVIEW

2: The 4th Amendment

2.1: Amendmant IV

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2.1: Amendmant IV

Searches and Seizures

The purpose of the 4th Amendment is to deny the national government the authority to make general searches and seizures of property. A major issue over the years has been the interpretation of "unreasonable" searches and seizures. The rules can be complicated. They also change often, but the general principle is that searches are valid methods of enforcing law and order, but unreasonable searches are prohibited.



Figure **2.1.1**: Magnifying class held over the opening phrase of the constitution. "We the People". PC Credits https://unsplash.com/@garand

The Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Over the years, the Supreme Court has interpreted the 4th Amendment to allow the police to search the following:

- The person arrested
- Things in plain view of the accused person
- Places or things that the arrested person could touch or reach or are otherwise in the person's "immediate control"
- Property where there is strong suspicion that a person could be in immediate danger

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CHAPTER OVERVIEW

3: Consensual Encounters – Investigative Contacts

3.1: Investigative Contacts - POV

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3.1: Investigative Contacts - POV

Street encounters between citizens and police officers are incredibly rich in diversity.[1]

There are probably no encounters on the streets (or anywhere else) that are more "rich in diversity" than those daily exchanges between officers and the public. After all, they run the gamut from "wholly friendly exchanges of pleasantries" to "hostile confrontations of armed men involving arrests, or injuries, or loss of life."[2]

Situated between these two extremes—but much closer to the "wholly friendly exchange" end—is a type of encounter known as an investigative contact or "consensual encounter." Simply put, a contact occurs when an officer, lacking grounds to detain a certain suspect, attempts to confirm or dispel his suspicions by asking him questions and maybe seeking consent to search his person or possessions. As the Supreme Court explained:

> Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage— provided they do not induce cooperation by coercive means.[3]

One of the interesting things about contacts is that they usually pose a dilemma for both the suspect and the officer. For the suspect (assuming he's guilty) the last person on earth he wants to chat with is someone who carries handcuffs. But he also knows that his refusal to cooperate, or maybe even a hesitation, might be interpreted as confirmation that he is guilty. So he will ordinarily play along for a while and see how things go, maybe try to outwit the officer or at least make up a story that is not an obvious crock.

Meanwhile, the officer knows that, while his badge might provide some "psychological inducement,"[4] he cannot "throw his weight around."[5] Thus he must employ restraint and resourcefulness, all the while keeping in mind that the encounter will instantly become a de facto detention if it crosses the line between voluntariness and compulsion.[6] So it often happens that both the suspect and the officer are role-playing—and they both know that the other knows it.

For officers, however, acting skills and resourcefulness are not enough. As one court put it, they must also have been "carefully schooled" in certain legal rules—the "do's and don'ts" of police contacts[7]—so as to prevent these encounters from inadvertently becoming de facto detentions, at least until they develop grounds to detain or arrest. What are these "do's and don'ts"? That is the subject of this article. To set the stage, it should be noted that, whenever an officer interacts with anyone in his official capacity, the law will classify the interaction as an arrest, detention, or contact. Arrests and detentions differ "markedly"[8] from contacts because they constitute Fourth Amendment "seizures" which require some level of suspicion; i.e., probable cause or reasonable suspicion.[9] So, as long as the encounter remains merely a contact, the Fourth Amendment and its various restrictions simply do not apply.

One other thing. Officers will sometimes contact a suspect at his home. Known as "knock and talks," these encounters are subject to the same rules as contacts that occur in public places. But because they are viewed as more of an intrusion, there are some additional restrictions that we will cover in the article "Knock and Talks" that begins below.

The Test: "Free to Terminate"

A police-suspect encounter will be deemed a contact if a reasonable person in the suspect's position would have "felt free to decline the officers' requests or otherwise terminate the encounter."[10] In other words, "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required."[11] Later we will discuss the many circumstances that are relevant in making this determination. But first it will be helpful to discuss some important general principles.

REASONABLE "INNOCENT" PERSON

We begin with a principle that might seem peculiar at first: The fictitious "reasonable person" is "innocent" of the crime under investigation. What this means is that the circumstances are viewed through the eyes of a person who, although not necessarily a pillar of the community, is not currently worried about being arrested.[12] Said the Third Circuit, "[W]hat a guilty [suspect] would feel and how he would react are irrelevant to our analysis because the reasonable person test presupposes an innocent person."[13]

The reason this is significant is that a person who was guilty of the crime under investigation would necessarilyviewtheofficers'words and actions much differently—much more ominously—than an innocent person, and might therefore erroneously conclude that any perceived restriction on his freedom was an indication that he had been detained. For

example, in In *re Kemonte H.* the court ruled that a reasonable innocent person who saw two officers approaching him on the street "would not have felt restrained" but would instead "only conclude that the officers wanted to talk to him."14

FREE TO DO WHAT?

In the past, the test was whether a reasonable person would have believed he was "free to leave" or "free to walk away" from the officers.15 This test made sense—and it still does if the encounter occurs on the streets or other place that the suspect could easily leave if he wanted to. But contacts also occur in places that the suspect has no desire to leave (e.g., his home, his car) and in places he cannot leave easily (e.g., a bus, the shoulder of a freeway, his workplace. For that reason, the Supreme Court in *Florida v. Bostick* simplified things by ruling that freedom to terminate—not freedom to leave—is the correct test because it can be applied "equally to police encounters that take place on trains, planes, and city streets."16 (In this article, we will use the terms "free to terminate," "free to go" and "free to leave" interchangeably.)

OBJECTIVE VS. SUBJECTIVE CIRCUMSTANCES

In applying the "free to terminate" test the only circumstances that matter are those that the suspect could have seen or heard. Thus, the officer's thoughts, beliefs, suspicions, and plans are irrelevant unless they were somehow communicated to the suspect.170

As the California Supreme Court explained:

> [A]n officer's beliefs concerning the potential culpability of the individual being questioned are relevant to determining whether a seizure occurred only if those beliefs were somehow manifested to the individual being interviewed—by word or deed—and would have affected how a reasonable person in that position would perceive his or her freedom to leave.18

For the same reason, the suspect's subjective belief that he could not freely terminate the encounter is also immaterial.19 For example, an encounter will not be deemed a seizure merely because the suspect testified that, based on his prior experiences with officers, he thought he would be arrested if he did not comply with all of the officer's requests.20

SHOULD VS. MUST

The test is whether a reasonable person would have believed he must stay or was otherwise *required* to cooperate with officers. This means a detention will not result merely because a reasonable person would have believed he *should* stay and cooperate, or because the officer's request made him "uncomfortable."21 As the Court of Appeal noted, "Cooperative citizens may ordinarily feel they should respond when approached by an officer on the street but this does not, by itself, mean that they do not have a right to leave if they so desire."22

REFUSAL TO COOPERATE

Because contacts are, by definition, consensual, a suspect may refuse to talk with officers, refuse to ID himself, or otherwise not cooperate.23 "Implicit in the notion of a consensual encounter," said the Court of Appeal, "is a choice on the part of the citizen not to consent but to decline to listen to the questions at all and go on his way."24 Or, as the Ninth Circuit put it, "When a citizen expresses his or her desire not to cooperate, continued questioning cannot be deemed consensual."25

COMPARE MIRANDA

It is important not to confuse the "free to terminate" test with *Miranda's* test for determining whether a suspect was "in custody." While both tests attempt to gauge the coercive pressures that existed during a police encounter, a suspect will be deemed "in custody" for Miranda purposes only if he reasonably believed he was effectively under arrest.26 But, as noted, a contact will become a de facto detention if the suspect reasonably believed that he was not free to terminate the encounter.

IF THE SUSPECT RUNS

There is one exception to the "free to terminate" rule: If the suspect ran from the officers when they attempted to contact him, and if they gave chase, the encounter will not be deemed a seizure until they apprehend him.27 Thus, if the suspect discarded drugs, weapons or other evidence while running, the evidence will not be suppressed on grounds that the officers lacked grounds to detain or arrest him.

TOTALITY OF CIRCUMSTANCES

In applying the "free to terminate" test, the courts will consider the totality of circumstances.28 Although there are some actions that will, in and of themselves, result in a seizure (e.g., pulling a gun), in most cases it takes a "collective show of authority."29 As

the California Supreme Court explained, “This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation.”30

FREE TO TERMINATE VS. STREET REALITY

Before going further, it must be acknowledged that many of the things that officers may say and do without converting a contact into a detention would plainly cause some innocent people to believe they were not free to terminate the encounter. But this does not mean, as some have suggested, that the test is a sham or, at best, naive.31

Instead,likemanyotherFourthAmendment“tests” (such as determining whether there are grounds to arrest or pat search a suspect) it is simply a practical—albeit imperfect—compromise between competing interests. As the Fourth Circuit put it, if a suspect decided to walk off, it “may have created an awkward situation,” but “awkwardness alone does not invoke the protections of the Fourth Amendment.”32 Similarly, the Ninth Circuit observed that “we must recognize that there is an element of psychological inducement when a representative of the police initiates a conversation. But it is not the kind of psychological pressure that leads, without more, to an involuntary stop.”33

Having covered the basic principles, we will now examine the various circumstances that are especially relevant in determining whether an encounter with an officer was a contact or a seizure.

Engaging the Suspect

Regardless of why the officers wanted to contact the suspect—whether he was acting suspiciously, or he resembled a wanted fugitive, or he was just hanging out in a high-crime area—the manner in which they get him to stop and talk to them is critical. This is because the usual methods of stopping a suspect constitute such an assertion of police authority that they automatically result in a seizure. As the Supreme Court put it, a seizure is likely to occur if an officer’s “use of language or tone of voice indicat[ed] that compliance with the officer’s request might be compelled.”34

COMMANDS TO STOP

Commanding a suspect to “stop,” “hold it,” “come over here,” or otherwise make himself immediately available to the officer is such an overt display of police authority that it will automatically render the encounter a de facto detention.35 “[W]hen an officer ‘commands’ a citizen to stop,” said the Court of Appeal, “this constitutes a detention because the citizen is no longer free to leave.”36

REQUESTS TO STOP

Unlike a command to stop, a request to do so demonstrates to the suspect that he has a choice and that the officer is not asserting his authority. For example, the courts have ruled that none of the following requests resulted in a detention: “Can I talk to you for a moment?”37 “Hey, how you doing? You mind if we talk?”38 “Gentlemen, may I speak with you just a minute?”39

The courts are aware, however, that an officer’s manner and tone of voice in making such a request may send an implicit message that the suspect has no choice. As the court explained in People v.Franklin:

> [I]f the manner in which the request was made constituted a show of authority such that [the suspect] reasonably might believe he had to comply, then the encounter was transformed into a detention 40

For example, in *U.S. v. Buchanon* a state trooper who had stopped to assist the occupants of a disabled vehicle started thinking they might be transporting drugs, at which point he said, “Gentlemen, why don’t you all come over here on the grass a second if you would please.” Although the trooper’s words were phrased as a request,the court listened to a recording of the incident and concluded that his tone of voice was “one of command.”41

DEMONSTRATING URGENT INTEREST

A request to stop might be deemed a detention if it was accompanied by one or more circumstances that demonstrated an unusual or urgent interest in the suspect.42 This occurred in *People v. Jones* when an Oakland police officer engaged three suspects by pulling his patrol car to the wrong side of the road, parking diagonally against traffic, then asking them to stop. Said the court, “A reasonable man does not believe he is free to leave when directed to stop by a police officer who has arrived suddenly and parked his car in such a way as to obstruct traffic.”43

APPROACH AND ASK QUESTIONS

A detention will not result if an officer merely walks up to a suspect, flashes a badge or otherwise identifies himself and— without saying or doing anything to indicate the suspect was not free to leave—begins to ask him some questions.[44] As the court observed in *People v. Derello*, "[T]he officers were doing exactly what they were lawfully entitled to do, which is to approach and talk if the subject is willing."[45]

RED LIGHTS

Shining a red light at a moving or parked vehicle is essentially a command directed at the driver to stop or stay put and thus necessarily results in a seizure of the driver if he complies.[46] As the Court of Appeal noted, "A reasonable person to whom the red light from a vehicle is directed would be expected to recognize the signal to stop or otherwise be available to the officer."[47]

Although a red light constitutes a command to only those people to whom it reasonably appeared to have been directed (usually the driver),[48] when an officer lights up a vehicle all passengers are also deemed detained. This is because they know that, for officer-safety purposes, the officer may prevent them from leaving the vehicle and may otherwise restrict their movements while he is dealing with the driver. As the Supreme Court explained in *Brendlin v. California*, "An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely."[49] Such a detention of the passengers is, however, legal so long as the officer had grounds to detain the driver or other occupant.

SPOTLIGHTS, HIGH BEAMS, AMBER LIGHTS

Using a white spotlight or high beams to get the suspect's attention is a relevant but usually insignificant circumstance. (This subject is covered below in the section "Officer-Safety Measures.") Also note that because an amber warning light is a safety measure that is directed at approaching motorists, it has no bearing on whether the suspect was detained.[50]

BLOCKING THE SUSPECT'S PATH

A detention will ordinarily result if officers stop the suspect by blocking his vehicle or path so as to prevent him from leaving.[51] For example, in *People v. Wilkins* [52] a San Jose police officer was driving through the parking lot of a convenience store when he noticed that two men in a parked station wagon had ducked down as if to conceal themselves. Having decided to contact them, the officer "parked diagonally" behind the vehicle, effectively blocking it in. He soon learned that one of the men, Wilkins, was on searchable probation, so he searched him and found drugs. The court, however, ruled that the search was unlawful because "the occupants of the station wagon were seized when [the officer] stopped his marked patrol vehicle behind the parked station wagon in such a way that the exit of the parked station wagon was prevented."

A detention will not result, however, merely because officers stopped a patrol car behind a pedestrian or to the side of a vehicle. As the court explained in *People v. Franklin*, "Certainly, an officer's parking behind an ordinary pedestrian reasonably would not be construed as a detention. No attempt was made to block the way." [53] Similarly, the courts have ruled that a seizure does not result when an officer only partially blocked the suspect.[54] For example, in *U.S. v. Basher* the Ninth Circuit ruled that, although an officer testified that he "parked his vehicle nose to nose with Basher's truck," this did not constitute a detention because the officer also testified that "there was room to drive way."[55] And in a forfeiture case, *U.S. v. $25,000*, the court ruled that two DEA agents had not inadvertently detained a person they spoke with at LAX because, among other things, one of the agents stood "about two feet" in front of the suspect, and the other stood "behind and to the side" of him.[56]

"YOU'RE FREE TO GO"

The easiest and most direct method of communicating to a suspect that he is free to go is to say so.[57] Although such a notification is not required,[58] it is recommended, especially in close cases. As the Court of Appeal put it, "[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent."[59]

When giving a "free to go" advisory, however, officers must not place any conditions or restrictions on the suspect's freedom to leave. This is because a suspect is either free to go or he's not; there's no middle ground. For example, despite such an advisory, the courts have ruled that encounters became detentions when an officer told the suspect that he would have to wait for a K9 to arrive,[60] or "wait a minute,"[61] or remain in the patrol car while the officer talked to another person.[62] Similarly, informing a suspect that he is free to go will have little impact if officers conducted themselves in a manner that reasonably indicated he was not; e.g., the officer used a "commanding tone of voice,"[63] the officer kept "leaning over and resting his arms on the driver's door."[64]

LOCATION OF THE ENCOUNTER

The courts frequently mention whether the encounter occurred in a place that was visible to others, the theory being that the presence of potential witnesses might provide the suspect with a greater sense of security.[65] For example, the courts have noted in passing that "many fellow passengers [were] present to witness the officers' conduct,"[66] "the incident occurred on a public street,"[67] "the encounter here occurred in a public place—the parking lot of a [7-Eleven] store— in view of other patrons."[68] Nevertheless, the fact that a contact occurred in a more isolated setting is seldom a significant circumstance. As the Third Circuit observed, "The location in itself does not deprive an individual of his ability to terminate an encounter; he can reject an invitation to talk in a private, as well as a public place."[69]

Officer-Safety Measures

A suspect who is being contacted may, of course, pose a threat to officers. This can present a problem because many basic officer-safety precautions are strongly suggestive of a detention. To help resolve this dilemma, the courts have ruled that some inquiries and requests pertaining to officer safety will not convert the encounter into a seizure.

REMOVE HANDS FROM POCKETS

A detention will not result if officers simply requested that the suspect remove his hands from his pockets or keep them in sight.[70] Thus in such a case, *U.S. v. Basher*, the Ninth Circuit explained that "[p]olice officers routinely ask individuals to keep their hands in sight for officer protection," and here the request "does not appear to have been made in a threatening manner."[71] Once again, note the importance of the officers' choice of words and their attitude. As the Court of Appeal explained, "[I]f the manner in which the request was made constituted a show of authority such that appellant reasonably might believe he had to comply, then the encounter was transformed into a detention."[72]

EXIT THE VEHICLE

For officer-safety purposes, officers may also request that the occupants of a parked vehicle step outside. But a detention will likely result if they expressly or impliedly commanded them to do so. Thus, in *People v. Rico* the court said, "While the appellants' initial stop did not constitute a detention, the officer's subsequent ordering the appellants to alight from their vehicle and remain by the patrol car constituted a detention."[73]

SPOTLIGHTS, HIGH BEAMS

A seizure does not result merely because officers utilized a white spotlight or high beams to illuminate the suspect, whether for officer safety or to get the suspect's attention.[74] For example, in *People v. Perez* [75] a San Jose police officer on patrol at night noticed two men in a car parked in an unlit section of a motel parking lot known for drug sales. As the officer pulled up to the car, he turned on his high beams and white spotlight to "get a better look at the occupants." He eventually arrested the driver for being under the influence of PCP, and one of the issues on appeal was whether his use of the lights converted the encounter into a detention. In ruling it did not, the court said, "While use of high beams and spotlights might cause a reasonable person to feel himself the object of official scrutiny, such directed scrutiny does not amount to a detention." Similarly, in *People v. Franklin* [76] a Ridgecrest officer on patrol in a high crime area spotlighted Franklin who was walking on the sidewalk. He did this because, although it was a warm night, Franklin was wearing a full-length camouflage jacket. When the officer stopped behind him, Franklin turned and walked toward the officer and repeatedly asked, "What's going on?" Because Franklin was sweating and appeared "real jittery," the officer asked him to remove his hands from his pockets. As he did so, the officer saw blood on his hands, which ultimately led to Franklin's arrest for a murder that had just occurred in a nearby motel room. Again, the court rejected the argument that the spotlighting rendered the encounter a seizure, saying, "the spotlighting of appellant alone fairly can be said not to represent a sufficient show of authority so that appellant did not feel free to leave."

PAT SEARCHES

A nonconsensual pat search is both a search and a seizure and will therefore automatically result in a detention.[77] As the court explained in *In re Frank V.*, "Since Frank was physically restrained by the patdown, it constituted a detention."[78]

HANDCUFFS, OTHER RESTRAINT

Not surprisingly, a detention will also automatically result if officers handcuffed or otherwise restrained the suspect. This is because such measures are classic indications of a detention or arrest.[79]

DRAWN WEAPON

Even more obviously, a detention will result if an officer drew a handgun or other weapon as a safety precaution.[80] It is even significant that the officer "had his hand on his revolver."[81] However, the fact that an officer was visibly armed has "little weight in the analysis."[82] As the Supreme Court observed, "That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."[83]

NUMBER OF OFFICERS

Finally, the presence of backup officers, the number of them, their proximity to the suspect, and the manner in which they arrived and conducted themselves are all highly relevant.[84] For example, in *U.S. v. Washington* the court ruled the defendant was seized mainly because he was "confronted" by six officers who had gathered "around him."[85] And in *U.S. v. Buchanon* the court ruled the defendant was detained largely because of "[t]he number of officers that arrived [three], the swiftness with which they arrived, and the manner in which they arrived (all with pursuit lights flashing)." These circumstances, said the court, "would cause a reasonable person to feel intimidated or threatened."[86] In contrast, the presence of backup officers has been deemed less significant when they were "posted in the background,"[87] were "out of sight,"[88] were "four to five feet away,"[89] or were "little more than passive observers."[90]

Conducting the Investigation

After engaging the suspect and taking appropriate safety measures, officers will ordinarily begin their investigation by asking questions. As the court 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."[91]

In addition to such questioning, there are some other investigative procedures that officers may ordinarily utilize without converting the encounter into a detention. But first, we will discuss—actually, reiterate—the all-important subject of the officers' general attitude.

Respectfulness

Lacking grounds to detain or arrest the suspect, officers must be courteous and demonstrate a respectful attitude. Even if he is a notorious sleaze with a bloated criminal record and a bad attitude, they must be careful not to impose their authority on him, at least until they develop grounds to do so. It doesn't matter whether they choose to adopt a friendly tone or one that is more businesslike. What counts is that they create—and maintain—a noncoercive environment. As the Court of Appeal explained, "It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not."[92]

For example, in *U.S. v. Jones* [93] an encounter quickly became a detention when, upon approaching the suspect, the officers immediately requested that he lift his shirt and consent to a search. Said the court, "A request certainly is not an order, but a request —two back-to-back requests in this case— that conveys the requisite show of authority may be enough to make a reasonable person feel that he would not be free to leave." And in *Orhorhaghe v. I.N.S.* the Ninth Circuit ruled that an encounter was converted into a de facto detention mainly because the officer "acted in an officious and authoritative manner that indicated that [the suspect] was not free to decline his requests."[94]

In contrast, in *Ford v. Superior Court* the court ruled that, "[a]lthough petitioner was never told in so many words that he was not under arrest or that he was free to leave, that advice was implicit in the sergeant's apology for the time it was taking to interview other witnesses." [95] Similarly, the courts have noted the following in ruling that a contact had not degenerated into a de facto detention:

- The officer "spoke in a polite, conversational tone." [96]
- The officer "seemed to act cordially."[97]
- His tone "was calm and casual."[98]
- The conversation was "nonaccusatory."[99]
- "[A]t no time did [the officers] raise their voices." [100]
- Their "tone of voice was inquisitive rather than coercive."[101]

To say that officers must be respectful does not mean they may not demonstrate some degree of suspicion. After all, most people are aware that officers do not go around questioning people at random in hopes that they had just committed a crime. Thus, in *People v. Lopez* the court noted that, while the officer's questions "did indicate [he] suspected defendant of something," and that his questions were "not the stuff of usual conversation among adult strangers," his tone was apparently "no different from those presumably gentlemanly qualities he displayed in the witness box."[102]

Officers may also demonstrate respectfulness if they take a moment to explain to the suspect why they wanted to speak with him, rather than begin by abruptly asking questions or making requests. For example, in rejecting an argument that a DEA agent's initial encounter with the defendant at an airport terminal had become a de facto detention, the court in *U.S v. Gray* noted that the agent "informed Gray of the DEA's purpose and function."[103] Similarly, in *U.S. v. Crapser* the Ninth Circuit pointed out that the officer began by "explain[ing] to [the suspect] why the police had come to her motel room." [104]

In contrast, in *People v. Spicer* [105] officers pulled over a car driven by Mr. Spicer because it appeared that he was under the influence of something. While one officer administered the FSTs to Mr. Spicer, the other asked his passenger, Ms. Spicer, to produce her driver's license. Although he had good reason for wanting to see the license (to make sure he could release the car to her) he did not explain this. As Ms. Spicer was looking for her license in her purse, the officer saw a gun and arrested her. But the court ruled the gun was seized illegally mainly because the officer's blunt attitude had effectively converted the encounter into a de facto detention. Said the court, "Had the officer made his purpose known to Ms. Spicer, it would have substantially lessened the probability his conduct could reasonably have appeared to her to be coercive."

Requesting ID

Before attempting to confirm or dispel their suspicions, officers will almost always ask the suspect to identify himself, preferably with a driver's license or other official document. Like a request to stop, a request for ID will not convert an encounter into a seizure unless it was reasonably interpreted as a command.[106] As the Supreme Court put it, "[N]o seizure occurs when officers ask . . . to examine the individual's identification—so long as the officers do not convey a message that compliance with their requests is required."[107] Similarly, the Court of Appeal explained:

> It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary.[108]

Even if the suspect freely handed over his license or other identification, a seizure might result if the officer retained it after looking it over. This is mainly because, having examined the suspect's ID, the officer's act of retaining it could reasonably be interpreted as an indication that he was not free to leave.[109] As the Ninth Circuit put it, "When a law enforcement official retains control of a person's identification papers, such as vehicle registration documents or a driver's license, longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart."[110] For example, the courts have ruled that a detention resulted when an officer did the following without the suspect's consent:

- took his ID to a patrol car to run a warrant check.[111]
- kept the ID while conducting a consent search.[112]
- pinned the ID to his uniform.[113]

Asking Questions

Although officers may pose investigative questions to the suspect,[114] questioning can be problematic if, as often happens, the suspect's answers were vague, nonresponsive, inconsistent, or nonsensical as this will necessarily prolong the encounter and may cause the officers to become frustrated which, in turn, may cause them to act in an aggressive or authoritative manner.[115] As the Tenth Circuit noted, "Accusatory, persistent, and intrusive questioning can turn an otherwise voluntary encounter into a coercive one."[116] Although the line between permissible probing and impermissible pressure can be difficult to detect, the following general principles should be helpful.

INVESTIGATIVE VS. ACCUSATORY QUESTIONING

There is a big difference between investigative and accusatory questions. As the name suggests, accusatory questions are those that are phrased in a manner that communicates to the suspect that the officers believe he is guilty of something, and that their objective

is merely to confirm their suspicion. While this type of questioning is appropriate in a police interview room, it is strictly prohibited during contacts. As the Court of Appeal observed:

> [Q]uestions of a sufficiently accusatory nature may by themselves be cause to view an encounter as a nonconsensual detention. . . . [T]he degree of suspicion expressed by the police is an important factor in determining whether a consensual encounter has ripened into a detention.117

For example, in *Wilson v. Superior Court* 118 LAPD narcotics officers at LAX received a tip that comedian Flip Wilson would be arriving on a flight from Florida and that he would be transporting drugs. When one of the officers spotted Wilson in the terminal, he approached him and, according to the officer, "I advised Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs." Wilson then consented to a search of his luggage in which the officers found cocaine.

In a unanimous opinion, the California Supreme Court suppressed the drugs because the encounter had become an illegal de facto detention when Wilson gave his consent. Said the court, "[A]n ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."

In contrast to accusatory questioning, investigative inquiries convey the message that officers are merely seeking information or, at most, are exploring the possibility the suspect might have committed a crime. In other words, while such questioning is "potentially incriminating,"119 it is also potentially exonerating. For example, in *U.S. v. Kim* 120 a DEA agent approached two suspected drug dealers on an Amtrak train and greeted them with, "You guys don't have drugs in your luggage today, do you?" One of the men, Kim, consented to a search of his luggage in which the agent found methamphetamine. In rejecting Kim's argument that the agent's question rendered the encounter a seizure, the court said "[t]he tone of the question in no way implied that [the agent] accused or believed that Kim had drugs in his possession; it was merely an inquiry."

PERSISTENCE

If the suspect agreed to answer the officers' questions (and, again, assuming he was guilty), officers will often be unable to obtain the truth unless they are persistent. But persistence, in and of itself, will not render an encounter a detention. For example, in *United States v. Sullivan* 121 a U.S. Parks police officer contacted Sullivan and asked him "if he had anything illegal in [his] vehicle." Sullivan hesitated, then asked "illegal"? The officer repeated the question, at which point Sullivan "turned his head forward and looked straight ahead." The officer persisted, telling Sullivan that "if he had anything illegal in the vehicle, it's better to tell me now." Still no response. Eventually, Sullivan admitted "I have a gun" and, as a result, he was convicted of being a felon in possession of a firearm. In rejecting Sullivan's argument that the officer's persistent questioning had converted the contact into a seizure, the court said, "[T]he repetition of questions, interspersed with coaxing, was prompted solely because Sullivan had not responded. They encouraged an answer, but did not demand one."

On the other hand, a seizure will certainly result if officers persisted in asking questions after the suspect made it clear that he wanted to discontinue the interview. For example, in *Morgan v. Woessner* the court ruled that baseball star Joe Morgan was unlawfully seized at Los Angeles International Airport when an LAPD narcotics officer continued to question him after Morgan had "indicated in no uncertain terms that he did not want to be bothered." Said the court, "We find that Morgan's unequivocal expression of his desire to be left alone demonstrates that the exchange between Morgan and [the officer] was not consensual."122

LENGTHY QUESTIONING

Because contacts are usually brief, the length of the encounter is seldom a significant issue.123 But lengthy questioning will not ordinarily convert a contact into a seizure so long as the suspect continued to express—explicitly or implicitly—his willingness to assist officers in their investigation. An example is found in an Oakland murder case, *Ford v. Superior Court*.124 Here, a contact with a "witness" to a murder (who was actually the murderer) began at the crime scene and ended with his arrest twelve hours later in a police interview room. Despite the length, the court ruled the encounter had remained consensual throughout because the suspect "deliberately chose a stance of eager cooperation in the hopes of persuading the police of his innocence," and the officers merely played along until they had probable cause.

MIRANDA WARNINGS

If an encounter is merely a contact, officers should never Mirandize the suspect before asking questions.125 This is mainly because Miranda warnings are commonly associated with arrests and, furthermore, they are likely to be interpreted as an indication that the officers have evidence of the suspect's guilt.

"YOU'RE FREE TO DECLINE"

Just as officers are not required to inform suspects that they are free to leave (discussed earlier), they need not inform them that they can refuse to answer their questions.126 Still, it is a highly relevant circumstance.127

Warrant checks

Running a warrant check without the suspect's consent will not automatically result in a detention.128 But it can be problematic, especially if the officer walks off with his ID to run the warrant check on his radio or in-car computer. For example, in *U.S. v. Jones* the court said that "[w]ithin thirty seconds" after initiating a contact with Jones, the officer asked for some identification. At that point, "Mr. Jones handed his identification to [the officer], who relayed it to [another officer who] then walked back to his patrol vehicle to run Mr. Jones's license." "Mr. Jones was seized," said the court, "once the officers took [his] license and proceeded to conduct a records check based upon it."129

In contrast, the court in *U.S. v. Analla* ruled that a detention did not result because, instead of taking the suspect's license to his patrol car, the officer "stood beside the car, near where Analla was standing."130 Note that this issue can usually be avoided if officers obtain the suspect's consent to temporarily carry his ID a short distance for the purpose of running a warrant check.131

Seeking consent to search

Officers who have contacted a suspect will frequently seek his consent to search his person, possessions, or vehicle. Like any other request, this will not convert the encounter into a seizure if the officers neither pressured the suspect nor asserted their authority.132 But if the suspect declines the request, they must, of course, not persist or otherwise encourage him to change his mind.

For example, in *United States v. Wilson* 133 a DEA agent approached Albert Wilson at the National Airport terminal in Washington, D.C. and asked to speak with him. At first, Wilson was cooperative. But when the agent asked if he would consent to a search of his coat he angrily refused and began walking away. Undeterred, the agent trailed behind him, repeatedly asking Wilson why he would not consent to a search. As they stepped outside the terminal, Wilson bolted but was quickly apprehended. The agents then searched his coat and found cocaine. On appeal, however, the court ordered it suppressed because the agent's "persistence" had converted the encounter into a seizure. It should also be noted that, although officers are not required to notify the suspect that he has a right to refuse consent,134 such a warning is a relevant circumstance.135

Seeking consent to transport

In some cases, officers will seek the suspect's consent to accompany them to some location such as a police station (e.g., for questioning, fingerprinting, a lineup) or to the crime scene (e.g., for a showup). Again, such a request will not convert the encounter into a detention so long as officers made it clear to the suspect that he was free to decline.136

For example, in *In re Gilbert R.*137 LAPD detectives went to Gilbert's home to see if he would voluntarily accompany them to the police station to answer some questions about an ADW. Both Gilbert and his mother consented. At the station, Gilbert confessed but later argued that his confession should have been suppressed because the officers had effectively arrested him by driving him to the station. In rejecting the argument, the court said that a reasonable person in Gilbert's position "would have believed that he or she did not have to accompany the detectives."

In contrast, in *People v. Boyer* 138 several Fullerton police officers went to Boyer's home to question him about a murder. Two of them covered the back yard while the others went to the front door and knocked. Boyer responded by running out the back door, where the officers ordered him to "freeze." He complied and later agreed to be interviewed at the police station where he made an incriminating statement. But the court suppressed it on grounds the consent was involuntary. Said the court, "[The] manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' to accompany them suggested they did not intend to take 'no' for an answer."

One other thing

Before transporting a suspect to a police station or anywhere else, officers may be required by departmental policy or officer-safety considerations to pat search him even though he is not being detained. As discussed earlier, this will not ordinarily convert the encounter into a detention provided that the suspect freely consented to the intrusion.

Converting Detentions Into Contacts

In the course of detaining a suspect, officers may conclude that, although they still have their suspicions, they no longer have grounds to hold him. At that point, the detention must, of course, be terminated. Nevertheless, they may be able to continue to question him if they can effectively convert the detention into a contact. As the Tenth Circuit said, "[I]f the encounter between the officer and the [suspect] ceases to be a detention but becomes consensual, and the [suspect] voluntarily consents to additional questioning, no further detention occurs."139

What must officers do to convert a detention into a contact? The cases indicate there are three requirements:

1. **Return documents**: If officers obtained the suspect's ID or any other property from him, they must return it.140 Again quoting the Tenth Circuit, "[W]e have consistently concluded that an officer must return a driver's documentation before a detention can end."141 Also see "Investigative requests" (Requests for ID), above.
2. **"You're free to go"**: While not technically a requirement,142 officers should inform the suspect that he is now free to leave.143 As the court explained in *Morgan v. Woessner*, "Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."144
3. **No contrary circumstances**: There must not have been other circumstances that, despite the "free to go" advisory, would have reasonably indicated to the suspect that he was, in fact, not free to leave. For example, in *U.S. v. Beck* 145 the court ruled that a suspect was detained because, although he was told he was free to go, he was also told he could not leave unless he consented to a search or waited for a canine unit to arrive. Similarly, in *U.S. v. Ramos* 146 the court ruled that an attempt to convert a traffic stop into a contact had failed mainly because the driver and passenger remained separated.

In addition to these three requirements, it would be significant that the officers explained to the suspect why they wanted to continue speaking with him. As discussed earlier in the section entitled "Respectfulness," a brief explanation of this sort is significant because such openness is more consistent with a contact than a detention, and it tends to communicate the idea that the officers are seeking thesuspect's voluntary cooperation.147

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33. *U.S. v. Ayon-Meza* (9th Cir. 1999) 177 F.3d 1130, 1133. Also see *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.
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52. (1986) 186 Cal.App.3d 804.
53. (1987) 192 Cal.App.3d 935, 940. ALSO SEE People v. Banks (1990) 217 Cal.App.3d 1358, 1362 [officer stopped "behind defendant's car"]; People v. Brueckner (1990) 223 Cal.App.3d 1500, 1505 [officer parked "next to" suspect's car]; People v. Juarez (1973) 35 Cal.App.3d 631 [officer pulled patrol car alongside suspect]; U.S. v. Pajari (8th Cir. 1983) 715 F.2d 1378, 1380 [the officers "simply parked behind his car"].
54. See People v. Banks (1990) 217 Cal.App.3d 1358, 1362; People v. Perez (1989) 211 Cal.App.3d 1492, 1946; U.S. v. Summers (9th Cir. 2001) 268 F.3d 683, 687.
55. (9th Cir. 2011) 629 F.3d 1161, 1167.
56. (9th Cir. 1988) 853 F.2d 1501, 1503, 1504.
57. See Florida v. Royer (1983) 460 U.S. 491, 504 ["[B]y informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish."]; People v. Profit (1986) 183 Cal.App.3d 849, 856 ["You're not under arrest, I'm not detaining you, you're free to leave and not speak to me if you don't want to."]; Morgan v. Woessner (9th Cir. 1993) 997 F.2d 1244, 1254 ["Although an officer's failure to advise a citizen of his freedom to walk away is not dispositive of the question of whether the citizen knew he was free to go, it is another significant indicator of what the citizen reasonably believed."].
58. See *United States v. Mendenhall* (1980) 446 U.S. 544, 555; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40; *People v. Daugherty* (1996) 50 Cal.App.4th 275, 283-84; *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314 ["the officers were not required to inform Mr. Jones that he was free to leave"].
59. *People v. Profit* (1986) 183 Cal.App.3d 849, 877.
60. See *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281; *U.S. v. Beck* (8th Cir. 1998) 140 F.3d 1129, 1136-37.
61. U.S. v. Sandoval (10th Cir. 1994) 29 F.3d 537. ALSO SEE U.S. v. Ramos (8th Cir. 1994) 42 F.3d 1160, 1162-64 [although the driver's license was returned to him, he was asked to remain in the patrol car while the officer spoke with the passenger].
62. *U.S. v. Ramos*, (8th Cir. 1994) 42 F.3d 1160, 1162-64.
63. *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.
64. *U.S. v. McSwain* (10th Cir. 1994) 29 F.3d 558, 563.
65. See I.N.S. v. Delgado (1994) 466 U.S. 210, 217, fn.5 ["other people were in the area"]; U.S. v. Yusuff (7th Cir. 1996) 96 F.3d 982, 986 ["the encounter was in a busy, public area of the airport"]; U.S. v. Sanchez (10th Cir. 1996) 89 F.3d 715, 718 [the encounter occurred "in an open and well illuminated parking lot"]; U.S. v. Ringold (10th Cir. 2003) 335 F.3d 1168, 1172 [the encounter occurred "in the public space outside the service station, in full view of other patrons"]; U.S. v. Spence (10th Cir. 2005) 397 F.3d 1280, 1283 ["This court does consider interaction in a nonpublic place and the absence of other members of the public as factors pointing toward a nonconsensual encounter."].
66. *United States v. Drayton* (2002) 536 U.S. 194, 204.
67. *People v. Sanchez* (1987) 195 Cal.App.3d 42, 45.
68. *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.
69. *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 952.
70. People v. Ross (1990) 217 Cal.App.3d 879, 885 [the officer "'asked' but did not demand that appellant remove her hands from her pockets"]; People v. Epperson (1986) 187 Cal.App.3d 115, 118, 120 [officer asked the suspect to identify an object in his pocket].
71. (9th Cir. 2011) 629 F.3d 1161, 1167.
72. People v. Franklin (1987) 192 Cal.App.3d 935, 941. ALSO SEE U.S. v. Jones (4th Cir. 2012) 678 F.3d 293, 305 [officers "quickly approached Jones . . . and nearly immediately asked first that he lift his shirt and then that he consent to a pat down"]. **NOTE**: While one California court ruled that such a command did not automatically result in a detention (In re Frank V.(1991) 233 Cal.App.3d 1232, 1239), to our knowledge no other court has adopted this reasoning
73. (1979) 97 Cal.App.3d 124, 130-31. ALSO SEE *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456.
74. See People v. Rico (1979) 97 Cal.App.3d 124, 130 ["momentarily" spotlighting of a vehicle "was ambiguous"]; People v. Brueckner (1990) 223 Cal.App.3d 1500, 1505 ["The fact he shined his spotlight on the vehicle as he parked in the unlit area would not, by itself, lead a reasonable person to conclude he or she was not free to leave."]; U.S. v. Mabery (8th Cir. 2012) 686 F.3d 591, 597 ["the act of shining a spotlight on Mabery's vehicle from the street was certainly no more intrusive (and arguably less so) than knocking on the vehicle's window"]. **NOTE**: In People v. Gary (2007) 156 Cal.App.4th 1100, 1111 the court

melodramatically described the spotlighting of the defendant as "bath[ing] him in light." Still, the dip did not appear to be a significant circumstance.

75. (1989) 211 Cal.App.3d 1492, 1496.
76. (1987) 192 Cal.App.3d 935.
77. See *U.S. v. Stewart* (8th Cir. 2011) 631 F.3d 453, 456 [pat search is both a search and seizure]; *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 238 [suspect was patted down and told to sit on the curb]; *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538. BUT ALSO SEE *People v. Singer* (1990) 226 Cal.App.3d 23, 46-67 [routine pat searching of unarrested suspect before he voluntarily got into a police car for a ride to the station did not convert the encounter into an arrest].
78. (1991) 233 Cal.App.3d 1232, 1240, fn.3.
79. See People v. Zamudio (2008) 43 Cal.4th 327, 342 ["no one was handcuffed or patted down"]; In re Frank V. (1991) 233 Cal.App.3d 1232, 1240, fn.3; People v. Gallant (1990) 225 Cal.App.3d 200, 207; Ford v. Superior Court (2001) 91 Cal.App.4th 112, 128 ["[he] was never handcuffed" and he "was left in the unlocked backseat of the police car"].
80. See United States v. Mendenhall (1980) 446 U.S. 544, 554 ["the display of a weapon by an officer" is a circumstance "that might indicate a seizure"]; People v. McKelvy (1972) 23 Cal.App.3d 1027, 1034 [one of the officers carried a shotgun]; People v. Gallant (1990) 225 Cal.App.3d 200, 204 ["One of the police officers answered defendant's knock at the door by drawing his gun, opening the door, and confronting defendant."].
81. See *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
82. See *People v. Zamudio* (2008) 43 Cal.4th 327, 346; *U.S. v. Thompson* (10th Cir. 2008) 546 F.3d 1223, 1227.
83. *United States v. Drayton* (2002) 536 U.S. 194, 205.
84. See United States v. Mendenhall (1980) 446 U.S. 544, 554 ["the threatening presence of several officers" is relevant]; In re Manuel G. (1997) 16 Cal.4th 805, 821; U.S. v. Black (4th Cir. 2013) 707 F.3d 531, 538 ["Four uniformed officers approached the men, a number that quickly increased to six uniformed officers, and then seven."]; U.S. v. Quintero (8th Cir. 2011) 648 F.3d 660, 670.
85. (9th Cir. 2004) 387 F.3d 1060, 1068.
86. (6th Cir. 1995) 72 F.3d 1217, 1224.
87. U.S. v. Kim (9th Cir. 1994) 25 F.3d 1426, 1431, fn.3. ALSO SEE People v. Profit (1986) 183 Cal.App.3d 849, 877 ["Here initially there were three defendants and only two officers. Only later did the third officer even the numbers. This does not constitute a show of force"]; U.S. v. Crapser (9th Cir. 2007) 472 F.3d 1141, 1146 ["Although there were four officers present, most of the time only two talked to Defendant, while two talked to Twilligear"]; U.S. v. Thompson (10th Cir. 2008) 546 F.3d 1223, 1227 ["while four officers were on the premises, only one . . . approached Mr. Thompson"]; U.S. v. Yusuff(7th Cir. 1996) 96 F.3d 982, 986 ["the officers stood several feet away from Yusuff"].
88. *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 954.
89. U.S. v. $25,000 (9th Cir. 1988) 853 F.2d 1501, 1504-1505.
90. U.S. v. White (8th Cir. 1996) 81 F.3d 774, 779; U.S. v. Jones (10th Cir. 2012) 701 F.3d 1300, 1314 ["while there were three officers on the scene . . . the officers' presence was nonthreatening"].
91. (1969) 268 CA2 653, 665.
92. People v. Franklin (1987) 192 Cal.App.3d 935, 941. ALSO SEE People v. Ross (1990) 217 Cal.App.3d 879, 884-85 ["It is the mode or manner in which the request for identification is put to the citizen, and not the nature of the request that determines whether compliance was voluntary."]; People v. Lopez (1989) 212 Cal.App.3d 289, 293, fn.2 ["both form and content are important."]; In re Frank V. (1991) 233 Cal.App.3d 1232, 1239 ["Both the nature and the manner must be examined."]; U.S. v. Ledesma (10th Cir. 2006) 447 F.3d 1307, 1314 [relevant circumstance is the "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory" as opposed to "an officer's pleasant manner and tone of voice that is not insisting"].
93. (4th Cir. 2012) 678 F.3d 293, 303.
94. (9th Cir. 1994) 38 F.3d 488, 495.
95. (2001) 91 Cal.App.4th 112, 128.
96. People v. Bennett (1998) 68 Cal.App.4th 396, 402. ALSO SEE United States v. Drayton (2002) 536 U.S. 194, 204 [the officer spoke "in a polite, quiet voice"]; U.S. v. Kim (3rd Cir. 1994) 27 F.3d 947, 953 [the officer's tone was "polite and conversational."]; U.S. v. Flowers(4th Cir. 1990) 912 F.2d 707, 711 ["they spoke to him in a casual tone of voice"]; U.S. v. Cruz-Mendez (10th Cir. 2006) 467 F.3d 1260, 1254 [the officers "acted courteously"]; U.S. v. Cormier (9th Cir. 2000) 220 F.3d

1103, 1110 [the officer "never spoke to Cormier in an authoritative tone"]; U.S. v. Ringold (10th Cir. 2003) 335 F.3d 1168, 1172 [the officer "was polite and the conversation was friendly in tone"]; U.S. v. Yusuff (7th Cir. 1996) 96 F.3d 982, 986, 986 ["a normal, polite tone of voice"]; U.S. v. Tavolacci (D.C. Cir. 1990) 895 F.2d 1423, 1425 ["conversational tones"]; U.S. v. Orman (9th Cir. 2007) 486 F.3d 1170, 1175 [he "politely asked him if he could have a word with him"].

97. *People v. Singer* (1990) 226 Cal.App.3d 23, 48.
98. *U.S. v. Jones* (10th Cir. 2012) 701 F.3d 1300, 1314.
99. *People v. Hughes* (2002) 27 Cal.4th 287, 328.
100. *U.S. v. $25,000* (9th Cir. 1988) 853 F.2d 1501, 1505.
101. U.S. v. Dockter (8th Cir. 1995) 58 F.3d 1284, 1287. ALSO SEE People v. Epperson (1986) 187 Cal.App.3d 115, 120 ["There was nothing in the officer's attitude or the nature of the inquiry which would indicate to a reasonable person that compliance with the officer's request might be compelled or that defendant was not free to leave."]; People v. Sanchez (1987) 195 Cal.App.3d 42, 47 ["The record lacks any indication their dialogue was coercive [there was] nothing apparent in [the officer's] attitude or the nature of his inquiry to reflect compulsory compliance"].
102. (1989) 212 Cal.App.3d 289, 293.
103. (4th Cir. 1989) 883 F.2d 320, 323.
104. (9th Cir. 2007) 472 F.3d 1141, 1144. ALSO SEE *United States v. Drayton* (2002) 536 U.S. 194, 198.
105. (1984) 157 Cal.App.3d 213. ALSO SEE People v. Garry (2007) 156 Cal.App.4th 1100, 1111-12 ["rather than engage in a conversation, [the officer] immediately and pointedly inquired about defendant's legal status as he quickly approached"].
106. See I.N.S. v. Delgado (1984) 466 U.S. 210, 216; Florida v. Royer (1983) 460 U.S. 491, 501; United States v. Mendenhall (1980) 446 U.S. 544, 555; United States v. Drayton (2002) 536 U.S. 194, 201; People v. Leath (2013) 217 Cal.App.4th 344, 353.
107. *Florida v. Bostick* (1991) 501 U.S. 429, 437.
108. *People v. Ross* (1990) 217 Cal.App.3d 879, 884-85.
109. See Florida v. Royer (1983) 460 U.S. 491, 503 ["Here, Royer's ticket and identification remained in the possession of the officers throughout the encounter . . . As a practical matter, Royer could not leave the airport without them."]; U.S. v. Black (4th Cir. 2013) 707 F.3d 531, 538 ["We have noted that though not dispositive, the retention of a citizen's identification or other personal property or effects is highly material under the totality of the circumstances analysis."]. COMPARE People v. Profit (1986) 183 Cal.App.3d 849, 879 [there was "no retention of Profit's briefcase"].
110. *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
111. U.S. v. Jones (10th Cir. 2012) 701 F.3d 1300, 1315. BUT ALSO SEE U.S. v. Analla (4th Cir. 1992) 975 F.2d 119, 124 ["[The officer] necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher."]; U.S. v. Weaver (4th Cir. 2002) 282 F.3d 303, 309 ["Weaver was in no way impeded physically by holding his identification from him"].
112. *U.S. v. Chan-Jimenez* (9th Cir. 1997) 125 F.3d 1324, 1326.
113. *U.S. v. Black* (4th Cir. 2013) 707 F.3d 531, 538.
114. See *Florida v. Bostick* (1991) 501 U.S. 429, 434; *I.N.S. v. Delgado* (1984) 466 U.S. 210, 216; *Florida v. Royer* (1983) 460 U.S. 491, 497.
115. See U.S. v. Beck (1998) 140 F.3d 1129, 1135 [questioning can result in a seizure if "the questioning is so intimidating, threatening or coercive that a reasonable person would not have believed himself free to leave"]. COMPARE United States v. Drayton (2002) 536 U.S. 194, 203 ["The officer gave the passengers no reason to believe that they were required to answer the officers' questions."].
116. *U.S. v. Ringold* (10th Cir. 2003) 335 F.3d 1168, 1174.
117. People v. Lopez (1989) 212 Cal.App.3d 289, 293. ALSO SEE Florida v. Royer (1983) 460 U.S. 491, 502 ["[The officers] informed him they were narcotics agents and had reason to believe that he was carrying illegal drugs."]; People v. Boyer (1989) 48 Cal.3d 247, 268 [defendant "was subjected to more than an hour of directly accusatory questioning [at the police station], in which [an officer] repeatedly told him— falsely—that the police knew he was the killer."]; U.S. v. Washington (9th Cir. 2004) 387 F.3d 1060, 1069 [suspect detained when officers told him he was "arrestable"]; U.S. v. Gonzales (5th Cir. 1996) 79 F3 413, 420 ["There is one troubling element: the officers informed Gonzales that the car he was driving was suspected of being used to transport drugs. This may have pushed the encounter, which was initially consensual, to being a [detention]."].
118. (1983) 34 Cal.3d 777.
119. See *Florida v. Bostick* (1991) 501 U.S. 429, 439.

120. (3rd Cir. 1994) 27 F.3d 947, 953. ALSO SEE People v. Daugherty (1996) 50 Cal.App.4th 275, 285 ["[The officer] did not directly accuse Daugherty of transporting narcotics, which may have been sufficient to convert the encounter into a detention."]; People v. Profit (1986) 183 Cal.App.3d 849, 865 ["[The officer] made no statement that he had information that the defendants were carrying drugs."]; People v. Hughes (2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory"]; U.S. v. Ringold (10th Cir. 2003) 335 F.3d 1168, 1174 [although the questions were "of an incriminating nature," they were "not worded or delivered in such a manner as to indicate that compliance with any officer directives (or even inquiries) was required"]; U.S. v. Thompson (10th Cir. 2008) 546 F.3d 1223, 1228 ["Most importantly, under the precedents, [the officer] did not use an antagonistic tone in asking questions."].
121. (4th Cir. 1998) 138 F.3d 126, 133-34.
122. (9th Cir. 1993) 997 F.2d 1244, 1253. ALSO SEE I.N.S. v. Delgado (1984) 466 U.S. 210, 216-17 [a seizure results "if the person refuses to answer and the police [persist]"]; U.S. v. Wilson (4th Cir. 1991) 953 F.2d 116, 122 ["but the persistence of [the officers] would clearly convey to a reasonable person that he was not free to leave the questioning by the police"].
123. See I.N.S. v. Delgado (1984) 466 U.S. 210, 219 ["The questioning by INS agents seems to have been nothing more than a brief encounter.]; People v. Hughes(2002) 27 Cal.4th 287, 328 ["The conversation was nonaccusatory, routine, and brief"]; People v. Bouser (1994) 26 Cal.App.4th 1280, 1283 ["The whole incident took around 10 minutes from the initial contact to Bouser's arrest."]; U.S. v. Crapser (9th Cir. 2007) 472 F.3d 1141, 1146 ["The entire event . . . lasted about five minutes."]; U.S. v. McFarley (4th Cir. 1993) 991 F.2d 1188, 1192 [20 minutes was not too long under the circumstances]; U.S. v. Cruz-Mendez (10th Cir. 2006) 467 F.3d 1260, 1267 [30 minutes was not unreasonableunder thecircumstances].
124. (2001) 91 Cal.App.4th 112, 128. ALSO SEE *People v. Hughes* (2002) 27 Cal.4th 287, 328-29; *Green v. Superior Court* (1985) 40 Cal.3d 126.
125. See *People v. Boyer* (1989) 48 Cal.3d 247, 268.
126. See *United States v. Mendenhall* (1980) 446 U.S. 544, 555.
127. See Florida v. Bostick (1991) 501 U.S. 429, 436; United States v. Mendenhall (1980) 446 U.S. 544, 559. Also see United States v. Washington (1977) 431 U.S. 181, 188 ["Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled."
128. See *People v. Bouser* (1994) 26 Cal.App.4th 1280, 1286; *People v. Terrell* (1999) 69 Cal.App.4th 1246.
129. (10th Cir. 2012) 701 F.3d 1300, 1306, 1315.
130. (4th Cir. 1992) 975 F.2d 119, 124.
131. See *People v. Bennett* (1998) 68 Cal.App.4th 396, 402.
132. See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548; *Florida v. Royer* (1983) 460 U.S. 491, 497.
133. (4th Cir. 1991) 953 F.2d 116.
134. See *United States v. Drayton* (2002) 536 U.S. 194, 206; *Ohio v. Robinette* (1996) 519 U.S. 33, 39-40.
135. See *United States v. Mendenhall* (1980) 446 U.S. 544, 559; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 249.
136. See United States v. Mendenhall (1980) 446 U.S. 544, 557-58; Ford v. Superior Court (2001) 91 Cal.App.4th 112, 125; People v. Zamudio (2008) 43 Cal.4th 327, 344-45; People v. Hughes (2002) 27 Cal.4th 287, 329.
137. (1994) 25 Cal.App.4th 1121.
138. (1989) 48 Cal.3d 247.
139. *U.S. v. Anderson* (10th Cir. 1997) 114 F.3d 1059, 1064.
140. See U.S. v. Sandoval (10th Cir. 1994) 29 F.3d 537, 540 ["no reasonable person would feel free to leave without such documentation"]; U.S. v. White (8th Cir. 1996) 81 F.3d 775, 779.
141. *U.S. v. Elliott* (10th Cir. 1997) 107 F.3d 810, 814.
142. See Ohio v. Robinette (1996) 519 U.S. 33, 39-40; U.S. v. Sullivan (4th Cir. 1998) 138 F.3d 126, 133; U.S. v. Anderson (10th Cir. 1997) 114 F.3d 1059, 1064.
143. See *U.S. v. Thompson* (7th Cir. 1997) 106 F.3d 794, 798.
144. (9th Cir. 1993) 997 F.2d 1244, 1254.
145. (8th Cir. 1998) 140 F.3d 1129, 1136-37. ALSO SEE *U.S. v. Finke* (7th Cir. 1996) 85 F.3d 1275, 1281.
146. (8th Cir. 1994) 42 F.3d 1160, 1162-64.
147. See U.S. v. Thompson (7th Cir. 1997) 106 F.3d 794, 798 [the officer "justified his desire to ask Thompson more questions by explaining that part of his job was to prevent the transport of illegal guns and drugs"].

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CHAPTER OVERVIEW

4: Detentions Based on Reasonable Suspicion

4.1: Investigative Detentions

4.2: Terry v. Ohio

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4.1: 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 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 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 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.

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 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 theofficers'interpretationofthecircumstancesbased 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] 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 perpetrators were armed.44 Or it maybe 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 investigationsafely.[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]

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:

- 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 pat down "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 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:

> [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 "couldnot 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 show up;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

Separating detainees is also permitted for officersafety 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 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:

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

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 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:

> 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]

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 the 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.

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.

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 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

References

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, 19-2
6. See Peoplev.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.
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)["Normaythepolice 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.
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)470U.S.675, 685. ALSO SEE U.S.v.Ruidiaz (1st Cir.2008) 529F.3d25,29["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.
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.
44. SeeTerryv.Ohio(1968)392U.S.1[robbery];Peoplev.Campbell(1981)118Cal.App.3d588,595[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 Peoplev.Castellon(1999)76Cal.App.4th1369,1377["[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"]; Peoplev.McLean(1970) 6 Cal.App.3d 300, 307-8 [asking a detainee "if he had anything illegal in his pocket"isa"traditional investigatory function"];U.S.v.Long(8thCir.2008)532F.3d791,795 [OK to ask"whether a driver is carrying illegal drugs"].
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.4th435, 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.
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) 17 5 Cal.App.4th 1052, 1062.

65. See U.S.v.Bautista (9th Cir. 1982) 684F.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. tainback v. Dixon (7th Cir. 2009) 569 F.3d 767, 772. ALSO SEE Heitschmidt v. City of Houston (5th Cir. 1998) 161 F.3d 834, 83940 [“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.
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.4th667, 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.”];Peoplev.McHugh(2004)119Cal.App.4th202,211[“A police officer may use force, including...displaying his or her weapon, to accomplish another wise 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”].
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.
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.
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.”]

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.
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.
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."]
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.
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
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.
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."].
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.

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4.2: Terry v. Ohio

PETITIONER	RESPONDENT
Terry	Ohio

LOCATION

Street Corner

DOCKET NO.	DECIDED BY
67	Warren Court

CITATION

392 US 1 (1968)

ARGUED

Dec 12, 1967

DECIDED

Jun 10, 1968

Facts of the case

Terry and two other men were observed by a plain clothes policeman in what the officer believed to be "casing a job, a stick-up." The officer stopped and frisked the three men, and found weapons on two of them. Terry was convicted of carrying a concealed weapon and sentenced to three years in jail.

Question

Was the search and seizure of Terry and the other men in violation of the Fourth Amendment?

Conclusion

8–1 DECISION

MAJORITY OPINION BY EARL WARREN

FOR	AGAINST
Fortas Warren Brennan Marshall Stewart Black White Harlan	Douglas

In an 8-to-1 decision, the Court held that the search undertaken by the officer was reasonable under the Fourth Amendment and that the weapons seized could be introduced into evidence against Terry. Attempting to focus narrowly on the facts of this particular case, the Court found that the officer acted on more than a "hunch" and that "a reasonably prudent man would have been warranted in believing [Terry] was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." The Court found that the searches undertaken were limited in scope and designed to protect the officer's safety incident to the investigation.

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CHAPTER OVERVIEW

5: Arrests Based on Probable Cause

5.1: Principles of Probable Cause and Reasonable Suspicion

5.2: Probable Cause to Arrest

5.3: Arrests

5.4: Illinois v. Gates

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5.1: Principles of Probable Cause and Reasonable Suspicion

Although there is certainly more to probable cause and reasonable suspicion than just principles, it's a good place to start, so that is where we will begin this four-part series. In part two, which begins on page 9, we will explain how officers can prove that the information they are relying upon to establish probable cause or reasonable suspicion was sufficiently reliable that is has significance. Then, in the Fall 2014 edition we will cover probable cause to arrest, including the various circumstances that officers and judges frequently consider in determining whether it exists. The series will conclude in the Winter 2015 edition with an discussion of how officers can determine whether they have probable cause to search.

It is ordinarily a bad idea to begin an article by admitting that the subjects to be discussed cannot be usefully defined. But when the subjects are probable cause and reasonable suspicion[1], and when the readership is composed of people who have had some experience with them, it would be pointless to deny it. Consider that the Seventh Circuit once tried to provide a good legal definition but concluded that, when all is said and done, it just means having "a good reason to act."[2] Even the Supreme Court—whose many powers include defining legal terms— decided to pass on probable cause because, said the Court, it is "not a finely-tuned standard"[3] and is actually an "elusive" and "somewhat abstract" concept.[4] As for reasonable suspicion, the uncertainty is even worse. For instance, in *United States v. Jones* the First Circuit would only say that it "requires more than a naked hunch."[5]

But this imprecision is actually a good thing because probable cause and reasonable suspicion are ultimately judgments based on common sense, not technical analysis. Granted, they are *important* judgments because they have serious repercussions. But they are fundamentally just rational assessments of the convincing force of information, which is something the human brain does all the time without consulting a rule book. So instead of being governed by a "neat set of rules,"[6] these concepts mainly require that officers understand certain principles— principles that usually enable them to make these determinations with a fair degree of consistency and accuracy.

First, however, it is necessary to explain the basic difference between probable cause and reasonable suspicion, as these terms will be used throughout this series. Both are essentially judgments as to the existence and importance of evidence. But they differ as to the level of proof that is required. In particular, probable cause requires evidence of higher quality and quantity than reasonable suspicion because it permits officers to take actions that are more intrusive, such as arresting people and searching things. In contrast, reasonable suspicion is the standard for lesser intrusions, such as detentions and pat searches. As the Supreme Court explained:

> 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 quality 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 than that required to show probable cause.[7]

What Probability is Required?

When people start to learn about probable cause or reasonable suspicion, they usually want a number: What probability percentage is required?[8] Is it 80%? 60%? 50%? Lower than 50? No one really knows, which might seem strange because, even in a relatively trivial venture such as sports betting, people would not participate unless they had some idea of the odds.

Nevertheless, the Supreme Court has refused to assign a probability percentage to these concepts because it views them as nontechnical standards based on common sense, not mathematical precision.[9] "The probable cause standard," said the Court, "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of circumstances."[10] Similarly, the Tenth Circuit observed, "Besides the difficulty of agreeing on a single number, such an enterprise would, among other things, risk diminishing the role of judgment based on situation-sense."[11] Still, based on inklings from the United States Supreme Court, it is possible to provide at least a ballpark probability percentage for probable cause.

Reasonable suspicion, on the other hand, remains an enigma.

Probable cause

Many people assume that probable cause requires at least a 51% probability because anything less would not be "probable." While this is technically true, the Supreme Court has ruled that, in the context of probable cause, the word "probable" has a somewhat different meaning. Specifically, it has said that probable cause requires neither a preponderance of the evidence nor "any showing that such belief be correct or more likely true than false,"[12] and that it requires only a "fair" probability, not a statistical

probability.13 Thus, it is apparent that probable cause requires something less than a 50% chance.14 How much less? Although no court has tried to figure it out, we suspect it is not much lower than 50%.

Reasonable suspicion

As noted, the required probability percentage for reasonable suspicion is a mystery. Although the Supreme Court has said that it requires "considerably less [proof] than preponderance of the evidence"15 (which means "considerably less" than a 50.1% chance), this is unhelpful because a meager 1% chance is "considerably less" than 51.1% but no one seriously thinks that would be enough. Equally unhelpful is the Supreme Court's observation that, while probable cause requires a "fair probability," reasonable suspicion requires only a "moderate" probability.16 What is the difference between a "moderate" and "fair" probability? Again, nobody knows. What we do know is that the facts need not rise to the level that they "rule out the possibility of innocent conduct."17 As the Court of Appeal explained, "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity."18 We also know that reasonable suspicion may exist if the circumstances were merely indicative of criminal activity. In fact, the California Supreme Court has said that if the circumstances are consistent with criminal activity, they "demand" an investigation."19

Basic Principles

Having given up on a mathematical solution to the problem, we must rely on certain basic principles. And the most basic principle is this: Neither probable cause nor reasonable suspicion can exist unless officers can cite "specific and articulable facts" that support their judgment.20 This demand for specificity is so important that the Supreme Court called it the "central teaching of this Court's Fourth Amendment jurisprudence." 21 The question, then, is this: How can officers determine whether their "specific and articulable" facts are sufficient to establish probable cause or reasonable suspicion? That is the question we will address in the remainder of this article.

Totality of the circumstances

Almost as central as the need for facts is the requirement that, in determining whether officers have probable cause and reasonable suspicion, the courts will consider the totality of circumstances. This is significant because it is exactly the opposite of how some courts did things many years ago. That is, they would utilize a "divide-and-conquer"22 approach which meant subjecting each fact to a meticulous evaluation, then frequently ruling that the officers lacked probable cause or reasonable suspicion because none of the individual facts were compelling. This practice officially ended in 1983 when, in the landmark decision in *Illinois v. Gates*, the Supreme Court announced that probable cause and reasonable suspicion must be based on an assessment of the convincing force of the officers' information as a whole. "We must be mindful," said the Fifth Circuit, "that probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the laminated total.23 Thus, in *People v. McFadin* the court responded to the defendant's "divide-and-conquer" strategy by utilizing the following analogy:

> Defendant would apply the axiom that a chain is no stronger than its weakest link. Here, however, there are strands which have been spun into a rope. Although each alone may have insufficient strength, and some strands may be slightly frayed, the test is whether when spun together they will serve to carry the load of upholding [the probable cause determination].24

Here is an example of how the "totality of the circumstances" test works and why it is so important. In *Maryland v. Pringle* 25 an officer made a traffic stop on a car occupied by three men and, in the course of the stop, saw some things that caused him to suspect that the men were drug dealers. One of those things was a wad of cash ($763) that the officer had seen in the glove box. He then conducted a search of the vehicle and found cocaine. But a Maryland appellate court ruled the search was unlawful because the presence of money is "innocuous." The Supreme Court reversed, saying the Maryland court's "consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken."

Common sense

Not only did the Court in Gates rule that probable cause must be based on a consideration of the totality of circumstances, it ruled that the significance of the circumstances must be evaluated by applying common sense, not hypertechnical analysis. In other words, the circumstances must be "viewed from the standpoint of an objectively reasonable police officer."26 As the Court explained:

Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.[27]

Legal, but suspicious, activities

It follows from the principles discussed so far that it is significant that officers saw the suspect do something that, while not illegal, was suspicious in light of other circumstances.[28] As the Supreme Court explained, the distinction between criminal and noncriminal conduct "cannot rigidly control" because probable cause and reasonable suspicion "are fluid concepts that take their substantive content from the particular contexts in which they are being assessed."[29] For example, in *Massachusetts v. Upton* the state court ruled that probable cause could not have existed because the evidence "related to innocent, nonsuspicious conduct or related to an event that took place in public." Acknowledging that no single piece of evidence was conclusive, the Supreme Court reversed, saying the "pieces fit neatly together."[30] Similarly, the Court of Appeal noted that seeing a man running down a street "is indistinguishable from the action of a citizen engaged in a program of physical fitness." But it becomes "highly suspicious" when it is "viewed in context of immediately preceding gunshots."[31]

Another example of how noncriminal activities can become highly suspicious is found in *Illinois v. Gates*.[32] It started with an anonymous letter to a police department saying that a local resident, Lance Gates, was a drug trafficker; and it explained in some detail the procedure that Gates and his wife, Sue, would follow in obtaining drugs in Florida. DEA agents followed both of them (Gates flew, Sue drove) and both generally followed the procedure described by the letter writer. This information led to a search warrant and Gates' arrest. On appeal, he argued that the warrant was not supported by probable cause because the agents did not see him or his wife do anything illegal. It didn't matter, said the Supreme Court, because the "seemingly innocent activity became suspicious in light of the initial tip."

Multiple incriminating circumstances

Here is a principle that, while critically important, is often overlooked or underappreciated: The chances of having probable cause or reasonable suspicion increase exponentially with each additional piece of independent incriminating evidence that comes to light. This is because of the unlikelihood that each "coincidence of information"[33] could exist in the absence of a fair or moderate possibility of guilt.

For example, in a Kings County murder case probable cause to arrest the defendant was based on the following: When the crime occurred, a car similar to defendant's "uniquely painted" vehicle had been seen in a rural area, two-tenths of a mile from where a 15-year old girl had been abducted. In addition, an officer saw "bootprints and tire prints" nearby and "he compared them visually with boots seen in, and the treads of the tires of, defendant's car, which he knew was parked in front of defendant's hotel and registered to defendant. He saw the condition of the victim's body; he knew that defendant had a prior record of conviction for forcible rape. He also knew of the victim's occasional employment as a babysitter at the farm where defendant worked." In ruling that these pieces of independent incriminating evidence constituted probable cause, the California Supreme Court said:

> The probability of the independent concurrence of these factors in the absence of the guilt of defendant was slim enough to render suspicion of defendant reasonable and probable.[34]

Similarly, in a case from Santa Clara County,[35] a man named Anthony Spears, who worked at a Chili's in Cupertino, arrived at the restaurant one morning and "discovered" that the manager had been shot and killed before the restaurant had opened for the day. In the course of their investigation, sheriff 's deputies learned that Spears had left home shortly before the murder even though it was his day off, there were no signs of forced entry, and that Marlboro cigarette butts (the same brand that Spears smoked) had been found in an alcove near the manager's office. Moreover, Spears had given conflicting statements about his whereabouts when the murder occurred; and, after "discovering" the manager's body, he told other employees that the manager had been "shot" but the cause of death was not apparent from the condition of the body.

Based on this evidence, detectives obtained a warrant to search Spears' apartment and the search netted, among other things, "large amounts of bloodstained cash." On appeal, Spears argued that the detectives lacked probable cause for the warrant but the court disagreed, saying, "[W]e believe that all of the factors, considered in their totality, supplied a degree of suspicion sufficient to support the magistrate's finding of probable cause."

While this principle also applies to reasonable suspicion to detain, a lesser amount of independent incriminating evidence will be required. The following are examples from various cases:

- The suspect's physical description and his clothing were similar to that of the perpetrator.36
- In addition to a description similarity, the suspect was in a car similar in appearance to that of the perpetrator.37
- The suspect resembled the perpetrator and he was in the company of a person who was positively identified as one of two men who had just committed the crime.38
- The suspect resembled the perpetrator plus he was detained shortly after the crime occurred at the location where the perpetrator was last seen or on a logical escape route.39
- In addition to resembling the perpetrator, the suspect did something that tended to demonstrate consciousness of guilt; e.g., he lied to officers or made inconsistent statements, he made a furtive gesture, he reacted unusually to the officer's presence, he attempting to elude officers.40
- The suspect resembled the perpetrator and possessed fruits of the crime.41
- The number of suspects in the vehicle corresponded with the number of people who had just committed the crime, plus they were similar in age, sex, and nationality.42

Unique circumstances

The odds of having reasonable suspicion or probable cause also increase dramatically if the matching or similar characteristics were unusual or distinctive. As the Court of Appeal observed, "Uniqueness of the points of comparison must also be considered in testing whether the description would be inapplicable to a great many others."43

For example, the courts have taken note of the following unique circumstances:

- The suspect and perpetrator both had bandages on their left hands;44
- The suspect and perpetrator were in vehicles of the same make and model with tinted windows and a dark-colored top with light-colored side.45 Conversely, the Second Circuit noted that "when the points of similarity are less unique or distinctive, more similarities are required before the probability of identity between the two becomes convincing."46

Inferences based on circumstantial evidence As noted earlier, probable cause and reasonable suspicion must be based on "specific and articulable facts." However, the courts will also consider an officer's inferences as to the meaning or significance of the facts so long as the inference appeared to be reasonable. It is especially relevant that the inference was based on the officer's training and experience.47 In the words of the Supreme Court, "The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."48 Or, as the Court explained in *United States v. Arvizu*:

> The process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.49

For example, in *People v. Soun* 50 the defendant and three other men killed the owner of a video store in San Jose during a botched robbery. The men were all described as Asian, but witnesses provided conflicting descriptions of the getaway car. Some said it was a two-door Japanese car, but one said it was a Volvo "or that type of car." Two of the witnesses provided a partial license plate number. One said he thought it began with 1RCS, possibly 1RCS525 or 1RCS583. The other said he thought it was 1RC(?)538.

A San Jose PD officer who was monitoring these developments at the station made two inferences:

> (1) the actual license plate probably began with 1RCS, and (2) the last three numbers included a 5 and an 8. So he started running these combinations through DMV until he got a hit on 1RCS558, a 1981 Toyota registered in Oakland. Because the car was last seen heading toward Oakland, officers notified OPD and, the next day, OPD officers stopped the car and eventually arrested the occupants for the murder. This, in turn, resulted in the seizure of the murder weapon. On appeal, one of the occupants, Soun, argued that the weapon should have been suppressed because the detention was based on nothing more than "hunch and supposition." On the contrary, said the court, what Soun labeled "hunch and supposition" was actually "intelligent and resourceful police work."

Similarly, in *People v. Carrington* 51 the California Supreme Court ruled that police in Los Altos reasonably inferred that two commercial burglaries were committed by the same person based on the following: "the two businesses were located in close

proximity to each other, both businesses were burglarized on or about the same date, and in both burglaries blank checks were stolen."

Hunches and unsupported conclusions

It is well known that hunches play an important role in solving crimes. "A hunch," said the Ninth Circuit, "may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction."[52] Still, hunches are absolutely irrelevant in determining the existence of probable cause or reasonable suspicion. In other words, a hunch "is not a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion."[53]

The same is true of unsupported conclusions.[54] For example, in ruling that a search warrant affidavit failed to establish probable cause, the court in *U.S. v. Underwood* [55] noted that much of the affidavit was "made up of conclusory allegations" that were "entirely unsupported by facts." Two of these allegation were that officers had made "other seizures" and had "intercepted conversations" that tended to prove the defendant was a drug trafficker. "[T]hese vague explanations," said the court, "add little if any support because they do not include underlying facts."

Information known to other officers

Information is ordinarily irrelevant unless it had been communicated to the officer who acted on it; i.e., the officer who made the detention, arrest, or search, or the officer who applied for the search or arrest warrant.[56] To put it another way, a search or seizure made without sufficient justification cannot be rehabilitated in court by showing that it would have been justified if the officer had been aware of information possessed by a colleague. As the California Supreme Court explained, "The question of the reasonableness of the officers' conduct is determined on the basis of the information possessed by the officer at the time a decision to act is made."[57]

There is, however, an exception to this rule known as the "official channels rule" by which officers may detain, arrest, or sometimes search a suspect based solely on an official request to do so from another officer or agency. Under this rule, officers may also act based on information transmitted via a law enforcement database, such as NCIC and CLETS.[58]

Although the officers who act upon such transmissions are seldom aware of many, if any, of the facts known to the originating officer, this does not matter because, as the U.S. Supreme Court pointed out, "[E]ffective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information."[59]

For example, in *U.S. v. Lyons* [60] state troopers in Michigan stopped and searched the defendant's car based on a tip from DEA agents that the driver might be transporting drugs. On appeal, Lyons argued that the search was unlawful because the troopers had no information as to why she was a suspected of carrying drugs. But the court responded "it is immaterial that the troopers were unaware of all the specific facts that supported the DEA's reasonable suspicion analysis. The troopers possessed all the information they needed to act—a request by the DEA (subsequently found to be well-supported)."

Note that, although officers "are entitled to presume the accuracy of information furnished to them by other law enforcement personnel,"[61] the officers who disseminated the information may later be required to prove in court that they had received such information and that they reasonably believed it was reliable.[62]

Information inadmissible in court

In determining whether probable cause or reasonable suspicion exist, officers may consider both hearsay and privileged communications.[63] For example, although a victim's identification of the perpetrator might constitute inadmissible hearsay or fall within the marital privilege, officers may rely on it unless they had reason to believe it was false. As the Court of Appeal observed, "The United States Supreme Court has consistently held that hearsay information will support issuance of a search warrant.... Indeed, the usual search warrant, based on a reliable police informer's or citizen-informant's information, is necessarily founded upon hearsay."[64] On the other hand, information may not be considered if it was inadmissible because it was obtained in violation of the suspect's constitutional rights; e.g., an illegal search or seizure.[65]

Mistakes of fact and law

If probable cause was based on information that was subsequently determined to be inaccurate or false, the information may nevertheless be considered if the officers reasonably believed it was true. As the Court of Appeal put it, “If the officer’s belief is reasonable, it matters not that it turns out to be mistaken.”66 Or, in the words of the Supreme Court, “[W]hat is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable.”67

The courts are not, however, so forgiving with mistakes of law. This is because officers are expected to know the laws they enforce and the laws that govern criminal investigations. Consequently, information will not be considered if it resulted from such a mistake, even if the mistake was made in good faith.68 As the California Supreme Court explained, “Courts on strong policy grounds have generally refused to excuse a police officer’s mistake of law.”69 Or, as the Ninth Circuit put it, “If an officer simply does not know the law and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable.”70

References

1. Ornelas v. United States (1996) 517 U.S. 690, 695.
2. Hanson v. Dane County (7th Cir. 2010) 608 F.3d 335. 338.
3. Ornelas v. United States (1996) 517 U.S. 690, 695.
4. United States v. Arvizu (2002) 534 U.S. 266, 274 [“abstract”]; United States v. Cortez (1981) 449 U.S. 411, 417 [“elusive”].
5. U.S. v. Jones (1st Cir. 2012) 700 F.3d 615, 621.
6. See United States v. Sokolow (1989) 490 U.S. 1, 7; United States v. Arvizu (2002) 534 U.S. 266, 274; Ker v. California (1963) 374 U.S. 23, 33; In re Rafael V. (1982) 132 Cal.App.3d 977, 982; In re Louis F. (1978) 85 Cal.App.3d 611, 616.
7. Alabama v. White (1990) 496 U.S. 325, 330.
8. See Illinois v. Gates (1983) 462 U.S. 213, 231 “In dealing with probable cause, as the very name implies, we deal with probabilities.”].
9. See Texas v. Brown (1983) 460 U.S. 730, 742; Illinois v. Gates (1983) 462 U.S. 213, 232.
10. See Maryland v. Pringle (2003) 540 U.S. 366, 371.
11. U.S. v. Ludwig (10th Cir. 2011) 641 F.3d 1243, 1251.
12. Texas v. Brown (1983) 460 U.S. 730, 742. Also see People v. Carrington (2009) 47 Cal.4th 145, 163.
13. See Illinois v. Gates (1983) 462 U.S. 213, 238; Safford Unified School District v. Redding (2009) 557 U.S. 364, 371.
14. See U.S. v. Melvin (1st Cir. 1979) 596 F.2d 492, 495 [“appellant reads the phrase ‘probable cause’ with emphasis on the word ‘probable’ and would define it mathematically to mean more likely than not or by a preponderance of the evidence. This reading is incorrect.”]; People v. Alcorn (1993) 15 Cal.App.4th 652, 655; U.S. v. Garcia (5th Cir. 1999) 179 F.3d 265, 269.
15. Illinois v. Wardlow (2000) 528 U.S. 119, 123. Also see United States v. Arvizu (2002) 534 U.S. 266, 274.
16. Safford Unified School District v. Redding (2009) 557 U.S. 364, 371.
17. United States v. Arvizu (2002) 534 U.S. 266, 277.
18. People v. Brown (1990) 216 Cal.App.3d 1442, 1449 [edited].
19. In re Tony C. (1978) 21 Cal.3d 888, 894. Also see United States v. Arvizu (2002) 534 U.S. 266, 277.
20. U.S. v. Pontoo (1st Cir. 2011) 666 F.3d 20, 27. Also see Illinois v. Gates (1983) 462 U.S. 213, 239.
21. Terry v. Ohio (1968) 392 U.S. 1, 21, fn.18.
22. United States v. Arvizu (2002) 534 U.S. 266, 274.
23. U.S. v. Edwards (5th Cir. 1978) 577 F.2d 883, 895. Also see U.S. v. Valdes-Vega (9th Cir. 2013) 739 F.3d 1074.
24. (1982) 127 Cal.App.3d 751, 767.
25. (2003) 540 U.S. 366. Also see Massachusetts v. Upton (1984) 466 U.S. 727, 734 [“The informant’s story and the surrounding facts possessed an internal coherence that gave weight to the whole.”].
26. Ornelas v. United States (1996) 517 U.S. 690, 696.
27. Illinois v. Gates (1983) 462 U.S. 213, 231. Also see United States v. Cortez (1981) 449 U.S. 411, 418.
28. See United States v. Sokolow (1989) 490 U.S. 1, 9 [“Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”]; People v. Glenos (1992) 7 Cal.App.4th 1201, 1207; U.S. v. Ruidiaz (1st Cir. 2008) 529 F.3d 25, 30 [“a fact that is innocuous in itself may in combination with other innocuous facts take on added significance”].

29. Safford Unified School District v. Redding (2009) 557 U.S. 364, 371.
30. (1984) 466 U.S. 727, 731-32.
31. People v. Juarez (1973) 35 Cal.App.3d 631, 636.
32. (1983) 462 U.S. 213.
33. Ker v. California (1963) 374 U.S. 23, 26. Also see People v. Pranke (1970) 12 Cal.App.3d 935, 940 [“when such remarkable coincidences coalesce, they are sufficient to warrant a prudent man in believing that the defendant has committed an offense”]; U.S.v. Abdus-Price (D.C. Cir. 2008) 518 F.3d 926, 930 [a “confluence” of factors]; U.S. v. Carney (6th Cir. 2012) 675 F.3d 1007 [“interweaving connections”].
34. People v. Hillery (1967) 65 Cal.2d 795, 804.
35. People v. Spears (1991) 228 Cal.App.3d 1.
36. See Chambers v. Maroney (1970) 399 U.S. 42, 46-47; People v. Adams (1985) 175 Cal.App.3d 855, 861; People v. Anthony (1970)7 Cal.App.3d 751, 763.
37. See People v. Hill (2001) 89 Cal.App.4th 48, 55; People v. Soun (1995) 34 Cal.App.4th 1499, 1524-25; People v. Watson (1970)12 Cal.App.3d 130, 134-35; People v. Davis (1969) 2 Cal.App.3d 230, 237; People v. Huff (1978) 83 Cal.App.3d 549, 557; In re Dung T. (1984) 160 Cal.App.3d 697, 712-13; People v. Flores (1974) 12 Cal.3d 85, 91; People v. Jones (1981) 126 Cal.App.3d 308, 313-14; People v. Moore (1975) 51 Cal.App.3d 610, 617; People v. Adams (1985) 175 Cal.App.3d 855, 861; People v. Orozco (1981) 114 Cal.App.3d 435, 445.
38. See People v. Bowen (1987) 195 Cal.App.3d 269, 274; In re Lynette G. (1976) 54 CA3 1087, 1092; In re Carlos M. (1990) 220 CA3 372, 382 [“[W]here, as here, a crime is known to have involved multiple suspects, some of whom are specifically described and others whose descriptions are generalized, a defendant’s proximity to a specifically described suspect, shortly after and near the site of the crime, provides reasonable grounds to detain for investigation a defendant who otherwise fits certain general descriptions.”].
39. People v. Atmore (1970) 13 Cal.App.3d 244, 246.
40. People v. Fields (1984) 159 Cal.App.3d 555, 564; People v. Turner (1994) 8 Cal.4th 137, 186; People v. Loudermilk (1987) 195 Cal.App.3d 996, 1005.
41. People v. Hagen (1970) 6 Cal.App.3d 35, 43; People v. Morgan (1989) 207 Cal.App.3d 1384, 1389; People v. Anthony (1970) 7Cal.App.3d 751, 763; People v. Rico (1979) 97 Cal.App.3d 124, 129.
42. People v. Soun (1995) 34 Cal.App.4th 1499, 1524. Also see People v. Brian A. (1985) 173 Cal.App.3d 1168, 1174 [“Where there were two perpetrators and an officer stops two suspects who match the descriptions he has been given, there is much greater basis to find sufficient probable cause for arrest. The probability of there being other groups of persons with the same combination of physical characteristics, clothing, and trappings is very slight.”]; People v. Britton (2001) 91 Cal.App.4th 1112, 1118-19 [“This evasive conduct by two people instead of just one person, we believe, bolsters the reasonableness of the suspicion”]. Compare In re Dung T. (1984) 160 Cal.App.3d 697, 713.
43. In re Brian A. (1985) 173 Cal.App.3d 1168, 1174
44. People v. Joines (1970) 11 Cal.App.3d 259, 264. Also see P v. Hill (2001) 89 CA4 48, 55 [medallion and scar].
45. U.S. v. Abdus-Price (D.C. Cir. 2008) 518 F.3d 926, 930-31. Also see P v. Orozco (1981) 114 CA3 435, 440 [a “cream, vinyl top over a cream colored vehicle”]; P v. Flores (1974) 12 C3 85, 92 [a “unique” paint job].
46. U.S. v. Jackson (2nd Cir. 2004) 368 F.3d 59, 64.
47. See United States v. Cortez (1981) 449 U.S. 411, 418; People v. Ledesma (2003) 106 Cal.App.4th 857, 866; In re Frank V. (1991) 233 Cal.App.3d 1232, 1240-41; U.S. v. Lopez-Soto (9th Cir. 2000) 205 F.3d 1101, 1105 [“An officer is entitled to rely on his training and experience in drawing inferences from the facts he observes, but those inferences must also be grounded in objective facts and be capable of rational explanation.”].
48. Illinois v. Gates (1983) 462 U.S. 213, 232.
49. (2002) 534 U.S. 266, 273.
50. (1995) 34 Cal.App.4th 1499. Also see Maryland v. Pringle (2003) 540 U.S. 366, 371-72 [it was reasonable to believe that all three occupants of a vehicle possessed five baggies of cocaine that were behind the back-seat armrest because they were stopped at 3:16 A.M., there was $763 in rolled-up cash in the glove box, and none of the men offered “any information with respect to the ownership of the cocaine or the money”]; People v. Loudermilk (1987) 195 Cal.App.3d 996, 1005; People v. Superior Court (Johnson) (1972) 6 Cal.3d 704, 712-13.
51. (2010) 47 Cal.4th 145.

52. U.S. v. Thomas (9th Cir. 2000) 211 F.3d 1186, 1192.
53. Ibid. Also see U.S. v. Cash (10th Cir. 2013) 733 F.3d 1264, 1274 [reasonable suspicion "must be based on something more than an inchoate and unparticularized suspicion or hunch"].
54. See Illinois v. Gates (1983) 462 U.S. 213, 239 [a "wholly conclusory statement" is irrelevant]; People v. Leonard (1996) 50 Cal.App.4th 878, 883 ["Warrants must be issued on the basis of facts, not beliefs or legal conclusions."]; U.S. v. Garcia-Villalba (9th Cir. 2009) 585 F.3d 1223, 1234; Gentry v. Sevier (7th Cir. 2010) 597 F.3d 838, 845 ["The officer was acting solely upon a general report of a 'suspicious person,' which did not provide any articulable facts that would suggest the person was committing a crime or was armed."].
55. (9th Cir. 2013) 725 F.3d 1076.
56. See Ker v. California (1963) 374 U.S. 23, 40, fn.12 ["It goes without saying that in determining the existence of probable cause we may concern ourselves only with what the officers had reason to believe at the time of their entry." Edited.]; Maryland v. Garrison (1987) 480 U.S. 79, 85 ["But we must judge the constitutionality of [the officers'] conduct in light of the information available to them at the time they acted."]; Dyke v. Taylor Implement Mfg. Co. (1968) 391 U.S. 216, 222 [officer "had not been told that Harris and Ellis had identified the car from which shots were fired as a 1960 or 1961 Dodge."]; People v. Adams (1985) 175 Cal.App.3d 855, 862 ["warrantless arrest or search cannot be justified by facts of which the officer was wholly unaware at the time"]; People v. Superior Court (Haflich) (1986) 180 Cal.App.3d 759. 766 ["The issue of probable cause depends on the facts known to the officer prior to the search."]; John v. City of El Monte (9th Cir. 2008) 515 F.3d 936, 940 ["The determination whether there was probable cause is based upon the information the officer had at the time of making the arrest."]; U.S. v. Ellis (7th Cir. 2007) 499 F.3d 686, 690 ["As there was no communication from Officers Chu and McNeil at the front door to [Officer] Lopez at the side door, it was improper to imputer their knowledge to Lopez."].
57. People v. Gale (1973) 9 Cal.3d 788, 795.
58. See Whiteley v. Warden (1971) 401 U.S. 560, 568; People v. Soun (1995) 34 Cal.App.4th 1499, 1521; U.S. v. Ramirez (9th Cir. 2007) 473 F.3d 1026, 1037
59. United States v. Hensley (1985) 469 U.S. 221, 232.
60. (6th Cir. 2012) 687 F.3d 754, 768.
61. U.S. v. Lyons (6th Cir. 2012) 687 F.3d 754, 768.
62. See United States v. Hensley (1985) 469 U.S. 221, 232. Also see People v. Madden (1970) 2 Cal.3d 1017.
63. See United States v. Ventresca (1965) 380 U.S. 102, 108; People v. Navarro (2006) 138 Cal.App.4th 146, 147.
64. People v. Superior Court (Bingham) (1979) 91 Cal.App.3d 463, 472.
65. See Lozoya v. Superior Court (1987) 189 Cal.App.3d 1332, 1340; U.S. v. Barajas-Avalos (9th Cir. 2004) 377 F.3d 1040, 1054.
66. Cantrell v. Zolin (1994) 23 Cal.App.4th 128, 134. Also see Hill v. California (1971) 401 U.S. 797, 802.
67. Illinois v. Rodriguez (1990) 497 U.S. 177, 185. Edited.
68. See People v. Reyes (2011) 196 Cal.App.4th 856, 863; People v. Cox (2008) 168 Cal.App.4th 702, 710.
69. People v. Teresinski (1982) 30 Cal.3d 822, 831.
70. U.S. v. Mariscal (9th Cir. 2002) 285 F.3d 1127, 113

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5.2: Probable Cause to Arrest

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

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

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

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

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

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

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

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

Description Similarities

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

PHYSICAL APPEARANCE

Each individual physical similarity between the perpetrator and suspect— height, weight, build, age, race, hair color—has little significance. In other words, neither a "mere resemblance" to the perpetrator nor a resemblance to a "vague" physical description

will carry much weight, even for an investigative detention.8 Instead, what matters—and it matters a lot— is the number of independent corresponding characteristics.9

CLOTHING

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

VEHICLE SIMILARITIES

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

CORRESPONDING NUMBER OF PEOPLE

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

DISCREPANCIES

The courts understand that witnesses may inadvertently provide officers with descriptions of perpetrators and vehicles that are not entirely accurate. Thus, officers may make allowances for the types of errors they have come to expect.17 As the Court of Appeal observed, "Crime victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock."18 For example, the following discrepancies in vehicle descriptions were considered insignificant:

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

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

Second, if the crime had just occurred, and if officers detained a group of suspects, the fact that the number of people in the group was larger or smaller than the number of perpetrators is not considered a significant discrepancy. This is because, as the California Court of Appeal observed in a robbery case, "it is a matter of common knowledge that holdup gangs often operate in varying numbers and combinations, and the victim of a robbery does not always see all of the participants."24 Third, even if witnesses did not see a getaway car, officers may usually infer that one was used. Thus, if the suspect was in a vehicle when he was detained or arrested, the fact that witnesses did not see a vehicle will not ordinarily constitute a discrepancy.25

Suspect's Location

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

NEAR THE CRIME SCENE

A suspect's presence at or near the scene of a crime—whether before, during, or just after the crime occurred—is of course a relevant circumstance. And, thanks to modern technology, this circumstance is becoming increasingly important as officers are

often able to determine the suspect's whereabouts at a particular time by means of GPS tracking or cell tower triangulation.29

ON ACTUAL ESCAPE ROUTE

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

ON A LOGICAL ESCAPE ROUTE

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

- At about 4 A.M., two men robbed a gas station in Long Beach. Two officers "proceeded to a nearby intersection, a vantage point which permitted them to survey the street leading from the crime scene to a freeway entrance, a logical escape route." A few minutes later, they saw two men in a car; the men fit the description of the robbers. No other cars were in the area; the suspects were "excessively attentive to the officers."31
- Shortly after a gang-related drive-by murder, LAPD officers found the shooters' car abandoned, and they reasonably believed the occupants had fled on foot. An officer assigned to a gang unit figured the shooters would be heading to their own neighborhood "by a route which avoided the territories of rival and hostile gangs," and he knew their "most logical route." Along that route, he detained several young men who were wearing the colors of the perpetrators' gang.32
- At about 8 P.M., two men robbed a motel in Coronado, an island in San Diego Bay with only two bridges leading in and out. Police dispatch transmitted a very general description of the suspects but no vehicle description. Within minutes, an officer at one of the bridges saw a car occupied by two men who matched the general description. Two other men in the car ducked down when the officer started following them.33

HIGH CRIME AREA

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

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

INSIDE A PERIMETER

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

Reaction to Seeing Officers

Even if they are not doing anything illegal at the moment, criminals tend to become nervous when they see an officer or patrol car. So officers naturally view this as a suspicious circumstance. And so do the courts—but with two qualifications: First, the officers must have had reason to believe the suspect had seen and recognized them. Second, the nature of the reaction must have been sufficiently suspicious.

Proving recognition

As noted, a suspect's reaction to seeing officers can be deemed suspicious only if it reasonably appeared he had recognized them as officers. As the Court of Appeal explained, "Absent a showing the citizen should reasonably know that those who are approaching are law enforcement officers, no reasonable inference of criminal conduct may be drawn."39 In most cases, this requirement is easily satisfied if (1) the reaction occurred immediately after the suspect looked in the officers' direction; and (2) the officers were

in a marked patrol car or were wearing a standard uniform or other clearly identifiable departmental attire. But if the officers were in plain clothes or in an unmarked car, the relevance of the suspect's reaction will depend on whether there was some circumstantial evidence of recognition. Thus, in *People v. Huntsman* 40 the court ruled that the defendant's flight from officers was not incriminating because the officers "were in plain clothes and were driving an unmarked car at night."

In addition to marked cars, there are semi-marked vehicles; i.e., vehicles with enough exposed police equipment or other markings that most people— especially criminals—will easily spot them. As the Court of Appeal put it, some of these cars are "about as inconspicuous as three bull elephants in a backyard swimming pool."41 Still, when this issue arises at a hearing on a motion to suppress evidence, officers must be able to prove that they reasonably believed the defendant had identified them or their car. This might be accomplished by describing in detail the various police markings and equipment that were readily visible. Thus, in U.S. v. Nash the court ruled that an officer's vehicle was clearly identifiable mainly because it was "a dark blue Dodge equipped with several antennae and police lights on the rear shelf."42

Suspicious reactions

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

FLIGHT

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

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

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

ATTEMPTING TO HIDE FROM OFFICERS

Like flight, a person's attempt to hide from officers—including "slouching, crouching, or any other arguably evasive movement"54—is a highly suspicious circumstance.55 Here are some examples:

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

ATTEMPTING TO AVOID OFFICERS

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

- Suspects "suddenly changed course" and "increased their pace" as the officers' vehicle came into view.60
- Suspects split up."61

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

WARNING TO ACCOMPLICE

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

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

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

ATTEMPT TO HIDE, CONCEAL, OR DISCARD

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

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

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

EXTREME ATTENTION TO OFFICERS

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

- Defendant was "constantly checking the [rear view] mirrors and talking on his mobile phone as he looked back at the unmarked car behind them."88
- Upon seeing a police car, the suspect "did not give it the passing glance of the upright, law abiding citizen. His eyes were glued on that car."89
- The suspect "appeared to be startled by [the officer], had a 'look of fear in his eyes' and then quickly looked away."90
- All six suspects inside a moving vehicle turned to look at an officer as they drove past him.91

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

Suspicious Activities

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

EXCESSIVE ALERTNESS

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

• As a suspected drug purchaser left a drug house, he quickly looked "side to side."97

• A suspected drug dealer "scouted the area before entering the apartment."98

• A suspected drug dealer "loitered about and looked furtively in all directions."99

• A suspected burglar "alighted from the vehicle and looked around apprehensively for quite some period of time."100

• Two men leaving a jewelry store (after robbing it) kept looking back at the store.101

COUNTERSURVEILLANCE

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

- Suspect began "weaving in and out of traffic at a high rate of speed in an apparent attempt to evade surveillance."102
- Suspect went to two houses "which the officers associated with drugs, and drove in and out of the parking lots of those buildings several times."103
- Suspect would "make U-turns in the middle of streets, slow down at green lights, and then accelerate through intersections when the lights turned yellow."104
- Suspect "pulled to the curb, allowing a surveillance unit to pass [then] drove to a residence after first going past it and making a U-turn."105
- Suspect drove "up and down side streets, making numerous U-turns, stopping, backing up, and finally arriving at the Ganesha Street property."106

LATE NIGHT ACTIVITY

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

- 11:40 P.M.: Officer saw three people inside a car parked "in front of a darkened home" in a neighborhood in which two to three burglaries had been occurring each week.107
- Midnight: Officer saw two occupied cars parked behind the sheriff 's warehouse; there were no homes or places of business in the area.108
- Midnight: On a dark and secluded road, an officer saw an occupied pickup truck "nosed into the driveway of a fenced construction storage area," and there was a big box in the back of the truck.109

- 12:15 A.M.: Officers saw two men “peering” into the window of a closed radio shop”; when the men saw the officers, they started to walk away.110
- 2:30 A.M.: Officers saw “three people in a car driving around a high crime area” and “the car proceeded along two residential blocks, slowing intermittently in a manner that an observing officer thought consistent with preparing for a burglary or drive-by shooting.”111
- 2:35 A.M.: Officer saw a man “exiting from darkened private property where valuable merchandise was located.”112
- 3:30 A.M.: Two men who were walking in a business area started running when they saw a patrol car approaching.113

CASING

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

HAND-TO-HAND EXCHANGES

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

NATURE OF ITEM EXCHANGED

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

PACKAGING OF ITEM EXCHANGED

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

LOCATION OF TRANSACTION

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

MONEY EXCHANGE

The suspected buyer gave money to the suspected seller.120

FURTIVENESS

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

PANICKY REACTION TO OFFICERS

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

MULTIPLE EXCHANGES

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

PRIOR ARRESTS

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

ADVANCING ON OFFICERS

A suspect's act of quickly approaching officers who are about to contact or detain him is a suspicious (and worrisome) response. Thus, in *People v. Hubbard* the following testimony by an officer established reasonable suspicion for a pat search: "Like I said, all three suspects alighted from the vehicle almost simultaneously. They all got out on us."127 Similarly, *U.S. v. Mattarolo*, the court upheld a pat search because "[t]he defendant's swift approach caused the officer to get out of his squad car quickly so as not to be trapped with the means of protecting himself consequently limited."128

"UNUSUAL" ACTIVITY

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

Nervousness

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

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

Although less significant, the following indications of nervousness have been noted: suspect looked "shocked,"136 suspect appeared "nervous and anxious to leave the area,"137 and suspect appeared nervous and was hesitant in answering questions.138 Much less significant—but not irrelevant 139—is a suspect's failure to make eye contact with officers.140

Lies and Evasions

When a suspect lies, evades a question, gives conflicting statements or tells an unbelievable story it is ordinarily reasonable to infer that the truth would incriminate him.141 Consequently, the following are all suspicious circumstances:

MATERIAL LIES

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

LIES ABOUT PERIPHERAL ISSUES

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

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

SUSPECT GIVES INCONSISTENT STATEMENT

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

SUSPECTS GIVE CONFLICTING STORIES

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

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

INDEPENDENT WITNESS GAVE DIFFERENT STORY

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

- The suspect denied reports of several witnesses who had told officers they had seen him arguing with a woman who was later raped and killed.155
- A murder suspect told officers that he left home at 8 A.M. (after his employer had been killed), but his mother said he left well before then.156
- A man suspected of having murdered a woman told officers that the woman had only been missing a week or so, but the woman's mother said her daughter had been missing 3-4 weeks.157 UNBELIEVABLE STORIES: Although not a provable lie, the suspect's story may generate suspicion because it didn't make sense, or because it didn't fit with the known facts.158
- A suspected drug dealer who was stopped for a traffic violation said he was driving from New Jersey to San Jose to fix a computer server for a company. "Yet if this were true," said the court, "it was surely curious that the San Jose company would be willing to wait for Mr. Ludwig to drive cross-country."159 Plus there are lots of people in San Jose (of all places) who can fix a server.
- A man who was found inside the locked apartment of a robbery suspect claimed he was not the suspect, but he couldn't explain his presence there.160
- A suspected car thief said the car belonged to a friend, but he didn't know his friend's last name.161
- When questioned by DEA agents at San Diego International Airport, a woman who was carrying $42,500 in cash inside a bag told them she had obtained the bag from a man named "Samuel," a man she had just met at the airport and whose last name she didn't know.162
- A burglary suspect told officers she was waiting for a friend, but she didn't know her friend's name; plus she said her friend would be arriving on a BART train from San Jose, but there are no BART stations in San Jose (at least until 2017).163
- A suspected rapist claimed he had been jogging, but he wasn't perspiring or breathing hard, nor did he have a rapid pulse.164

AMBIGUOUS AnswerS

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

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

WITHHOLDING INFORMATION

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

KNOWING TOO MUCH

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

Possession of Evidence

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

Types of incriminating evidence

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

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

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

Types of "possession"

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

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

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

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

CONTRABAND IN SUSPECT'S RESIDENCE

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

CONTRABAND IN A VEHICLE

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

COMPANION IN POSSESSION

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

INDICIA

A suspect's control over a certain place or thing may be established by the presence of documents or other indicia linking him to the location; e.g., rent receipts, utility bills, driver's license.192

Other Relevant Circumstances

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

SUSPECT'S PHYSICAL CONDITION

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

SUSPECT'S RAP SHEET

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

GANG CLOTHING

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

ELECTRONIC COMMUNICATION RECORDS

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

References

1. Source: Crime in the United States 2012, FBI.
2. United States v. Arvizu (2002) 534 U.S. 255, 274 ["abstract"]; United States v. Cortez (1981) 499 U.S. 411, 417 ["elusive"].
3. NOTE: Contrary to what happens on TV, officers cannot arrest people "for investigation" of a crime or "on suspicion." This is because probable cause requires a fair probability that a person actually committed a crime—not that he might have done so. See Papachristou v. City of Jacksonville (1972) 405 U.S. 156, 169 ["Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system"].
4. See U.S. v. Edwards (5th Cir. 1978) 577 F.2d 883, 895; Jackson v. U.S. (D.C. Cir. 1962) 302 F.2d 194, 197.
5. Ker v. California (1963) 374 U.S. 23, 36.
6. See People v. Flores (1974) 12 Cal.3d 85, 92 ["distinctive" hat]; People v. Carpenter (1997) 15 Cal.4th 312, 364 [corresponding shoeprint]; People v. Orozco (1981) 114 Cal.App.3d 435, 440 [unusual color of car].
7. In re Brian A. (1985) 173 Cal.App.3d 1168, 1174.
8. See In re Carlos M. (1990) 220 Cal.App.3d 372, 381-82; In re Dung T. (1984) 160 Cal.App.3d 697, 713; People v. Walker (2012) 210 Cal.App.4th 165, 182; Grant v. Long Beach (9th Cir. 2002) 315 F.3d 1081, 1088 ["mere resemblance to a general description"].
9. See People v. Fields (1984) 159 Cal.App.3d 555, 564; In re Brian A. (1985) 173 Cal.App.3d 1168, 1174.
10. See Chambers v. Maroney (1970) 399 U.S. 42, 46 [corresponding green sweater]; People v. Fields (1984) 159 Cal.App.3d 555, 564 [corresponding jogging pants]; People v. Hagen (1970) 6 Cal.App.3d 35, 41 [corresponding three-quarter length coat].
11. People v. Soun (1995) 34 Cal.App.4th 1499, 1524-25. Also see People v. Adams (1985) 175 Cal.App.3d 55, 859, 861 [white straw hat, dark pants, light shirt"]; People v. Little (2012) 206 Cal.App.4th 1364, 1370 [male wore a white shirt; female wore a

green dress”]; In re Brian A. (1985) 173 Cal.App.3d 1168, 1174 [jacket with “shiny red hood” and soccer-style bag with double handles]; People v. Joines (1970) 11 Cal.App.3d 259, 264 [bandage on the left hand].

12. People v. Soun (1995) 34 Cal.App.4th 1499, 1522; People v. Watson (1970) 12 Cal.App.3d 130, 134-135.
13. People v. Flores (1974) 12 Cal.3d 85.
14. People v. Chandler (1968) 262 Cal.App.2d 350, 354.
15. See People v. Leath (2013) 217 Cal.App.4th 344, 354; People v. Little (2012) 206 Cal.App.4th 1364, 1373; In re Dung T. (1984) 160 Cal.App.3d 697, 713.
16. See Chambers v. Maroney (1970) 399 U.S. 42, 46; People v. Soun (1995) 34 Cal.App.4th 1499, 1518; People v. Joines (1970) 11 Cal.App.3d 259, 263; In re Brian A. (1985) 173 Cal.App.3d 1168, 1174; In re Lynette G. (1976) 54 Cal.App.3d 1087, 1092.
17. See Hill v. California (1971) 401 U.S. 797, 803, fn.6; Dawkins v. Los Angeles (1978) 22 Cal.3d 126, 133; People v. Arias (1996) 13 Cal.4th 92, 169; People v. Price (1991) 1 Cal.4th 324, 410-11.
18. People v. Smith (1970) 4 Cal.App.3d 41, 48.
19. People v. Weston (1981) 114 Cal.App.3d 764, 775, fn.5. Also see U.S. v. Marxen (6th Cir. 2005) 410 F.3d 326, 331, fn.5.
20. People v. Watson (1970) 12 Cal.App.3d 130, 134-35.
21. People v. Jones (1981) 126 Cal.App.3d 308, 313-14.
22. People v. Rico (1979) 97 Cal.App.3d 124, 132.
23. See Williams v. Superior Court (1985) 168 Cal.App.3d 349, 361.
24. People v. Coffee (1980) 107 Cal.App.3d 28, 33-34. Also see People v. Chandler (1968) 262 Cal.App.2d 350, 354.
25. See People v. Anthony (1970) 7 Cal.App.3d 751, 761; People v. Overten (1994) 28 Cal.App.4th 1497, 1505; People v. Joines (1970) 11 Cal.App.3d 259, 263.
26. See Brown v. Texas (1979) 443 U.S. 47, 52; Ybarra v. Illinois (1979) 444 U.S. 85, 91.
27. See Illinois v. Wardlow (2000) 528 U.S. 119, 124 [“officers are not required to ignore the relevant characteristics of a location”].
28. See People v. Anthony (1970) 7 Cal.App.3d 751, 761; People v. Conway (1994) 25 Cal.App.4th 385, 390.
29. See United States v. Jones (2012) U.S. [132 S.Ct. 945, 947; In re Application of the U.S. (S.D.N.Y. 2006) 460 F.Supp.2d 448, 452 [“Where the government obtains information from multiple towers simultaneously, it often can triangulate the caller’s precise location and movements by comparing the strength, angle, and timing of the cell phone’s signal measured from each of the sites.”]; In re Application of the U.S. (3rd Cir. 2010) 620 F.3d 304, 308 [data included “which of the tower’s ‘faces’ carried a given call at its beginning and end”]), or by GPS technology if equipment has been upgraded to the Enhanced 911 standards.”]; In re Application of the U.S. (3rd Cir. 2010) 620 F.3d 304, 311 [the Government noted that “much more precise location information is available when global positioning system (‘GPS’) technology is installed in a cell phone”].
30. See In re Louis F. (1978) 85 Cal.App.3d 611; U.S. v. Jones (8th Cir. 2008) 535 F.3d 886.
31. People v. Joines (1970) 11 Cal.App.3d 59, 62-65.
32. People v. Superior Court (Price) (1982) 137 Cal.App.3d 90, 96.
33. People v. Overten (1994) 28 Cal.App.4th 1497, 1505.
34. See Maryland v. Buie (1990) 494 U.S. 325, 334, fn.2; Illinois v. Wardlow (2000) 528 U.S. 119, 124.
35. People v. Holloway (1985) 176 Cal.App.3d 150, 155.
36. See Illinois v. Wardlow (2000) 528 U.S. 119, 124; People v. Souza (1994) 9 Cal.4th 224, 240.
37. (1983) 141 Cal.App.3d 814.
38. (1992) 8 Cal.App.4th 1000, 1009-10.
39. People v. Huntsman (1984) 152 Cal.App.3d 1073, 1091.
40. (1984) 152 Cal.App.3d 1073.
41. Flores v. Superior Court (1971) 17 Cal.App.3d 119, 224.
42. (7th Cir. 1989) 876 F.2d 1359, 1360.
43. See People v. Dickey (1994) 21 Cal.App.4th 952, 956, fn.2.
44. Illinois v. Wardlow (2000) 528 U.S. 119, 124.
45. People v. Souza (1994) 9 Cal.4th 224, 235-36.
46. Illinois v. Wardlow (2000) 528 U.S. 119, 124; People v. Magee (2011) 194 Cal.App.4th 178, 191, fn.12.
47. Crofoot v. Superior Court (1981) 121 Cal.App.3d 717, 724; People v. Superior Court (Johnson) (1971) 15 Cal.App.3d 146.
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50. People v. McGriff (1990) 217 Cal.App.3d 1140, 1144; People v. Mims (1992) 9 Cal.App.4th 1244, 1250.
51. People v. Souza (1994) 9 Cal.4th 224, 240; People v. Johnson (1991) 231 Cal.App.3d 10, 12.
52. People v. Rodriguez (2012) 207 Cal.App.4th 1540, 1544; In re Rafael V. (1982) 132 Cal.App.3d 977, 982-83.
53. See Pen. Code § 148; People v. Allen (1980) 109 Cal.App.3d 981, 987; People v. Johnson (1991) 231 Cal.App.3d 1, 13, fn.2; People v. Mendoza (1986) 176 Cal.App.3d 1127, 1131.
54. U.S. v. Woodrum (1st Cir. 2000) 202 F.3d 1, 7.
55. See Illinois v. Wardlow (2000) 528 U.S. 119, 124 [“evasive behavior” is a “pertinent factor in determining reasonable suspicion”].
56. In re Michael S. (1983) 141 Cal.App.3d 814, 816.
57. U.S. v. Thompson (D.C. Cir. 2000) 234 F.3d 725, 729.
58. People v. Souza (1994) 240. Also see People v. Overten (1994) 28 Cal.App.4th 1497, 1504.
59. U.S. v. Valentine (3rd Cir. 2000) 232 F.3d 350, 357.
60. U.S. v. Briggs (10th Cir. 2013) 720 F.3d 1281, 1286; People v. Manis (1969) 268 Cal.App.2d 653, 660.
61. See People v. Boissard (1992) 5 Cal.App.4th 972, 975; People v. Profit (1986) 183 Cal.App.3d 849, 882; People v. Divito (1984) 152 Cal.App.3d 1, 13; In re Stephen L. (1984) 162 Cal.App.3d 257, 260; People v. Brown (1990) 216 Cal.App.3d 1442, 1450.
62. People v. Lloyd (1992) 4 Cal.App.4th 724, 734.
63. People v. Turnage (1975) 45 Cal.App.3d 201, 205.
64. In re Eduardo G. (1980) 108 Cal.App.3d 745, 754.
65. U.S. v. Lopez-Garcia (11th Cir. 2009) 565 F.3d 1306, 1314. Also see Flores v. Superior Court (1971) 17 Cal.App.3d 219, 224.
66. People v. Bigham (1975) 49 Cal.App.3d 73, 78. Also see U.S. v. Mays (6th Cir.2011) 643 F.3d 537, 543.
67. People v. Vasquez (1983) 138 Cal.App.3d 995, 999.
68. People v. Mims (1992) 9 Cal.App.4th 1244, 1250. Also see Sanderson v. Superior Court (1980) 105 Cal.App.3d 264, 271 [“Cops!”].
69. People v. Lee (1987) 194 Cal.App.3d 975, 980.
70. People v. Wigginton (1973) 35 Cal.App.3d 732, 736.
71. Florida v. Rodriguez (1984) 469 U.S. 1, 3.
72. Pierson v. Superior Court (1970) 8 Cal.App.3d 510, 516.
73. People v. Lee (1987) 194 Cal.App.3d 975, 983. Also see People v. Flores (1979) 100 Cal.App.3d 221, 226.
74. U.S. v. Mays (6th Cir. 2011) 643 F.3d 537, 543.
75. People v. McLean (1970) 6 Cal.App.3d 300, 306.
76. People v. Atmore (1970) 13 Cal.App.3d 244, 246.
77. People v. Lopez (2004) 119 Cal.App.4th 132, 134.
78. People v. Ochoa (1970) 9 Cal.App.3d 500, 502. Also see People v. Gonzales (1989) 216 Cal.App.3d 1185, 1189.
79. See People v. Miller (1976) 60 Cal.App.3d 849, 854 [it was reasonable for the officer to conclude “that defendant feared discovery of the book or notebook because it contained or would lead to incriminating evidence”].
80. People v. Superior Court (Vega) (1969) 272 Cal.App.2d 383, 387.
81. In re John C. (1978) 80 Cal.App.3d 814, 819.
82. U.S. v. Stigler (8th Cir. 2009) 574 F.3d 1008, 1009.
83. People v. Superior Court (Brown) (1980) 111 Cal.App.3d 948, 956.
84. People v. Hunter (2005) 133 Cal.App.4th 371, 379, fn.5.
85. People v. Johnson (1991) 231 Cal.App.3d 1, 12.
86. People v. Butler (2003) 111 Cal.App.4th 150.
87. U.S. v. Burnette (9th Cir. 1983) 698 F.2d 1038, 1048.
88. U.S. v. Sloan (7th Cir. 2011) 636 F.3d 845, 850.
89. Flores v. Superior Court (1971) 17 Cal.App.3d 219, 224.
90. People v. Fields (1984) 159 Cal.App.3d 555, 564.
91. People v. Soun (1995) 34 Cal.App.4th 1499, 1513.
92. (2002) 534 U.S. 266, 270.

93. In re Elisabeth H. (1971) 20 Cal.App.3d 323, 327.
94. See People v. Souza (1994) 9 Cal.4th 224, 233.
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97. People v. Avalos (1996) 47 Cal.App.4th 1569, 1577.
98. People v. Carrillo (1995) 37 Cal.App.4th 1662, 1668.
99. People v. Moore (1970) 13 Cal.App.3d 424, 431.
100. People v. Dolliver (1986) 181 Cal.App.3d 49.
101. People v. Green (1994) 25 Cal.App.4th 1107, 1109, 1111.
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108. People v. Lovejoy (1970) 12 Cal.App.3d 883, 886.
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110. People v. Koelzer (1963) 222 Cal.App.2d 20.
111. U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079.
112. People v. Allen (1975) 50 Cal.App.3d 896, 901.
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119. See People v. Limon (1993) 17 Cal.App.4th 524, 532; In re Frederick B. (1987) 192 Cal.App.3d 79, 86.
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124. People v. Handy (1971) 16 Cal.App.3d 858, 860.
125. See People v. Maltz (1971) 14 Cal.App.3d 381, 393.
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129. People v. Foranyic (1998) 64 Cal.App.4th 186, 190.
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146. See People v. Suennen (1980) 114 Cal.App.3d 192, 199; People v. Juarez (1973) 35 Cal.App.3d 631, 635.
147. See People v. Daugherty (1996) 50 Cal.App.4th 275, 286; People v. Loudermilk (1987) 195 Cal.App.3d 996, 1005.
148. See People v. Hunter (2005) 133 Cal.App.4th 371, 379, fn.5. ALSO SEE In re Lennies H. (2005) 126 Cal.App.4th 1232, 1238.
149. See People v. Carrillo (1995) 37 Cal.App.4th 1662, 1668-71.
150. See U.S. v. Raymond Wong (9th Cir. 2003) 334 F.3d 831.
151. See U.S. v. Holzman (9th Cir. 1989) 871 F.2d 1496, 1503. Also see U.S. v. Ayon-Meza (9th Cir. 1999) 177 F.3d 1130, 1133.
152. (1995) 11 Cal.4th 786, 843. Also see People v. Gravatt (1971) 22 Cal.App.3d 133, 137 [suspect claimed at first that item belonged to his brother-in-law, then said he won it in a crap game]; People v. Shandloff (1985) 170 Cal.App.3d 372, 382.
153. (1981) 121 Cal.App.3d 239, 246.
154. (10th Cir.2007) 472 F.3d 784, 788. Also see U.S. v. Gill (8th Cir. 2008) 513 F.3d 836, 844-45.
155. People v. Davis (1981) 29 Cal. 3d 814, 823.
156. People v. Spears (1991) 228 Cal.App.3d 1.
157. People v. Rogers (2009) 46 Cal.4th 1136, 1159.
158. See People v. Memro (1995) 11 Cal.4th 786, 843; In re Richard T. (1978) 79 Cal.App.3d 382, 388.
159. U.S. v. Ludwig (10th Cir. 2011) 641 F.3d 1243, 1249.
160. Hill v. California (1971) 401 U.S. 797, 803, fn.8.
161. People v. Cartwright (1999) 72 Cal.App.4th 1362, 1364 [“Any experienced officer hearing this frequently used but almost literally incredible tale—provided by a driver who had no identification, no proof of registration, and a car with tabs which Department of Motor Vehicles records showed did not belong to it—would have entertained a robust suspicion the car was stolen.”].
162. U.S. v. $42,500 (9th Cir. 2002) 283 F.3d 977, 981.
163. People v. Harris (1980) 105 Cal.App.3d 204, 212-13.
164. People v. Fields (1984) 159 Cal.App.3d 555, 564.
165. See U.S. v. Holzman (9th Cir. 1989) 871 F.2d 1496, 1504 [suspect “gave evasive responses to simple questions”].
166. People v. Adams (1985) 175 Cal.App.3d 855, 861.
167. People v. Hart (1999) 74 Cal.App.4th 479, 493.
168. U.S. v. Riley (8th Cir. 2012) 684 F.3d 758, 763. Also see U.S. v. Torres-Ramos (6th Cir. 2008) 536 F3 542, 552.
169. U.S. v. Wong (9th Cir, 2003) 334 F.3d 831, 836.
170. (1991) 228 Cal.App.3d 1.
171. See U.S. v. Harrell (9th Cir. 2008) 530 F.3d 1051, 1057.
172. See People v. Koelzer (1963) 222 Cal.App.2d 20, 25; People v. Stokes (1990) 224 Cal.App.3d 715, 721; People v. Mack (1977) 66Cal.App.3d 839, 859; People v. Taylor (1975) 46 Cal.App.3d 513, 518.
173. People v. Nonnette (1990) 221 Cal.App.3d 659, 666.
174. People v. Brueckner (1990) 223 Cal.App.3d 1500, 1505.
175. People v. Easley (1983) 34 Cal.3d 858, 872.
176. People v. Hill (1974) 12 Cal.3d 731, 763.
177. People v. Miley (1984) 158 Cal.App.3d 25, 35-36.
178. Horton v. California (1990) 496 U.S. 128, 130-1, 142.
179. See People v. James (1969) 1 Cal.App.3d 645, 648-49; People v. Russell (2000) 81 Cal.App.4th 96, 103.
180. In re Daniel G. (2004) 120 Cal.App.4th 824, 831.
181. See People v. Martino (1985) 166 Cal.App.3d 777, 790; Frazzini v. Superior Court (1970) 7 Cal.App.3d 1005, 1016.
182. See Maryland v. Pringle (2003) 540 U.S. 366, 372; People v. Montero (2007) 155 Cal.App.4th 1170, 1176.
183. In re Daniel G. (2004) 120 Cal.App.4th 824, 831.
184. See Ker v. California (1963) 374 U.S. 23, 36-37.
185. See People v. Magana (1979) 95 Cal.App.3d 453, 464.
186. See People v. Gabriel (1986) 188 Cal.App.3d 1261, 1265-66; Frazzini v. Superior Court (1979) 7 Cal.App.3d 1005, 1016.

187. See In re James M. (1977) 72 Cal.App.3d 133, 137-38; People v. Schoennauer (1980) 103 Cal.App.3d 398, 410.
188. See Maryland v. Pringle (2003) 540 U.S. 366, 372-73.
189. See People v. Newman (1971) 5 Cal.3d 48, 53.
190. See Rideout v. Superior Court (1967) 67 Cal.2d 471, 473-75; People v. Hill (1974) 12 Cal.3d 731, 749.
191. See People v. Vermouth (1971) 20 Cal.App.3d 746, 756; People v. Fourshey (1974) 38 Cal.App.3d 426, 430.
192. See People v. Nicolaus (1991) 54 Cal.3d 551, 575; People v. Williams (1992) 3 Cal.App.4th 1535.
193. See People v. Anderson (1983) 149 Cal.App.3d 1161, 1165.
194. See People v. Arevalo (2014) 225 Cal.App.4th 612; People v. Nelson (2008) 43 Cal.4th 1242, 1257-60.
195. See People v. Price (1991) 1 Cal.4th 324, 410.
196. See People v. Manis (1969) 268 Cal.App.2d 653, 661; People v. Kaurish (1990) 52 Cal.3d 648, 676.
197. See Brinegar v. United States (1949) 338 U.S. 160, 172; People v. Lim (2000) 85 Cal.App.4th 1289, 1298.
198. See U.S. v. Guardado (10th Cir. 2012) 699 F.3d 1220, 1223.
199. See People v. Andrino (1989) 210 Cal.App.3d 1395, 1401.

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5.3: Arrests

"An arrest is distinguished by the involuntary, highly intrusive nature of the encounter."[1]

There is hardly anything that is more likely to louse up a criminal's day than hearing the words: "You're under arrest." After all, it means the miscreant is now subject to an immediate, complete, and sometimes permanent loss of freedom. As the United States Supreme Court observed, an arrest is "the quintessential seizure of the person."[2]

For these reasons, arrests are subject to several requirements that, as the Court explained, are intended "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime."[3] As we will discuss in this article, these requirements can be divided into three categories:

1. GROUNDS FOR ARREST: Grounds for an arrest means having probable cause.
2. MANNER OF ARREST: The requirements pertaining to the arrest procedure include giving notice, the use of deadly and non-deadly force, the issuance and execution of arrest warrants, restrictions on warrantless misdemeanor arrests, searches incident to arrest, and entries of homes to arrest an occupant.
3. POST-ARREST PROCEDURE: In this category are such things as booking, phone calls, attorney visits, disposition of arrestees, probable cause hearings, arraignment, and even "perp walks."

Before we begin, it should be noted that there are technically three types of arrests. The one we will be covering in this article is the conventional arrest, which is defined as a seizure of a person for the purpose of making him available to answer pending or anticipated criminal charges.[4] A conventional arrest ordinarily occurs when the suspect was told he was under arrest, although the arrest does not technically occur until the suspect submits to the officer's authority or is physically restrained.[5]

The other two are de facto and traffic arrests. De facto arrests occur inadvertently when a detention becomes excessive in its scope or intrusiveness.[6] Like all arrests, de facto arrests are unlawful unless there was probable cause. A traffic arrest occurs when an officer stops a vehicle after seeing the driver commit an infraction. This is deemed an arrest because the officer has probable cause, and the purpose of the stop is to enforce the law, not conduct an investigation.[7] Still, these stops are subject to the rules pertaining to investigative detentions.[8]

Probable Cause

Perhaps the most basic principle of criminal law is that an arrest requires probable cause. In fact, this requirement and the restrictions on force and searches are the only rules pertaining to arrest procedure that are based on the Constitution, which means they are enforced by the exclusionary rule. All the others are based on state statutes.[9]

Although we covered the subject of probable cause at length in a series of articles last year, there are some things that should be noted here.

DEFINED: Probable cause to arrest exists if there was a "fair probability" or "substantial chance" that the suspect committed a crime.[10]

WHAT PROBABILITY IS REQUIRED: Probable cause requires neither a preponderance of the evidence, nor "any showing that such belief be correct or more likely true than false."[11] Consequently, it requires something less than a 51% chance.[12]

ARRESTS "FOR INVESTIGATION": Unlike officers on television and in movies, real officers cannot arrest suspects "for investigation" or "on suspicion" in hopes of obtaining incriminating evidence by interrogating them, putting them in a lineup, or conducting a search incident to arrest.[13] This is because probable cause requires reason to believe the person actually committed a crime, not that he might have. As the Supreme Court said, "It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge."[14]

MISTAKES OF LAW: There are two types of mistakes of law that can occur when officers arrest someone. First, there are mistakes as to the crime he committed; e.g., officers arrested the suspect for burglary, but the crime he actually committed was defrauding an innkeeper. These types of mistakes are immaterial so long as there was probable cause to arrest for some crime.[15]

The other type of mistake occurs when officers were wrong in their belief that there was probable cause to arrest. These types of mistakes render the arrest unlawful.[16]

PREMATURE WARRANTLESS ARRESTS

Although officers may consider their training and experience in determining whether probable cause to arrest exists, they must not jump to conclusions or ignore information that undermines probable cause. This is especially true if there was time to conduct further investigation before making the arrest. As the Seventh Circuit pointed out, "A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued."[17]

For example, in *Gillan v. City of San Marino* [18] a young woman told officers that, several months earlier while attending high school, she had been sexually molested by Gillan, her basketball coach. So they arrested him—even though the woman was unable to provide many details about the crime, even though some of the details she provided were inconsistent, even though she had a motive to lie (she had "strong antipathy" toward Gillian because of his coaching decisions), and even though they surreptitiously heard Gillan flatly deny the charge when confronted by the woman. After the DA refused to file charges, Gillan sued the officers for false arrest, and the jury awarded him over $4 million.

On appeal, the court upheld the verdict, noting that the information known to the officers was "not sufficiently consistent, specific, or reliable" to constitute probable cause. Among other things, the court noted that "[s]ome of the allegations were generalized and not specific as to time, date, or other details, including claims of touching in the gym. Other accusations concerning more specific events either lacked sufficient detail or were inconsistent in the details provided."

In another case, *Cortez v. McCauley*,[19] a woman brought her two-year old daughter to an emergency room in New Mexico because her daughter had said that Cortez, an acquaintance, "hurt her pee pee." A nurse at the hospital notified police who immediately arrested Cortez at his home. After prosecutors refused to file charges against him, Cortez sued the officers for false arrest.

In ruling that the officers were not entitled to qualified immunity, the Tenth Circuit pointed out that they "did not wait to receive the results of the medical examination of the child (the results were negative), did not interview the child or her mother, and did not seek to obtain a warrant." Said the court, "We believe that the duty to investigate prior to a warrantless arrest is obviously applicable when a double-hearsay statement, allegedly derived from a two-year old, is the only information law enforcement possesses."

Warrantless Arrests

When officers have probable cause to arrest, the courts prefer that they seek an arrest warrant.[20] But they also understand that a rule prohibiting warrantless arrests would "constitute an intolerable handicap for legitimate law enforcement."[21] Consequently, warrantless arrests are permitted regardless of whether officers had time to obtain a warrant.[22] As we will discuss, however, there are certain statutory restrictions if the crime was a misdemeanor.

Arrests for felonies and "wobblers"

If the suspect was arrested for a felony, the only requirement under the Fourth Amendment and California law is that they have probable cause.[23] That's also true if the crime was a "wobbler," meaning a crime that could have been prosecuted as a felony or misdemeanor.[24] Accordingly, if the crime was a felony or wobbler, officers may make the arrest at any time of the day or night,[25] and it is immaterial that the crime did not occur in their presence.[26]

Arrests for misdemeanors

Because most misdemeanors are much less serious than felonies, there are three requirements (in addition to probable cause) that must be satisfied if the arrest was made without a warrant.

TIME OF ARREST

The arrest must have been made between the hours of 6 A.M. and 10 P.M. There are, however, four exceptions to this rule. Specifically, officers may make a warrantless misdemeanor arrest at any time in any of the following situations:

1. IN THE PRESENCE: The crime was committed in the officers' presence. (See the "in the presence rule," below.)
2. DOMESTIC VIOLENCE: The crime was a domestic assault or battery.
3. CITIZEN'S ARREST: The arrest was made by a citizen.
4. PUBLIC PLACE: The suspect was arrested in a public place.[27]

What is a “public” place? In the context of the Fourth Amendment, it is broadly defined as any place in which the suspect cannot reasonably expect privacy.28 Thus, a suspect is in a “public” place if he was on the street or in a building open to the public. Furthermore, the walkways and pathways in front of a person’s home usually qualify as “public places” because the public is impliedly invited to use them.29 In fact, the Supreme Court has ruled that a suspect who is standing at the threshold of his front door is in a “public place.”30

THE “IN THE PRESENCE” RULE

As a general rule, officers may not make warrantless misdemeanor arrests unless they have probable cause to believe the crime was committed in their “presence.”31 In discussing this requirement, the Court of Appeal explained, “This simply means that such an arrest may be made when circumstances exist that would cause a reasonable person to believe that a crime has been committed in his presence.”32 If the crime was not committed in the officers’ presence, and if they believe the suspect should be charged, they will ordinarily submit the case to prosecutors for review. They may not issue a citation in lieu of arrest.33

Although the “in the presence” requirement is an “ancient common-law rule,”34 it is not mandated by the Fourth Amendment.35 Instead, it is based upon a California statute,36 which means that evidence cannot be suppressed for a violation of this rule.37 What is “presence?” A crime is committed in the “presence” of officers if they saw it happening, even if they needed a telescope.38 A crime is also committed in the officers’ presence if they heard or smelled something that reasonably indicated the crime was occurring; e.g., officers overheard a telephone conversation in which the suspect solicited an act of prostitution, officers smelled an odor of marijuana.39 The question arises: Is a crime committed in the officers’ presence if they watched a video of the suspect committing it at an earlier time? It appears the answer is no.40 What if officers watched it live on a television or computer monitor? While there is no direct authority, it would appear that the crime would be occurring in their presence because there does not seem to be a significant difference between watching a crime-in-progress on a computer screen and watching it through a telescope.

While the courts frequently say that the “in the presence” requirement must be “liberally construed,”41 it will not be satisfied unless officers can testify, “based on [their] senses, to acts which constitute every material element of the misdemeanor.”42 In making this determination, however, officers may rely on circumstantial evidence and reasonable inferences based on their training and experience. For example, in *People v. Steinberg* 43 an LAPD officer received information that the defendant was a bookie and that he was working out of his rooming house. The officer went there and, from an open window, saw the defendant sitting near several items that indicated to the officer, an expert in illegal gambling, that the defendant was currently engaged in bookmaking. As the officer testified, the room “contained all the equipment and accoutrement commonly found in the rendezvous of the bookmaker.” In ruling that the crime of bookmaking had been committed in the officer’s presence, the court noted, “In the room where appellant had been seen engaged in his operations, the telephone was on his desk on which lay the National Daily Reporter and nearby were racing forms, pencils and ball point pens. . . . One sheet of paper was an ‘owe sheet’ on which was a record of the moneys owed by the bettors to the bookmaker, or the sum due from the latter to the bettors.”

Similarly, in a shoplifting case, *People v. Lee*,44 an officer in an apparel store saw Lee walk into the fitting room carrying five items of clothing. But when she left the room, she was carrying only three, which she returned to the clothing racks. The officer then checked the fitting room and found only one item, which meant that one was unaccounted for. So when Lee left the store, the officer arrested her and found the missing item in her purse. On appeal, Lee claimed the arrest was unlawful because the officer had not actually seen her conceal the merchandise in her purse. It didn’t matter, said the court, because the term “in the presence” has “historically been liberally construed” and thus “[n]either physical proximity nor sight is essential.”

EXCEPTIONS TO THE “IN THE PRESENCE” RULE

Arrests for the following misdemeanors are exempt from the “in the presence” requirement,45 presumably because of the overriding need for quick action:

ASSAULT AT SCHOOL: Assault or battery on school property when school activities were occurring.46

CARRYING LOADED GUN: Carrying a loaded firearm in a public place.

GUN IN AIRPORT: Carrying a concealed firearm in an airport.

DOMESTIC VIOLENCE PROTECTIVE ORDER: Violating a domestic violence protective order or restraining order if there was probable cause to believe the arrestee had notice of the order.

DOMESTIC VIOLENCE: Assault on a spouse, cohabitant, or the other parent of the couple's child.

ASSAULT ON ELDER: Assault or battery on any person aged 65 or older who is related to the suspect by blood or legal guardianship.

ASSAULT ON FIREFIGHTER, PARAMEDIC: Assault on a firefighter, EMT, or paramedic engaged in the performance of his duties.

DUI PLUS: Even though officers did not see the suspect driving a vehicle, they may arrest him for DUI if, (1) based on circumstantial evidence, they had probable cause to believe he had been driving while under the influence; and (2) they had probable cause to believe that one or more of the following circumstances existed:

- He had been involved in an auto accident.
- He was in or about a vehicle obstructing a roadway.
- He would not be apprehended unless he was immediately arrested.
- He might harm himself or damage property if not immediately arrested.
- He might destroy or conceal evidence unless immediately arrested.
- His blood-alcohol level could not be accurately determined if he was not immediately arrested.

In addition, officers who have probable cause to arrest a juvenile for the commission of any misdemeanor may do so regardless of whether the crime was committed in their presence.46

"STALE" MISDEMEANORS

Even though a misdemeanor was committed in the officers' presence, there is a long-standing rule that they may not arrest the suspect if they delayed doing so for an unreasonably long period of time.47 This essentially means that officers must make the arrest before doing other things that did not appear to be urgent. As the court explained in Jackson v. Superior Court, "[T]he officer must act promptly in making the arrest, and as soon as possible under the circumstances, and before he transacts other business."48

Note that because this rule is not based on the Fourth Amendment, a violation cannot result in the suppression of evidence. Still, a lengthy delay should be considered by officers in determining whether the suspect should be cited and released.

Warrant Arrests

As noted earlier, an arrest is lawful under the Fourth Amendment if officers have probable cause. What, then, is the purpose of seeking an arrest warrant? After all, the United States Supreme Court has pointed out that it "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant."49

There are essentially four situations in which officers will apply for a warrant. First, if the suspect has fled or if officers will otherwise be unable to make an immediate arrest, they may seek a warrant in order to download the arrest authorization into an arrest-warrant database such as NCIC. Second, as we will discuss later, an arrest warrant will ordinarily be required if officers will need to forcibly enter the suspect's residence to make the arrest. Third, as discussed earlier, a warrant may be required if the crime was a misdemeanor that was not committed in an officer's presence. Finally, if officers are uncertain about the existence of probable cause, they may seek an arrest warrant so as to obtain a judge's determination on the issue which, in most cases, will also trigger the good faith rule.50 Apart from these practical reasons for seeking an arrest warrant, there is a philosophical one: the courts prefers that officers seek warrants when possible because, as the United States Supreme Court explained, they prefer to have "a neutral judicial officer assess whether the police have probable cause." 51

The basics

Before we discuss the various types of arrest warrants that the courts can issue, it is necessary to cover the basic rules and principles that govern the issuance and execution of arrest warrants.

WARRANTS ARE COURT ORDERS

An arrest warrant is a court order directing officers to arrest a certain person if and when they locate him.52 Like a search warrant, an arrest warrant "is not an invitation that officers can choose to accept, or reject, or ignore, as they wish, or think, they should."53

WHEN A WARRANT TERMINATES

An arrest warrant remains valid until it is executed or recalled.54

CHECKING THE WARRANT'S VALIDITY

Officers are not required to confirm the propriety of a warrant that appears valid on its face.55 They may not, however, ignore information that reasonably indicates the warrant was invalid because, for example, it had been executed or recalled, or because probable cause no longer existed.56 [Case-in-point: The Carter County Sheriff 's Department in Tennessee recently discovered an outstanding warrant for the arrest of J.A. Rowland for passing a $30 bad check. The warrant had been issued in 1928, and was payable to a storage company that ceased to exist decades ago. Said the sheriff with tongue in cheek, "This is still a legal document. We'll have to start a manhunt for this guy."]

INVESTIGATING THE ARRESTEE'S IDENTITY

An arrest will ordinarily be upheld if the name of the arrestee and the name of the person listed on the warrant were the same.70 But officers may not ignore objective facts that reasonably indicate the person they were arresting was not, in fact, the person named in the warrant; e.g., discrepancy in physical description, date of birth.58

CONFIRMING THE WARRANT

To make sure that an arrest warrant listed in a database had not been executed or recalled, officers will ordinarily confirm that it is still outstanding.59

WARRANTS SENT BY EMAIL OR FAX

An arrest warrant or a warrant abstract sent from one agency to another via email or fax has the same legal force as the original warrant.60

TIME OF ARREST

Officers may serve felony arrest warrants at any hour of the day or night.61 However, misdemeanor warrants may not be served between the hours of 10 P.M. and 6 A.M. unless, (1) officers made the arrest in a public place, (2) the judge who issued the warrant authorized night service, or (3) the arrestee was already in custody for another offense.62

The question has arisen on occasion: If officers are inside a person's home after 10 P.M. because, for instance, they are taking a crime report, can they arrest an occupant if they should learn that he is wanted on a misdemeanor warrant that is not endorsed for night service? Although there is no case law directly on point, the California Court of Appeal has pointed out that the purpose of the time limit on misdemeanor arrests "is the protection of an individual's right to the security and privacy of his home, particularly during night hours and the avoidance of the danger of violent confrontations inherent in unannounced intrusion at night."63 It is at least arguable that none of these concerns would be implicated if officers had been invited in. But, again, the issue has not been decided.

Conventional arrest warrants

A conventional arrest warrant—also known as a complaint warrant—is issued by a judge after prosecutors charged the suspect with a crime.64 Such a warrant will not, however, be issued automatically simply because a complaint had been filed with the court. Instead, a judge's decision to issue one—like the decision to issue a search warrant—must be based on facts that constitute probable cause.65 For example, a judge may issue a conventional arrest warrant based on information contained in an officer's sworn declaration, which may include police reports and written statements by the victim or witnesses, so long as there is reason to believe the information is accurate. As the California Supreme Court explained:

The information in the complaint or affidavit in support thereof must either (1) state facts within the personal knowledge of the affiant or complainant directly supportive of allegations in the complaint that the defendant committed the offense; or (2) when such stated facts are not within the personal knowledge of the affiant or complainant, further state facts relating to the identity and credibility of the source of the directly incriminating information.66

MISDEMEANOR WARRANTS

Warrants may be issued for misdemeanors, as well as felonies.67

REQUIRED INFORMATION

The warrant must include the name of the person to be arrested, the date and time it was issued, the city or county in which it was issued, the name of the court, and the judge's signature.[68] The warrant must also contain the amount of bail or a "no bail" endorsement.[69]

JOHN DOE WARRANTS

If officers don't know the suspect's name, they may obtain a John Doe warrant, but it must contain enough information about the suspect to sufficiently reduce the chances of arresting the wrong person.[70] As the court explained in *People v. Montoya*, "[A] John Doe warrant must describe the person to be seized with reasonable particularity. The warrant should contain sufficient information to permit his identification with reasonable certainty."[71] Similarly, the court in *Powe v. City of Chicago* noted that, "[w]hile an arrest warrant may constitutionally use such arbitrary name designations, it may do so only if, in addition to the name, it also gives some other description of the intended arrestee that is sufficient to identify him."[72]

For example, in *U.S. v. Doe*, where the person named on the arrest warrant was identified only as "John Doe a/k/a Ed," the court ruled the warrant was invalid because "the description did not reduce the number of potential subjects to a tolerable level."[73] Thus, a John Doe warrant should include, in addition to a physical description, any information that will help distinguish the arrestee, such as his home or work address, a description of the vehicles he drives, the places where he hangs out, and the names of his associates.[74] Whenever possible, a photo of the suspect should also be included.

IF THE WARRANT CONTAINS AN ADDRESS

There are two reasons for including the suspect's address on an arrest warrant. First, as just noted, if it's a John Doe warrant an address may be necessary to help identity him.[75] Second, the address may assist officers in locating the suspect. Otherwise, an address on a warrant serves no useful purpose. As the court observed in *Cuerva v. Fulmer*, "In an arrest warrant, unlike a search warrant, the listed address is irrelevant to its validity and to that of the arrest itself."[76] The question has arisen: Does the inclusion of an address on a warrant constitute authorization to enter and search the premises for the arrestee? The answer is no.[77] As we will discuss later, officers cannot enter a residence to execute an arrest warrant unless they have probable cause to believe that the suspect lives there, and that he is now inside. Thus, the legality of the entry depends on whether the officers have this information, not whether the residence is listed on the warrant.

Ramey warrants

In contrast to conventional arrest warrants, Ramey warrants are issued before a complaint has been filed against the suspect. The question arises: Why would officers seek a Ramey warrant instead of a conventional warrant? The main reason is that they cannot obtain a conventional warrant because, although they have probable cause, they do not have enough incriminating evidence to meet the legal standard for charging. So they seek a Ramey warrant—also known as a "Warrant of Probable Cause for Arrest"[78]—in hopes that by questioning the suspect in a custodial setting, by placing him in a physical lineup, or by utilizing some other investigative technique, they can convert their probable cause into proof beyond a reasonable doubt.

The procedure for obtaining a Ramey warrant— felony or misdemeanor [79]—is essentially the same as the procedure for obtaining a search warrant. Specifically, officers must do the following:

1. **Prepare declaration**: Officers must prepare a "Declaration of Probable Cause" setting forth the facts upon which probable cause is based.
2. **Prepare Ramey warrant**: Officers will also complete the Ramey warrant which must contain the following: the arrestee's name, the name of the court, name of the city or county in which the warrant was issued, a direction to peace officers to bring the arrestee before a judge, the signature and title of issuing judge, the time the warrant was issued, and the amount of bail (if any).[80] See page 11 for a sample Ramey warrant.
3. **Submit to judge**: Officers submit the declaration and warrant to a judge. This can be done in person, by fax, or by email.[81]

Other arrest warrants

The following are the other kinds of warrants that constitute authorization to arrest:

STEAGALD WARRANT

This is a combination search and arrest warrant which is required when officers forcibly enter the home of a third person to arrest the suspect; e.g., the home of the suspect's friend or relative. See "Entering a Home to Arrest an Occupant," below. Also see Page 11 for a sample Steagald warrant.

INDICTMENT WARRANT

An indictment warrant is issued by a judge on grounds that the suspect had been indicted by a grand jury.82

PAROLE VIOLATION WARRANT

Issued by the parole authority when there is probable cause to believe that a parolee violated the terms of release.83

PROBATION VIOLATION WARRANT

Issued by a judge based on probable cause to believe that a probationer violated the terms of probation.84

BENCH WARRANT

Issued by a judge when a defendant fails to appear in court.85

WITNESS FTA WARRANT

Issued by a judge for the arrest of a witness who has failed to appear in court after being ordered to do so.86

Arrest Formalities

Under California law, there are three technical requirements with which officers must comply when making an arrest. They are as follows:

NOTIFICATION

Officers must notify the person that he is under arrest.87 While this is usually accomplished directly ("You're under arrest"), any other words or conduct will suffice if it would have indicated to a reasonable person that he was under arrest; e.g., suspect was apprehended following a pursuit,88 officer took the suspect by the arm and told him he had a warrant for his arrest.89 Furthermore, notification is unnecessary if the suspect was apprehended while committing the crime.90

SPECIFY AUTHORITY

Officers must notify the suspect of their authority to make the arrest.91 Because this simply means it must have been apparent to the suspect that he was being arrested by a law enforcement officer, this requirement is satisfied if the officer was in uniform or he displayed a badge.92

SPECIFY CRIME

If the suspect wants to know what crime he is being arrested for, officers must tell him.93 (As noted earlier, it is immaterial that officers specified the "wrong" crime.)

Searches Incident to Arrest

When officers arrest a suspect, they may ordinarily conduct a limited search to locate any weapons or destructible evidence in the arrestee's possession and in the immediate vicinity. This type of search— known as a search incident to arrest—may be made as a matter of routine, meaning that officers will not be required to prove there was reason to believe they would find weapons or evidence in the places they searched. As the United States Supreme Court explained:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.94

Requirements

Officers may conduct a search incident to arrest if the following circumstances existed:

1. **Probable cause**: There must have been probable cause to arrest the suspect.
2. **Custodial arrest**: The arrest must have been "custodial" in nature, meaning that officers had decided to transport the arrestee to jail, a police station, a detox facility, or a hospital.

3. **Contemporaneous search**: The search must have occurred promptly after the arrest was made.95

Scope of search

The following places and things may be searched incident to an arrest:

ARRESTEE'S CLOTHING

Officers may conduct a "full search" of the arrestee.96 Although the term "full search" is vague, the courts have ruled that it permits a more intensive search than a pat down; and that it entails a "relatively extensive exploration" of the arrestee, including his pockets.97

A more invasive search can never be made as a routine incident to an arrest.98 For example, officers may not conduct a partial strip search or reach under the arrestee's clothing. Such a search would almost certainly be permitted, however, if, (1) officers had probable cause to believe the suspect was concealing a weapon or evidence that could be destroyed or corrupted if not seized before the suspect was transported, and (2) they had probable cause to believe the weapon or evidence was located in the place or thing that was searched.99 Moreover, such a search would have to be conducted in a place and under circumstances that would adequately protect the arrestee's privacy.100

CONTAINERS

Officers may search containers in the arrestee's immediate control when he was arrested (e.g., wallet, purse, backpack, hide-a-key box, cigarette box, pillbox, envelope 101), even if he was not carrying the item when he was arrested, and even if officers knew he was not the owner.102 CELL PHONES: This is currently a hot topic: Can officers search the arrestee's cell phone for evidence pertaining to the crime for which he was arrested?103 At least two federal circuit courts have upheld such searches in published opinions,104 while some district courts have ruled otherwise.105 Stay tuned.

PAGERS

There is limited authority for retrieving numerical data from pagers in the arrestee's possession if such information would constitute evidence of the crime under investigation.106

ITEMS TO GO WITH ARRESTEE

If the arrestee wants to take an item with him, and if officers permit it, they may search the item.107

VEHICLES

Officers may search the passenger compartment of a vehicle in which the arrestee was an occupant.108

RESIDENCES

If the suspect was arrested inside a residence, officers may search places and things in the area within his grabbing or lunging distance at the time he was arrested.109 Officers may also search the area "immediately adjoining" the place of arrest—even if it was not within his immediate control—but these searches must be limited to spaces in which a potential attacker might be hiding.110 [For a more detailed discussion of this subject, see the 2005 article entitled "Searches Incident to Arrest" on Online.]

Use of Force

It is, of course, sometimes necessary to use force to make an arrest.111 In fact, the Eleventh Circuit pointed out that "the use of force is an expected, necessary part of a law enforcement officer's task of subduing and securing individuals suspected of committing crimes."112 The question arises: How does the law distinguish between permissible and excessive force? The short answer is that force is permissible if it was reasonably necessary.113 "When we analyze excessive force claims," said the Ninth Circuit, "our initial inquiry is whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting them."114

Like the other police actions that are governed by the standard of "reasonableness," the propriety of the use of force is intensely fact-specific. Thus, in applying this standard in a pursuit case, the U.S. Supreme Court began by noting, "[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'"115 The problem for officers is that their decisions on the use of force must be made quickly and under extreme pressure, which means there is seldom time for "sloshing."116 Taking note of this problem, the Court ruled that a hypertechnical analysis of the circumstances is inappropriate:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.117

For this reason, an officer's use of force will not be deemed excessive merely because there might have been a less intrusive means of subduing the suspect.118 As noted in *Forrester v. City of San Diego*, "Police officers are not required to use the least intrusive degree of force possible. Rather, the inquiry is whether the force that was used to effect a particular seizure was reasonable."119

Because the reasonableness of any use of force will ultimately depend on the severity or "quantum" of the force utilized by officers, the courts usually begin their analysis by determining whether the force was deadly, non-deadly, or insignificant.120

Non-deadly force

Force is deemed "non-deadly" if it does not create a substantial risk of causing death or serious bodily injury.121 To determine whether non-deadly force was reasonably necessary, the courts apply a balancing test in which they examine both the need for the force and its severity. And if need outweighs or is proportionate to the severity, the force will be deemed reasonable.122 Otherwise, it's excessive. As the United States Supreme Court explained in *Graham v. Connor*:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.123

THE NEED FOR FORCE

The first issue in any use-offorce case is whether there was an objectively reasonable need for force. As the Ninth Circuit observed, "[I]t is the need for force which is at the heart of [the matter]."124 In most cases, the need will be based solely on the suspect's physical resistance to arrest;125 e.g., the arrestee "spun away from [the arresting officer] and continued to struggle,"126 the arrestee "stiffened her arm and attempted to pull free." 127

On the other hand, if the suspect was not resisting, there would be no need for any force, other than the *de minimis* variety. Thus, in *Drummond v. City of Anaheim*, the court ruled that an officer's use of force was unreasonable because, "once Drummond was on the ground, he was not resisting the officers; there was therefore little or no need to use any further physical force."128 Similarly, in *Parker v. Gerrish* the court observed, "In some circumstances, defiance and insolence might reasonably be seen as a factor which suggests a threat to the officer. But here [the suspect] was largely compliant and twice gave himself up for arrest to the officers."129

Although force is seldom necessary if the arrestee was not presently resisting, there may be a need for it if the suspect had been actively resisting and, although he was not combative at the moment, he was not yet under the control of the arresting officers. This is especially true if there was probable cause to arrest him for a serious felony.130 For example, in ruling that officers did not use excessive force in pulling a bank robbery suspect from his getaway car, the court in *Johnson v. County of Los Angeles* noted that, even though the suspect was not "actively resisting arrest," it is "very difficult to imagine that any police officer facing a moving, armed bank robbery suspect would have acted any differently—at least not without taking the very real risk of getting himself or others killed. The need to quickly restrain Johnson by removing him from the car and handcuffing him was paramount."131

The need for force will increase substantially if the suspect's resistance also constituted a serious and imminent threat to the safety officers or others.132 Thus, in Scott v. Harris, a vehicle pursuit case, the Supreme Court upheld the use of the PIT maneuver to end a high-speed chase because, said the court, "[I]t is clear from the videotape [of the pursuit] that [the suspect] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."133 Similarly, in *Miller v. Clark County*, the court noted that Miller attempted "to flee from police by driving a car with a wanton or willful disregard for the lives of others."134

PROPORTIONATE RESPONSE BY OFFICERS

Having established a need for some force, the courts will look to see whether the amount of force utilized was commensurate with that need.135 As the court explained in *Lee v. Ferraro*, "[T]he force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for the force, which is measured by the severity of the crime, the danger to the officer, and the

risk of flight."[136] For example, utilizing a control hold,[137] pepper stray,[138] "hard pulling,"[139] or a trained police dog [140] will often be deemed reasonably necessary if officers were facing resistance that was moderate to severe.

TASERS

Although the shock caused by tasers is currently classified as non-deadly force,[141] the courts are aware that it is quite painful and that the consequences are not always predictable. In fact, some people have died after being tased. As a result, some courts have classified tasers as "intermediate" force, which requires a demonstrably greater need than non-deadly force.[142] As the court in *Beaver v. City of Federal Way* observed:

> While the advent of the Taser has undeniably provided law enforcement officers with a useful tool to subdue suspects with a lessened minimal risk of harm to the suspect or the officer, it is equally undeniable that being "tased" is a painful experience. The model used by [the officer] delivers a full five-second cycle of electrical pulses of a maximum of 50,000 volts at very low amperage that interrupts a target's motor system and causes involuntary muscle contraction.[143]

Still, tasing is often deemed justified when there was significant resistance, especially if officers had been unable to control the arrestee by other means. Thus, the Eleventh Circuit noted, "[I]n a difficult, tense and uncertain situation the use of a taser gun to subdue a suspect who has repeatedly ignored police instructions and continues to act belligerently toward police is not excessive force."[144]

For example, in *Draper v. Reynolds* [145] the court ruled that the use of a taser to subdue a suspect was proportionate because, among other things, the suspect "was hostile, belligerent, and uncooperative. No less than five times, [the officer] asked [the suspect] to retrieve documents from the truck cab, and each time [the suspect] refused to comply. . . . [The suspect] used profanity, moved around and paced in agitation, and repeatedly yelled at [the officer]." Said the court, "Although being struck by a taser gun is an unpleasant experience, the amount of force [the officer] used—a single use of the taser gun causing a one-time shocking—was reasonably proportionate to the need for force and did not inflict any serious injury."

Similarly, in *Sanders v. City of Fresno* [146] the court ruled that the use of a taser was reasonable because, among other things, the suspect "was agitated, did not obey the request to let [his wife] go, believed that the officers were there to kill him and/or take [his wife] away from him, appeared to be under the influence of drugs . . . "

MENTALLY UNSTABLE ARRESTEES

It should be noted that an officer's use of force will not be deemed excessive merely because the arrestee was mentally unstable. Still, it is a circumstance that should, when possible, be considered in deciding how to respond. As the Ninth Circuit observed:

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation . . . [147]

Deadly force

In the past, deadly force was defined as action that was "reasonably likely to kill."[148] Now, however, it appears that most courts define it more broadly as action that "creates a substantial risk of causing death or serious bodily injury."[149]

Under the Fourth Amendment, the test for determining whether deadly force was justified is essentially the same as the test for non-deadly force. I both cases, the use of force is lawful if it was reasonable under the circumstances.[150] The obvious difference is that deadly force cannot be justified unless there was an especially urgent need for it. As the United States Supreme Court observed, "[N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched."[151]

The Court has acknowledged, however, that there is "no obvious way to quantify the risks on either side," that there is no "magical on/off switch" for determining the point at which deadly force is justified,[152] and that the test is "cast at a high level of generality."[153] Still, it has ruled that the use of deadly force can be justified under the Fourth Amendment only if the following circumstances existed:

1. **RESISTING ARREST**: The arrestee must have been fleeing or otherwise actively resisting arrest.

2. **THREAT TO OFFICERS OR OTHERS**: Officers must have had probable cause to believe that the arrestee posed a significant threat of death or serious physical injury to officers or others.154
3. **WARNING**: Officers must, "where feasible," warn the arrestee that they are about to use deadly force.155

As the Court observed in *Tennessee v. Garner*, "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."156

Although most threats that will justify deadly force pose an immediate threat to officers or others,157 in some cases an impending or imminent threat will suffice. Such a threat may exist if officers reasonably believed—based on the nature of the suspect's crime, his state of mind, and any other relevant circumstances—that his escape would pose a severe threat of serious physical harm to the public. As the Supreme Court explained in *Scott v. Harris*, deadly force might be reasonably necessary "to prevent escape when the suspect is known to have committed a crime involving the infliction or threatened infliction of serious physical harm, so that his mere being at large poses an inherent danger to society."158 (The Court in Garner ruled that a fleeing burglar did not present such a threat.159).

The use of deadly force will not, of course, be justified after the threat had been eliminated. For example, in *Waterman v. Batton* the Fourth Circuit ruled that, while officers were justified in firing at the driver of a car that was accelerating toward them, they were not justified in shooting him after he had passed by. Said the court, "[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." 160

It should be noted that the test for determining whether deadly force was reasonable under the Fourth Amendment is essentially the same as the test for determining whether officers may be prosecuted for using deadly force that results in the death of a suspect. Specifically, Penal Code § 196 has been interpreted to mean that officers cannot be criminally liable if the suspect was actively resisting and, (1) "the felony for which the arrest is sought is a forcible and atrocious one which threatens death or serious bodily harm," or (2) "there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another."161

Entering a home to arrest an occupant

In the past, officers could forcibly enter a residence to arrest an occupant whenever they had probable cause to arrest. Now, however, a forcible entry is permitted only if there were additional circumstances that justified the intrusion. As we will now explain, the circumstances that are required depend on whether officers enter the suspect's home or the home of a third person, such as a friend or relative of the suspect.

Entering the suspect's home

To enter the suspect's home, officers must comply with the so-called Ramey-Payton rule,162 under which a forcible entry is permitted only if both of the following circumstances existed:

1. **WARRANT ISSUED**: A warrant for the suspect's arrest must have been outstanding. Either a conventional or Ramey warrant will suffice.163
2. **ARRESTEE'S HOME**: Officers must have had "reason to believe" the suspect, (a) lived in the residence, and (b) was presently inside. Although most federal courts have ruled that the "reason to believe" standard is merely reasonable suspicion,164 the Ninth Circuit ruled it means probable cause.165 The California Supreme Court has not yet decided.166

Entering a third person's home

If the suspect is inside the home of a third person, such as a friend or relative, the so-called Steagald rule applies, which means that officers may enter only if they have a search warrant supported by an affidavit that establishes probable cause to believe, (1) the suspect committed the crime under investigation, and (2) he is presently inside the residence and will be there when the warrant is executed.167 See page 11 for a sample Steagald warrant.

Other grounds for entering

There are essentially three situations in which officers without a warrant may enter a residence to arrest an occupant:

"HOT PURSUIT"

Officers may enter if they are in “hot pursuit” of the suspect. In this context of executing arrest warrants, the term “hot pursuit” means a situation in which all of the following circumstances existed:

1. PROBABLE CAUSE TO ARREST: Officers must have had probable cause to arrest the suspect for a felony or misdemeanor.
2. ATTEMPT TO ARREST OUTSIDE: Officers must have attempted to make the arrest outside the residence.
3. SUSPECT FLEES INSIDE: The suspect must have tried to escape or otherwise prevent an immediate arrest by going inside the residence.168

“FRESH PURSUIT”

Officers may also enter a residence without a warrant to arrest an occupant if they are in “fresh pursuit.” This essentially means they must have been actively attempting to locate the arrestee and, in doing so, were quickly responding to developing information as to his whereabouts. Although the courts have not established a checklist of requirements for fresh pursuits, the cases seem to indicate there are four:

1. SERIOUS FELONY: Officers must have had probable cause to arrest the suspect for a serious felony, usually a violent one.
2. DILIGENCE: Officers must have been diligent in attempting to apprehend the suspect.
3. SUSPECT INSIDE: Officers must have had probable cause to believe the suspect was inside the structure.
4. CIRCUMSTANTIAL EVIDENCE OF FLIGHT: Officers must have been aware of circumstances indicating the suspect was in active flight or that active f light was imminent.169

CONSENT

If officers obtained consent to enter from the suspect or other occupant, the legality of their entry will usually depend on whether they misled the consenting person as to their objective, so that an immediate arrest would have exceeded the scope of consent. For example, if officers said they merely wanted to enter (“Can we come in?”) or talk (“We’d like to talk to you.), a court might find that they exceeded the permissible scope of the consent if they immediately arrested him.170 But there should be no problem if officers intended to make the arrest only if, after speaking with the suspect, they believed that probable cause existed or continued to exist.171

[For a more detailed discussion of this subject, see the 2005 article “Entry to Arrest” on Online.]

Post-Arrest Procedure

Although the lawfulness of an arrest will depend on what the officers did at or near the time the suspect was taken into custody, there are certain procedural requirements that must be met after the arrest is made.

BOOKING

Booking is “merely a ministerial function”172 which involves the “recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested.”173 While the California Penal Code does not require booking,174 it is considered standard police procedure because one of its primary purposes is to confirm the identity of the arrestee.175 For this reason, booking is permitted even if officers were aware that the arrestee would be posting bail immediately.176

PHONE CALLS

The arrestee has a right to make completed telephone calls to the following: an attorney, a bail bondsman, and a relative. Furthermore, he has a right to make these calls “immediately upon being booked,” and in any event no later than three hours after the arrest except when it is “physically impossible.”177

ATTORNEY VISITS

Officers must permit the arrestee to visit with an attorney if the arrestee or a relative requested it.178

PROBABLE CAUSE DETERMINATION

If the suspect was arrested without a warrant, and if he has not bailed out,179 a judge must determine whether there was probable cause for the arrest. While such a determination must be made “promptly,”180 there is a presumption of timeliness if the determination was made within 48 hours after arrest.181 Note that in calculating the time limit, no allowance is made for weekends and holidays—it’s a straight 48 hours.182

What must officers do to comply with this requirement? They will usually submit a Declaration of Probable Cause which contains a summary of the facts upon which probable cause was based.

Note that a suspect may not be released from custody based on a tardy probable cause determination,[183] nor may the charges be dismissed.[184] However, statements made by the arrestee after the 48 hours had expired might be suppressed if the court finds that probable cause to arrest did not exist.

ARRAIGNMENT

After an arrestee has been charged with a crime by prosecutors (and thus becomes a "defendant"), he must be arraigned. An arraignment is usually a defendant's first court appearance during which, among other things, a defense attorney is appointed or makes an appearance; the defendant is served with a copy of the complaint and is advised of the charges against him; the defendant pleads to the charge or requests a continuance for that purpose; and the judge sets bail, denies bail, or releases the defendant on his own recognizance.

A defendant must be arraigned within 48 hours of his arrest [185] unless, (1) he was released from custody,[186] or (2) he was being held on other charges or a parole hold.[187] Unlike the time limit for probable cause determinations, the 48-hour countdown does not include Sundays and holidays.[188] Furthermore, if time expires when court is in session, the defendant may be arraigned anytime that day.[189] If court is not in session, he may be arraigned anytime the next day.[190] If, however, the arrest occurred on Wednesday after the courts closed, the arraignment must take place on Friday, unless Wednesday or Friday were court holidays.[191]

Note that short delays are permitted if there was good cause; e.g., defendant was injured or sick.[192] A short delay may also be justified if, (1) the crime was serious; (2) officers were at all times diligently engaged in actions they reasonably believed were necessary to obtain necessary evidence or apprehend additional perpetrators; and (3) officers reasonably believed that these actions could not be postponed without risking the loss of necessary evidence, the identification or apprehension of additional suspects, or otherwise compromising the integrity of their investigation.[193]

References

1. Cortez v. McCauley (10th Cir. 2007) 478 F.3d 1108, 1115.
2. California v. Hodari D. (1991) 499 U.S. 621, 624.
3. Brinegar v. United States (1949) 338 U.S. 160, 176.
4. See Virginia v. Moore (2008) U.S. [2008 WL 1805745] ["Arrest ensures that a suspect appears to answer charges and does not continue a crime"]; Terry v. Ohio (1968) 392 U.S. 1, 16 ["[I]n traditional terminology," arrests are "seizures of the person which eventuate in a trip to the station house and prosecution for crime"].
5. See California v. Hodari (1991) 499 U.S. 621, 626; Pen. Code §§ 841, 835.
6. See Dunaway v. New York (1979) 442 U.S. 200, 212 ["the detention of petitioner was in important respects indistinguishable from a traditional arrest"]; People v. Campbell (1981) 118 Cal.App.3d 588, 597.
7. 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."]; U.S. v. $404,905 (8th Cir. 1999) 182 F.3d 643, 648 ["A traffic stop is not investigative; it is a form of arrest, based upon probable cause"].
8. See Berkemer v. McCarty (1984) 468 U.S. 420, 439, fn.29.
9. See People v. McKay (2002) 27 Cal.4th 601, 613-14 ["[N]early every circuit to address the issue [has] held that, once the officer has probable cause to believe a violation of law has occurred, the constitutionality of the arrest does not depend upon compliance with state procedures that are not themselves compelled by the Constitution."].
10. See Illinois v. Gates (1983) 462 U.S. 213, 244; U.S. v. Brooks (9th Cir. 2004) 367 F3 1128, 1133-34.
11. Texas v. Brown (1983) 460 U.S. 730, 742.
12. See People v. Alcorn (1993) 15 Cal.App.4th 652, 655 [there was probable cause when only a 50% chance existed]; People v. Tuadles(1992) 7 Cal.App.4th 1777, 1783 ["requires less than a preponderance of the evidence"].
13. See Henry v. United States (1959) 361 U.S. 98, 101 ["Arrest on mere suspicion collides violently with the basic human right of liberty."]; People v. Gonzalez (1998) 64 Cal.App.4th 432, 439 ["Arrests made without probable cause in the hope that something might turn up are unlawful."].
14. Gerstein v. Pugh (1975) 420 U.S. 103, 120, fn.21.

15. See People v. White (2003) 107 Cal.App.4th 636, 641 ["[A]n officer's reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant's conduct."]; U.S. v. Turner (10th Cir. 2009) F.3d [2009 WL 161737] ["[T]he probable cause inquiry . . . requires merely that officers had reason to believe that a crime—any crime—occurred."].
16. See People v. Teresinski (1982) 30 Cal.3d 822, 831.
17. BeVier v. Hucal (7th Cir. 1986) 806 F.2d 123, 128.
18. (2007) 147 Cal.App.4th 1033.
19. (10th Cir. 2007) 478 F.3d 1108.
20. See Wong Sun v. United States (1963) 371 U.S. 471, 481-82 ["The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police"].
21. Gerstein v. Pugh (1975) 420 U.S. 103, 113.
22. See United States v. Watson (1976) 423 U.S. 411, 423; U.S. v. Bueno-Vargas (9th Cir. 2004) 383 F.3d 1104, 1107, fn.4.
23. See Carroll v. United States (1925) 267 U.S. 132 156; Pen. Code § 836(a)(3).
24. See People v. Stanfill (1999) 76 Cal.App.4th 1137, 1144.
25. See Pen. Code § 840 ["An arrest for the commission of a felony may be made on any day and at any time of the day or night."].
26. See Pen. Code § 836(a)(2).
27. See Pen. Code §§ 836(1); 840; People v. Graves (1968) 263 Cal.App.2d 719, 730.
28. See United States v. Santana (1976) 427 U.S. 38, 42.
29. See Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 629
30. See United States v. Santana (1976) 427 U.S. 38, 42.
31. See Pen. Code § 836(a)(1); People v. Johnson (1981) 123 Cal.App.3d 495, 499.
32. People v. Bradley (1957) 152 Cal.App.2d 527, 532.
33. See Penal Code § 853.6(h) [notice to appear is authorized only if the suspect is "arrested"]
34. United States v. Watson (1976) 423 U.S. 411, 418.
35. See Barry v. Fowler (9th Cir. 1990) 902 F.2d 770, 772; Woods v. City of Chicago (7th Cir. 2001) 234 F.3d 979 995; U.S. v. McNeill (4th Cir. 2007) 484 F.3d 301, 311. NOTE: The United States Supreme Court has not ruled on the issue. See Atwater v. City of Lago Vista (2001) 532 U.S. 318, 340, fn11.
36. Pen. Code § 836(a)(1).
37. See People v. McKay (2002) 27 Cal.4th 601, 608.
38. See Royton v. Battin (1942) 55 Cal.App.2d 861, 866 [officer observed fish and game code violations by means of telescope].
39. See People v. Cahill (1958) 163 Cal.App.2d 15, 19 [officer overheard solicitation of prostitution]; In re Alonzo C. (1978) 87 Cal.App.3d 707, 712 ["The test is whether the misdemeanor is apparent to the officer's senses."].
40. See Forgie-Buccioni v. Hannaford Brothers, Inc. (1st Cir. 2005) 413 F.3d 175, 180 ["Although Officer Tompkins watched a partial videotape of Plaintiff allegedly shoplifting, neither Officer Tompkins nor any other police officer observed Plaintiff shoplifting."].
41. See In re Alonzo C. (1978) 87 Cal.App.3d 707, 712 ["The term 'in his presence' is liberally construed."].
42. In re Alonzo C. (1978) 87 Cal.App.3d 707, 713.
43. (1957) 148 Cal.App.2d 855. ALSO SEE People v. Bradley (1957) 152 Cal.App.2d 527 [bookmaking].
44. (1984) 157 Cal.App.3d Supp. 9.
45. See Pen. Code § 243.5 [school assault]; Pen. Code § 12031(a)(3) [loaded firearm]; Pen. Code § 836(e) [firearm at airport]; Pen. Code § 836(c)(1) [domestic violence protective order]; Pen. Code § 836(d) [domestic violence]; Pen. Code § 836(d) [assault on elder]; Pen. Code § 836.1 [assault on firefighter, paramedic]; Veh. Code § 40300.5 [DUI].
46. See Welf. & Inst. Code § 625; In re Samuel V. (1990) 225 Cal.App.3d 511.
47. See People v. Craig (1907) 152 Cal. 42, 47; Hill v. Levy (1953) 117 Cal.App.2d 667, 671; Green v. DMV (1977) 68 Cal.App.3d 536, 541; People v. Hampton (1985) 164 Cal.App.3d 27, 30 ["Such an arrest must be made at the time of the offense or within a reasonable time thereafter."]. NOTE: The rule seems to have been traceable to the common law. See Regina v. Walker 25 Eng.Law&Eequity 589. ALSO SEE Wahl v. Walter (1883) 16 N.W. 397, 398 ["The officer must at once set about the arrest, and follow up the effort until the arrest is effected."]; Jackson v. Superior Court (1950) 98 Cal.App.2d 183, 188 ["such limitation . . . has for long been a part of the common-law preceding the statutes in the various states"].
48. (1950) 98 Cal.App.2d 183, 185. Quoting from Oleson v. Pincock (1926) 251 P. 23, 26.

49. Gerstein v. Pugh (1975) 420 U.S. 103, 113.
50. See United States v. Leon (1984) 468 U.S. 897; People v. Palmer (1989) 207 Cal.App.3d 663, 670.
51. Steagald v. United States (1981) 451 U.S. 204, 212. ALSO SEE Wong Sun v. United States (1963) 371 U.S. 471, 481-82 ["The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess and weight and credibility of the information which the complaining officer adduces as probable cause."].
52. See Pen. Code §§ 816 ["A warrant of arrest shall be directed generally to any peace officer … and may be executed by any of those officers to whom it may be delivered."].
53. People v. Fisher (2002) 96 Cal.App.4th 1147, 1150. ALSO SEE Code of Civil Procedure § 262.1 ["A sheriff or other ministerial officer is justified in the execution of, and shall execute, all process and orders regular on their face"].
54. See People v. Bittaker (1989) 48 Cal.3d 1046, 1071 ["Once an individual is arrested and is before the magistrate, the 'complaint' is functus officio" ["having served its purpose"]; People v. Case (1980) 105 Cal.App.3d 826, 834.
55. See Herndon v. County of Marin (1972) 25 Cal.App.3d 933, 937 ["It is not [the officer's] duty to investigate the procedure which led to the issuance of the warrant, nor is there any obligation on his part to pass judgment upon the judicial act of issuing the warrant or to reflect upon the legal effect of the adjudication. On the contrary, it is his duty to make the arrest."].
56. See Milliken v. City of South Pasadena (1979) 96 Cal.App.3d 834, 842 ["But if [the officer] had actual knowledge that the arrest warrant did not constitute the order of the court because it had been recalled, then he could not rely upon the warrant."]; People v. Fisher (2002) 96 Cal.App.4th 1147, 1151 [court notes that "perhaps there could be circumstances where law enforcement officers, at the time they execute a warrant, are confronted with facts that are so fundamentally different from those upon which the warrant was issued that they should seek further guidance from the court"].
57. See Powe v. City of Chicago (7th Cir. 1981) 664 F.2d 639, 645 ["An arrest warrant that correctly names the person to be arrested generally satisfies the fourth amendment's particularity requirement, and no other description of the arrestee need be included in the warrant."]; Wanger v. Bonner (5th Cir. 1980) 621 F.2d 675, 682 ["Generally, the inclusion of the name of the person to be arrested on the arrest warrant constitutes a sufficient description"].
58. See Robinson v. City and County of San Francisco (1974) 41 Cal.App.3d 334, 337 ["the police officers did not consider any of the proffered identification when making the arrest"]; Smith v. Madruga (1961) 193 Cal.App.2d 543, 546 ["[T]he arrest was unlawful if the arresting officer failed to use reasonable prudence and diligence to determine whether the party arrested was actually the one described in the warrant."].
59. See U.S. v. Martin (7th Cir. 2005) 399 F.3d 879, 881 ["Police guarded against that risk [of recall of execution] by checking to see whether the charge remained unresolved."].
60. See Pen. Code § 850; People v. McCraw (1990) 226 Cal.App.3d 346, 349 ["A warrant may be sent by any electronic method and is just as effective as the original."].
61. See Pen. Code § 840; People v. Schmel (1975) 54 Cal.App.3d 46, 51.
62. See Pen. Code § 840. NOTE: No suppression: A violation of the time restriction will not result in suppression. See People v. McKay (2002) 27 Cal.4th 601, 605 ["[C]ompliance with state arrest procedures is not a component of the federal constitutional inquiry."]; People v. Whitted (1976) 60 Cal.App.3d 569, 572 ["The limitation on night-time arrest under misdemeanor warrants is of statutory, rather than constitutional, origin."].
63. People v. Whitted (1976) 60 Cal.App.3d 569, 572.
64. See Pen. Code §§ 806, 813(a).
65. See Steagald v. United States (1981) 451 U.S. 204, 213 ["An arrest warrant is issued upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense."]; People v. Case (1980) 105 Cal.App.3d 826, 832 [court notes that Ramey arrest warrants are "generally accompanied by copies of police reports, which advised the magistrate of the factual basis for the complainant's belief that the named individual had committed a felony offense."
66. In re Walters (1975) 15 Cal.3d 738, 748.
67. See Pen. Code §§ 813 [felony warrants], 1427 [misdemeanor warrants]; U.S. v. Clayton (8th Cir. 2000) 210 F.3d 841, 843 ["We agree with those courts that have held that [the arrest warrant requirement is satisfied] with equal force to misdemeanor warrants." Citations omitted]; U.S. v. Spencer (2nd Cir. 1982) 684 F.2d 220, 224 ["In determining reasonableness, the nature of the underlying offense is of no moment."]; Howard v. Dickerson (10th Cir. 1994) 34 F.3d 978, 981 [misdemeanor warrant is sufficient].
68. See Pen. Code § 815.

69. See Pen. Code § 815a.
70. See Pen. Code § 815 [if the arrestee's name is unknown, he "may be designated therein by any name"].
71. (1967) 255 Cal.App.2d 137, 142.
72. (7th Cir. 1981) 664 F.2d 639, 647.
73. (3d Cir. 1983) 703 F.2d 745, 748.
74. See People v. Montoya (1967) 255 Cal.App.2d 137, 142 [an arrestee might be sufficiently identified "by stating his occupation, his personal appearance, peculiarities, place or residence or other means of identification"].
75. See U.S. v. Stinson (D. Conn. 1994) 857 F.Supp. 1026, 1031, fn.8 ["[T]he address may play a vital role where the officers have a John Doe warrant."].
76. (E.D. Pa. 1984) 596 F.Supp. 86, 90.
77. See Wanger v. Bonner 621 F.2d 675, 682 [court rejects the argument that "the inclusion of an address for the person to be arrested in the warrant provided the deputies with a reasonable basis for the belief that the [arrestee] could be found within the premises"
78. Pen. Code § 817.
79. See Pen. Code §§ 817(a)(2), 840.
80. See Pen. Code §§ 815, 815a, 816; People v. McCraw (1990) 226 Cal.App.3d 346, 349.
81. See Pen. Code § 817(c). NOTE: For information on the procedure for obtaining a warrant by fax or email, see the chapter on arrest warrants in California Criminal Investigation.
82. See Pen. Code § 945.
83. See Pen. Code § 3060.
84. See Pen. Code § 1203.2.
85. See Pen. Code §§ 978.5; 813(c); 853.8; 983; Allison v. County of Ventura (1977) 68 Cal.App.3d 689, 701-2
86. See Code of Civil Procedure § 1993.
87. See Pen. Code § 841.
88. See People v. Sjosten (1968) 262 Cal.App.2d 539, 545; Lowry v. Standard Oil Co. (1942) 54 Cal.App.2d 782, 791.
89. See People v. Vasquez (1967) 256 Cal.App.2d 342
90. See People v. Kelley (1969) 3 Cal.App.3d 146, 151.
91. Pen. Code § 841.
92. See People v. Logue (1973) 35 Cal.App.3d 1, 5 ["A police officer's uniform is sufficient indicia of authority to make the arrest."].
93. Pen. Code § 841. NOTE: Specifying the crime is not required under the Fourth Amendment, but it is considered "good police practice." See Devenpeck v. Alford (2004) 543 U.S. 146, 155 ["While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required."].
94. United States v. Robinson (1973) 414 U.S. 218, 235.
95. See United States v. Robinson (1973) 414 U.S. 218, 234-35 ["It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station."]; Gustafson v. Florida (1973) 414 U.S. 260, 265.
96. United States v. Robinson (1973) 414 U.S. 218, 235.
97. United States v. Robinson (1973) 414 U.S. 218, 227.
98. See United States v. Robinson (1973) 414 U.S. 218, 236 ["While thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause"].
99. NOTE: While more intrusive searches based on reasonable suspicion are permitted at jail before the arrestee is admitted into the general population (see Pen. Code § 4030(f)), we doubt that anything less than probable cause would justify such a search in the field.
100. See Illinois v. Lafayette (1983) 462 U.S. 640, 645 ["[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street"].
101. See United States v. Robinson (1973) 414 U.S. 218, 223; In re Humberto O. (2000) 80 Cal.App.4th 237, 243.
102. See Chimel v. California (1969) 395 U.S. 752, 763.
103. See U.S. v. Skinner (E.D. Tenn. 2007) 2007 WL 1556596] ["To say that case law is substantially undeveloped as to what rights are accorded a cell phone's user, particularly in these circumstances, would be an understatement."].

104. See U.S. v. Finley (5th Cir. 2007) 477 F.3d 250, 260; U.S. v. Murphy (4th Cir. 2009) F.3d [2009 WL 94268].
105. See, for example, U.S. v. Park (N.D. Cal. 2007) 2007 WL 1521573; U.S. v. Wall (S.D. Fla. 2008) [2008 WL 5381412]. ALSO SEE U.S. v. Zavala (5th Cir. 2008) 541 F.3d 562 [search of cell phone unlawful because officers did not have probable cause to arrest].
106. See U.S. v. Ortiz (7th Cir. 1996) 84 F.3d 977, 984 ["[I] is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence."]; U.S. v. Reyes (S.D. N.Y. 1996) 922 F.Supp. 818, 833 ["[T]he search of the memory of Pager #1 was a valid search incident to Reyes' arrest."]; U.S. v. Chan (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["The search conducted by activating the pager's memory is therefore valid."].
107. See People v. Topp (1974) 40 Cal.App.3d 372, 378; U.S. v. Garcia (9th Cir. 2000) 205 F.3d 1182.
108. See New York v. Belton (1981) 453 U.S. 454.
109. See Chimel v. California (1969) 395 U.S. 752, 763.
110. See Maryland v. Buie (1990) 494 U.S. 325, 334.
111. 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."]; Pen. Code § 835a [the officer "need not retreat or desist from his efforts by reason of the resistance or threatened resistance"].
112. Lee v. Ferraro (11th Cir. 2002) 284 F.3d 1188, 1200.
113. See Saucier v. Katz (2001) 533 U.S. 194, 202; Graham v. Connor (1989) 490 U.S. 386, 395.
114. Tatum v. City and County of San Francisco (9th Cir. 2006) 441 F.3d 1090, 109
115. Scott v. Harris (2007) 550 U.S. 372, .
116. See Waterman v. Batton (4th Cir. 2005) 393 F.3d 471, 478 ["Of course, the critical reality here is that the officers did not have even a moment to pause and ponder these many conflicting factors."].
117. Graham v. Connor (1989) 490 U.S. 386, 396-97. ALSO SEE Thompson v. County of Los Angeles (2006) 142 Cal.App.4th 154, 165 [courts must view the facts "from the perspective of the officer at the time of the incident and not with the benefit of hindsight"]; Phillips v. James (10th Cir. 2005) 422 F.3d 1075, 1080 ["What may later appear to be unnecessary when reviewed from the comfort of a judge's chambers may nonetheless be reasonable under the circumstances presented to the officer at the time."].
118. See Atwater v. City of Lago Vista (2001) 532 U.S. 318, 350; People v. Bell (1996) 43 Cal.App.4th 754, 761, fn.1.
119. (9th Cir. 1994) 25 F.3d 804, 807.
120. See Deorle v. Rutherford (9th Cir. 2001) 272 F.3d 1272, 1279 ["We first assess the quantum of force used to arrest Deorle by considering the type and amount of force inflicted."]. NOTE: If the force was insignificant or de minimis, it will ordinarily be considered justifiable if there were grounds to arrest the suspect. See Zivojinovich v. Barner (11th Cir. 2008) 525 F.3d 1059, 1072 ["De minimis force will only support a Fourth Amendment excessive force claim when an arresting officer does not have the right to make an arrest."]; Graham v. Connor (1989) 490 U.S. 386, 396 ["Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."].
121. See Smith v. City of Hemet (9th Cir. 2005) 394 F.3d 689, 705.
122. See Scott v. Harris (2007) 550 U.S. 372, ["we must balance the nature and quality of the intrusion . . . against the importance of the governmental interests alleged"]; Tekle v. U.S. (9th Cir. 2006) 511 F.3d 839, 845 ["[W]e must balance the force used against the need"]; Miller v. Clark County (9th Cir. 2003) 340 F.3d 959, 964 ["[W]e assess the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted."].
123. (1989) 490 U.S. 386, 396.
124. Drummond v. City of Anaheim (9th Cir. 2003) 343 F.3d 1052, 1057.
125. See Graham v. Connor (1989) 490 U.S. 386, 396 [courts must consider whether the suspect "is actively resisting arrest"]; Miller v. Clark County (9th Cir. 2003) 340 F.3d 959, 964 ["we assess . . . whether the suspect was actively resisting arrest or attempting to evade arrest by flight"].
126. Tatum v. City and County of San Francisco (9th Cir. 2006) 441 F.3d 1090, 1097.
127. Arpin v. Santa Clara Valley Transportation Agency (9th Cir. 2001) 261 F.3d 912, 921.
128. (9th Cir. 2003) 343 F.3d 1052, 1058. ALSO SEE Casey v. City of Federal Heights (10th Cir. 2007) 509 F.3d 1278, 1282 ["[W]e are faced with the use of force—an arm-lock, a tackling, a Tasering, and a beating—against one suspected of innocuously

committing a misdemeanor, who was neither violent nor attempting to flee."]; Meredith v. Erath (9th Cir. 2003) 342 F.3d 1057, 1061 [suspect "passively resisted" but "did not pose a safety risk and made no attempt to leave"].

129. (1st Cir. 2008) 547 F.3d 1, 10.
130. See Thompson v. County of Los Angeles (2006) 142 Cal.App.4th 154, 163 [courts considers "the severity of the crime at issue"]; Tekle v. U.S. (9th Cir. 2007) 511 F.3d 839, 844 ["Factors to be considered [include] the severity of the crime at issue"]; Miller v. Clark County (9th Cir. 2003) 340 F.3d 959, 964 [court considers "the severity of the crime at issue"].
131. (9th Cir. 2003) 340 F.3d 787, 793.
132. See Graham v. Connor (1989) 490 U.S. 386, 396 [courts must consider "whether the suspect poses an immediate threat to the safety of the officers or others"]; Miller v. Clark County (9th Cir. 2003) 340 F.3d 959, 964 ["we assess . . . whether the suspect posed an immediate threat to the safety of the officers or others"].
133. (2007) 550 U.S. 372, .
134. (9th Cir. 2003) 340 F.3d 959, 965.
135. See Forrester v. City of San Diego (9th Cir. 1994) 25 F.3d 804, 807 ["[T]he force consisted only of physical pressure administered on the demonstrators' limbs in increasing degrees, resulting in pain."].
136. (11th Cir. 2002) 284 F.3d 1188, 1198.
137. See Tatum v. City and County of San Francisco (9th Cir. 2006) 441 F.3d 1090, 1097 ["Faced with a potentially violent suspect, behaving erratically and resisting arrest, it was objectively reasonable for [the officer] to use a control hold"]; Zivojinovich v. Barner (11th Cir. 2008) 525 F.3d 1059, 1072 ["using an uncomfortable hold to escort an uncooperative and potentially belligerent suspect is not unreasonable"].
138. See Smith v. City of Hemet (9th Cir. 2005) 394 F.3d 689, 703-4; McCormick v. City of Fort Lauderdale (11th Cir. 2003) 333 F.3d 1234, 1245 ["Pepper spray is an especially noninvasive weapon and may be one very safe and effective method of handling a violent suspect who may cause further harm to himself or others."]; Vinyard v. Wilson (11th Cir. 2002) 311 F.3d 1340, 1348 ["[P]epper spray is a very reasonable alternative to escalating a physical struggle with an arrestee."]; Gaddis v. Redford Township (6th Cir. 2004) 364 F.3d 763, 775 ["[The officer] used an intermediate degree of nonlethal force to subdue a suspect who had previously attempted to evade arrest, was brandishing a knife, showed signs of intoxication or other impairment, and posed a clear risk of leaving the scene behind the wheel of a car."].
139. Johnson v. City of Los Angeles (9th Cir. 2003) 340 F.3d 787, 793.
140. See Thompson v. County of Los Angeles (2006) 142 Cal.App.4th 154, 167 [court notes that "the great weight of authority" holds that the "use of a trained police dog does not constitute deadly force"]; People v. Rivera (1992) 8 Cal.App.4th 1000, 1007 [officer testified that he hoped that by using the police dog to "search, bite and hold" a fleeing burglary suspect, he could "alleviate any shooting circumstance."]; Kuha v. City of Minnetonka (8th Cir. 2003) 365 F.3d 590, 597-98 ["No federal appeals court has held that a properly trained police dog is an instrument of deadly force, and several have expressly concluded otherwise." Citations omitted.]; Quintanilla v. City of Downey (9th Cir. 1996) 84 F.3d 353, 358 ["Moreover, the dog was trained to release on command, and it did in fact release Quintanilla on command."]; Miller v. Clark County (9th Cir. 2003) 340 F.3d 959, 963 ["[T]he risk of death from a police dog bite is remote. We reiterate that the possibility that a properly trained police dog could kill a suspect under aberrant circumstances does not convert otherwise nondeadly force into deadly force."].
141. See Sanders v. City of Fresno (E.D. Cal. 2008) 551 F.Supp.2d 1149, 1168 ["[C]ase law indicates that Tasers are generally considered non-lethal or less lethal force." Citations omitted.].
142. See Sanders v. City of Fresno (E.D. Cal. 2008) 551 F.Supp.2d 1149, 1168 ["The Court will view the use of a Taser as an intermediate or medium, though not insignificant, quantum of force that causes temporary pain and immobilization."].
143. (W.D. Wash. 2007) 507 F.Supp.2d 1137, 1144.
144. Zivojinovich v. Barner (11th Cir. 2008) 525 F.3d 1059, 1073. ALSO SEE Miller v. Clark County (9th Cir. 2003) 340 F.3d 959, 966 ["[W]e think it highly relevant here that the deputies had attempted several less forceful means to arrest Miller"].
145. (11th Cir. 2004) 369 F.3d 1270.
146. (E.D. Cal. 2008) 551 F.Supp.2d 1149.
147. Deorle v. Rutherford (9th Cir. 2001) 272 F.3d 1272, 1282-3.
148. See Vera Cruz v. City of Escondido (9th Cir. 1997) 139 F.3d 659, 660.
149. Smith v. City of Hemet (9th Cir. 2005) 394 F.3d 689, 705 [emphasis added]. ALSO SEE Thompson v. County of Los Angeles (2006) 142 Cal.App.4th 154, 165.

150. See Scott v. Harris (2007) 550 U.S. 372, [“Garner was simply an application of the Fourth Amendment’s ‘reasonableness’ test”].
151. Tennessee v. Garner (1985) 471 U.S. 1, 10.
152. Scott v. Harris (2007) 550 U.S. 372, .
153. Brosseau v. Haugen (2004) 543 U.S. 194, 199.
154. See Scott v. Harris (2007) 550 U.S. 372, , fn.9; Munoz v. City of Union City (2004) 120 Cal.App.4th 1077, 1103 [“An officer’s use of deadly force is reasonable only if ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”]; Smith v. City of Hemet (9th Cir. 2005) 394 F.3d 689, 704 [“[A] police officer may not use deadly force unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”].
155. See Tennessee v. Garner (1985) 471 U.S. 1, 11-12 [“some warning” must be given “where feasible”].
156. (1985) 471 US 1, 11.
157. See Martinez v. County of Los Angeles (1996) 47 Cal.App.4th 334, 344 [man with a knife, high on PCP, refused the officers’ commands to drop the weapon, said “Go ahead kill me or I’m going to kill you,” advanced on officers to within 10-15 feet]; Reynolds v. County of San Diego (9th Cir. 1996) 84 F.3d 1162, 1168 [apparently deranged suspect suddenly swung a knife at an officer]; Billington v. City of Boise (9th Cir. 2002) 292 F.3d 1177, 1185 [“Hennessey was trying to get the detective’s gun, and he was getting the upper hand. Hennessey posed an imminent threat of injury or death; indeed, the threat of injury had already been realized by Hennessey’s blows and kicks.”]; McCormick v. City of Fort Lauderdale (11th Cir. 2003) 333 F.3d 1234, 1246 [suspect in a violent felony, carrying a stick, advanced on an officer—”pumping or swinging the stick”—then charged the officer as he was falling]; Sanders v. City of Minneapolis (8th Cir. 2007) 474 F.3d 523, 526 [suspect in a vehicle was attempting to run down the arresting officers]; Waterman v. Batton (4th Cir. 2005) 393 F.3d 471, 478 [the suspect, after attempting to run an officer off the road, accelerated toward officers who were standing in front of him (although not directly in front); Untalan v. City of Lorain (6th Cir. 2005) 430 F.3d 312, 315 [man armed with a butcher knife lunged at the officer].
158. (2007) 550 U.S. 372, , fn. 9.
159. Tennessee v. Garner (1985) 471 U.S. 1, 21 [“While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force.”].
160. (4th Cir. 2005) 393 F.3d 471, 481.
161. Foster v. City of Fresno (E.D. Cal. 2005) 392 F.Supp.2d 1140, 1159. ALSO SEE Tennessee v. Garner (1985) 471 U.S. 1, 16, fn. 15 [“[Under the California Penal Code] the police may use deadly force to arrest only if the crime for which the arrest is sought was a forcible and atrocious one which threatens death or serious bodily harm, or there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed.”]; Kortum v. Alkire (1977) 69 Cal.App.3d 325, 333[deadly force against a fleeing felony suspect is permitted only if the felony is “a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another”]; Ting v. U.S. (9th Cir. 1991) 927 F.2d 1504, 1514 [“A law enforcement officer is authorized to use deadly force to effect an arrest only if the felony for which the arrest is sought is a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another."].
162. See People v. Ramey (1976) 16 Cal.3d 263; Payton v. New York (1980) 445 U.S. 573.
163. See People v. Case (1980) 105 Cal.App.3d 826, 831 [“From a practical standpoint the use of the Ramey Warrant form was apparently to permit, prior to an arrest, judicial scrutiny of an officer’s belief that he had probable cause to make the arrest without involving the prosecutor’s discretion in determining whether to initiate criminal proceedings.” Quote edited]; People v. Bittaker (1980) 48 Cal.3d 1046, 1070; Godwin v. Superior Court (2001) 90 Cal.App.4th 215, 225 [“To comply with Ramey and Payton, prosecutors developed the use of a Ramey warrant form, to be presented to a magistrate in conjunction with an affidavit stating probable cause to arrest.”].
164. See U.S. v. Route (5th Cir. 1997) 104 F.3d 59, 62 [“All but one of the other circuits [the 9th] that have considered the question are in accord, relying upon the ‘reasonable belief’ standard as opposed to a probable cause standard. . . . [W]e adopt today the ‘reasonable belief’ standard of the Second, Third, Eighth, and Eleventh Circuits.” Citations omitted].
165. See Cuevas v. De Roco (9th Cir. 2008) 531 F.3d 726, 736; Motley v. Parks (9th Cir. en banc 2005) 432 F.3d 1072. NOTE: Because the United States Supreme Court used the words “reason to believe,” and because the Court is familiar with the term “probable cause,” it would seem that it meant something less than probable cause. See U.S. v. Magluta (11th Cir. 1995) 44 F.3d

1530, 1534 [“The strongest support for a lesser burden than probable cause remains the text of Payton, and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of ‘reason to believe’ over that of ‘probable cause.’”].

166. See People v. Jacobs (1987) 43 Cal.3d 472, 479, fn.4.
167. See Steagald v. United States (1981) 451 U.S. 204. NOTE: Because it can be difficult to establish probable cause for a Steagald warrant, the Supreme Court has noted that there are at least two options: (1) wait until the arrestee is inside his own residence, in which case only an arrest warrant is required; wait until the arrestee leaves the third party’s house or is otherwise in a public place, in which case neither an arrest warrant nor a Steagald warrant is required. See Steagald v. United States (1981) 451 U.S. 204, 221, fn.14 [“[I]n most situations the police may avoid altogether the need to obtain a search warrant simply by waiting for a suspect to leave the third party’s home before attempting to arrest the suspect.”].
168. 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.” Edited]; People v. Lloyd (1989) 216 Cal.App.3d 1425, 1430.
169. See People v. Manderscheid (2002) 99 Cal.App.4th 355, 361-63; People v. Amaya (1979) 93 Cal.App.3d 424, 428 [“Thus, officers need not secure a warrant to enter a dwelling in fresh pursuit of a fleeing suspect believed to have committed a grave offense and who therefore may constitute a danger to others.”].
170. See People v. Superior Court (Kenner) (1977) 73 Cal.App.3d 65, 69 [“A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right of explanation or justification.”]; In re Johnny V. (1978) 85 Cal.App.3d 120, 130 [“A consent for the purpose of talking with a suspect is not a consent to enter for the purpose of making an arrest”].
171. See People v. Evans (1980) 108 Cal.App3d. 193, 196 [“[The officers] were inside with consent, with probable cause to arrest but with the intent to continue the investigation”];
172. People v. Patterson (1979) 94 Cal.App.3d 456, 463 [“There is nothing in the record to indicate that the police intended to arrest Patterson immediately following the entry or that they were not prepared to discuss the matter with Patterson first in order to permit her to explain away the basis of the officers’ suspicions.”]; In re Reginald B. (1977) 71 Cal.App.3d 398, 403 [arrest lawful when made after officers confirmed the suspect’s identity].
173. See People v. Superior Court (Logue) (1973) 35 Cal.App.3d 1, 6.
174. See Pen. Code § 7.21. ALSO SEE Pen. Code § 13100 et seq. [criminal offender record information].
175. See 4 Witkin, California Criminal Law (3rd edition 2000), p. 258 [“[T]here is little statutory or case law coverage of the police practices of . . . booking arrested persons.”].
176. See Doe v. Sheriff of DuPage County (7th Cir. 1997) 128 F.3d 586, 588 [one purpose of booking is to confirm the arrestee’s identity]; 3 LaFave Search and Seizure (Fourth Edition) at p. 46 [“law enforcement agencies view booking as primarily a process for their own internal administration”].
177. See Doe v. Sheriff of DuPage County (7th Cir. 1997) 128 F.3d 586, 588.
178. See Pen. Code § 851.5.
179. See In re Walters (1975) 15 Cal.3d 738, 743.
180. See County of Riverside v. McLaughlin (1991) 500 U.S. 44, 47.
181. See County of Riverside v. McLaughlin (1991) 500 U.S. 44, 56; Powell v. Nevada (1994) 511 U.S. 79, 80 [“[Riverside] established that ‘prompt’ generally means within 48 hours of the warrantless arrest”].
182. See County of Riverside v. McLaughlin (1991) 500 U.S. 44, 58; Anderson v. Calderon (9th Cir. 2000) 232 F.3d 1053, 1070 [“TheMcLaughlin Court made clear that intervening weekends or holidays would not qualify as extraordinary circumstances”].
183. See New York v. Harris (1990) 495 U.S. 14, 18 [“Nothing in the reasoning of [Payton v. New York] 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.”]; People v. Watkins (1994) 26 Cal.App.4th 19, 29 [“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.”]; Pen. Code § 836(a). NOTE: The United States Supreme Court indicated that even if a judge ordered the release of a suspect because of a post-arrest time limit violation, the suspect could be immediately rearrested if probable cause continued to exist. New York v. Harris (1990) 495 U.S. 14, 18.
184. See People v. Valenzuela (1978) 86 Cal.App.3d 427, 431.
185. Pen. Code § 825.

186. See Pen. Code § 849(a); Ng v. Superior Court (1992) 4 Cal.4th 29, 38.
187. Ng v. Superior Court (1992) 4 Cal.4th 29, 38; People v. Gordon (1978) 84 Cal.App.3d 913, 923; O'Neal v. Superior Court (1986)Cal.App.3d 1086, 1090; People v. Hughes (2002) 27 Cal.4th 287, 326 [parole hold].
188. See Pen. Code § 825(a)(2); People v. Gordon (1978) 84 Cal.App.3d 913, 922 ["Sunday was excludable"].
189. See Pen. Code § 825(a)(2).
190. See People v. Gordon (1978) 84 Cal.App.3d 913, 922.
191. See Pen. Code § 825(a)(2).
192. See In re Walker (1974) 10 Cal.3d 764, 778; People v. Williams (1977) 68 Cal.App.3d 36, 43.

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5.4: Illinois v. Gates

PETITIONER

Illinois

RESPONDENT

Lance Gates, et ux

LOCATION

Residence of Gates

DOCKET NO.

81-430

DECIDED BY

Burger Court

LOWER COURT

Supreme Court of Illinois

CITATION

462 US 213 (1983)

ARGUED

Oct 13, 1982

REARGUED

Mar 1. 1983

DECIDED

June 8, 1983

ADVOCATES

Paul P. Biebel, Jr. *Reargued the cause for the petitioner*

James W . Reilley *Reargued the cause for the respondents*

Rex E. Lee A*rgued the case on re-argument for the United States as amicus curiae urging reversal*

Paul B. Biebel Jr. *on behalf of petitioner*

Facts of the case

The Bloomingdale, Illinois Police Department received an anonymous tip that Lance and Susan Gates were selling drugs out of their home. After observing the Gates's drug smuggling operation in action, police obtained a warrant and upon searching the suspects' car and home uncovered large quantities of marijuana, other contraband, and weapons.

Question

Did the search of the Gates's home violate the Fourth and Fourteenth Amendments?

Conclusion

6–3 Decision for Illinois

Majority Opinion by William H. Rehnquist

FOR	AGAINST
Blackmun White Powell Burger O’Conner Rehnquist	Marshall Brennan Stevens

The Court found no constitutional violation and argued that the lower court misapplied the test for probable cause which the Court had announced in *Spinelli v. United States (1969)*. Justice Rehnquist argued that an informant's veracity, reliability, and basis of knowledge are important in determining probable cause, but that those issues are intertwined and should not be rigidly applied. He argued that the"totality-of-the-circumstances" approach to probable cause was the correct one to glean from Spinelli, and that the law enforcement officials who obtained a warrant abided by it in this case.

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CHAPTER OVERVIEW

6: Search and Siezure of Things

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6.3: Searches Incident to Arrest
6.4: Schneckloth v. Bustamonte
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6.6: Taking a “Second Look” at Prisoners’ Property
6.7: Searches and Detentions on School Grounds
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6.10: Chimel v. California

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6.1: Consent Searches

Let's go search my apartment. You can search the shit out of it. I'll even help you.[1]

That was a major league bluff. And soon after suspected murderer Eugene Wheeler made his bold offer in an LAPD interview room, he must have realized he had blundered. That's because the detectives gracefully accepted his offer, then diligently searched his apartment and found the murder weapon hidden behind a wall-mounted music speaker. So, thanks in part to his hubris, Wheeler was convicted of first degree murder.

Why did he take such a chance? Actually, there are several logical reasons.[2] As the Court of Appeal pointed out, a suspect "may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile."[3]

But whatever a suspect's motivation, the thing to remember for officers is that, when it comes to consent searches, there's no harm in asking. In fact, the Supreme Court has described them as a "wholly legitimate aspect of effective police activity" which is often "the only means of obtaining important and reliable evidence."[4] Of course, such evidence is worthless unless it is admissible in court, and that is why we are devoting this edition of to the rules that govern consent searches.

As we will explain, there are four basic requirements:

1. Consent was given: The suspect must have expressly or impliedly consented.
2. Consent was voluntary: The consent must have been given voluntarily.
3. Scope of consent: Officers must have searched only those places and things that the suspect expressly or impliedly authorized them to search.
4. Intensity of search: The search must not have been unduly intrusive.

In addition to these requirements, we will discuss two issues that frequently arise: mid-search withdrawal of consent and consent obtained by means of trickery. Then in the accompanying article, "Third Party Consent," we will explain the rules for obtaining consent to search a suspect's property from someone other than the suspect, such as his spouse, roommate, or accomplice.

Did he consent?

The most basic requirement is that the suspect must have consented—either expressly or impliedly.

EXPRESS CONSENT

Express consent results when the suspect responds in the affirmative to an officer's request for permission. There are, however, no "magic words" that the suspect must utter.[5] Instead, express consent may be given by means of any words or gestures that reasonably indicate the suspect was consenting. Express consent will also result if, like Mr. Wheeler, the suspect suggested it.

IMPLIED CONSENT TO SEARCH

Consent will be implied if the suspect said or did something that officers reasonably interpreted as authorization to search.[6] As the Court of Appeal explained, "Specific words of consent are not necessary; actions alone may be sufficient."[7] For example, consent to search a home or vehicle has been implied when the suspect responded to the officer's request to search by handing him the keys;[8] and when an officer told the suspect what he was looking for and when the suspect responded by telling them where it was located.[9] However, a failure to object to a search does not constitute consent.[10]

Voluntary Consent

In addition to proving that the suspect expressly or impliedly consented, officers must prove that his consent had been given voluntarily.[11] This simply means the consent must not have been the result of threats, promises, intimidation, demands, or any other method of pressuring the suspect to consent.[12] "Where there is coercion," said the Supreme Court, "there cannot be consent."[13]

It has been argued (usually out of desperation) that any consent search that results in the discovery of incriminating evidence must have been involuntary because no lucid criminal would voluntarily do something that would likely land him in jail. But, as the Court of Appeal observed, these arguments have "never been dispositive of the issue of consent."[14] For example, the Sixth Circuit observed in *U.S. v. Carter* [15] that, while the defendant's decision to consent "may have been rash and ill-considered, that does not make it invalid."

Furthermore, if the suspect consented, it is immaterial that he was not joyful or enthusiastic about it.[16] This is because "[n]o person, even the most innocent, will welcome with glee and enthusiasm the search of his home by law enforcement agents."[17] For example, consent to search has been found when, upon being asked for consent, the suspect responded "Yeah," "I don't care," "No problem," "Do what you gotta do," and "Be my guest."[18]

As we will now discuss, the circumstances that are relevant in determining whether consent was voluntary can be divided into four categories: (1) direct evidence of coercion, (2) circumstantial evidence of coercion, (3) circumstantial evidence of voluntariness, and (4) circumstantial evidence bearing on the suspect's state of mind.

Direct evidence of coercion

Apart from physical violence, the most obvious forms of coercion are threats and demands—either of which will likely render consent involuntary.

THREATS

An officer's threat to arrest or take punitive action against the suspect if he refused to consent will render the consent involuntary. For example, the courts have ruled that consent was involuntary when it resulted from an officer's threat to arrest the suspect,[19] terminate her welfare benefits,[20] or remove her children from the home.[21]

DEMANDING CONSENT

Consent is also involuntary if officers said or suggested that, although they were asking for the suspect's consent, he really had no choice. As the court observed in *People v. Fields*, "There is a world of difference between requesting one to open a trunk and asking one's permission to look in a trunk."[22] Similarly, an officer's entry into a home would not be consensual if he was admitted after announcing, "Police! Open the door!"[23]

Circumstantial evidence of coercion

Even if there were no explicit threats or demands, consent is involuntary if (1) a reasonable person in the suspect's position would have viewed the officers' words or conduct as coercive, and (2) there was no overriding circumstantial evidence of voluntariness (discussed in the next section).

INTIMIDATION

Consent is involuntary if it was obtained by the use of police tactics that were reasonably likely to elicit fear if it was denied.[24] For example, in *People v. Reyes* [25] a narcotics officer induced Reyes to leave his home by claiming that Reyes' parked car had been damaged in a traffic accident. As Reyes stepped outside, he was met by five officers, three of whom were "attired in full ninja-style raid gear, including black masks and bulletproof vests emblazoned with POLICE markings." Although Reyes consented to a search his pockets (there were drugs), the court ruled the consent was involuntary because the officers had "lured him into a highly intimidating situation." Said the court, "[W]e think the police went too far." Some other examples:

- The suspect was "standing in a police spotlight, surrounded by four officers all armed with shotguns or carbines."[26]
- "Six or seven officers strode into Poole's apartment in order to 'talk' to him, without so much as a by-your-leave."[27]
- "[A] half dozen uniformed police officers" asked for consent while "moving up the [suspect's] stairs with pistols drawn."[28]

BADGERING

If the suspect initially refused to consent, an officer's badgering him into changing his mind is necessarily coercive. Officers may, however, ask the suspect to reconsider his decision so long as they are not overly persistent.[29] When does mere persistence become badgering? Although the line may be difficult to draw, it may depend a lot on the officers' attitude; e.g., hostile or accusatory versus "restrained and noncoercive."[30]

NUMBER OF OFFICERS

The presence of several officers at the scene is somewhat coercive. But unless they surrounded the suspect or were otherwise in close proximity, this circumstance is not a strong indication of coercion.[31]

ARREST, HANDCUFFS

That the suspect had been arrested or was handcuffed is relevant, but not significant.[32] As the Supreme Court observed, "[C]ustody alone has never been enough to demonstrate a coerced confession or consent to search."[33]

DRAWN WEAPONS

Consent to search given at gunpoint will usually be involuntary [34] unless the following circumstances existed: (1) the officer had good reason for drawing the weapon, (2) the weapon was reholstered before consent was sought, and (3) the circumstances were not otherwise coercive.[35]

REFERENCES TO SEARCH WARRANTS

A remark by officers as to the existence, issuance, or necessity of a search warrant may constitute evidence of coercion depending on the context:

> "WE HAVE A WARRANT": Consent is involuntary if officers falsely said or implied that they possessed a warrant or that one had been issued. As the Supreme Court observed in *Bumper v. North Carolina*, "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion."[36] "WE DON'T NEED A WARRANT": Consent is involuntary if officers said or implied that, although they were asking for consent, they did not need it.[37] "[T]here can be no effective consent," said the Ninth Circuit, "if that consent follows a law enforcement officer's assertion of an independent right to engage in such conduct."[38]
>
> "WE WILL SEEK A WARRANT": Consent is not involuntary if officers merely told the suspect they would "seek" or "apply for" a search warrant if consent was refused.[39] As the court explained in *People v. Gurtenstein*,[40] an officer's statement that "he would go down and apply for a search warrant" could not be considered coercive because he "was merely telling the defendant what he had a legal right to do." Similarly, in *U.S. v. Faruolo* [41] an FBI agent told the defendant that if he refused to consent to a search of his house the agents would secure the premises and apply for a warrant. In rejecting the argument that this comment constituted coercion, the court said that, on the contrary, it was "a fair and sensible appraisal of the realities facing the defendant Faruolo."
>
> "WE WILL 'GET' A WARRANT": If officers told the suspect that they would "get" or "obtain" a warrant if he refused to consent (as if warrants were issued on request), his consent should not be deemed involuntary if officers did, in fact, have probable cause for a warrant.[42] As the Ninth Circuit explained, "[C]onsent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if the officer had probable cause upon which a warrant could issue."[43] Similarly, the Seventh Circuit observed in *U.S. v. Duran*, "Although empty threats to obtain a warrant may at times render a subsequent consent involuntary, the threat in this case was firmly grounded."[44]

A REFUSAL IS A CONFESSION

Coercion is likely to be found if officers said or implied that, under the law, a refusal to consent is the same as a confession of guilt. This occurred in *Crofoot v. Superior Court* in which an officer detained a suspected burglar named Stine. Stine was carrying a "bulging" backpack and, in the course of the detention, the officer told him that he "shouldn't have any objections to my looking in the backpack if he wasn't doing anything." In ruling that Stine's subsequent consent was involuntary and that stolen property in the backpack should have been suppressed, the Court of Appeal said this: "[I]mplicit in the officer's statement is the threat that by exercising his right to refuse the search Stine would be incriminating himself or admitting participation in illegal activity."[45]

In a similar but somewhat less obvious scenario, an officer will ask a detainee if he is carrying drugs, weapons or other contraband. When the detainee says no, the officer will say or suggest that if he was telling the truth he would certainly have no objection to a search. Although this is not an unusual practice, we were unable to find any California case in which this precise subject was addressed. There are, however, at least two federal circuit cases in which the courts ruled that consent given under such circumstances may be voluntary if the officers made it clear to the detainee that he was free to reject their request.[46]

In a third variation on this theme (and probably the most common), the officer will omit asking the suspect if he is carrying contraband, and simply ask if he has "any objection" to a search. Of all three approaches, this is plainly the least objectionable.

For example, in *Gorman v. United States* 47 an FBI agent asked a robbery suspect if he had "any objection" to a search of his motel room, and the suspect said "go ahead." In ruling that the agent's words did not constitute a threat, the First Circuit explained that consent is not involuntary merely because the suspect faced the following dilemma: If he consented, the evidence would likely be found. But if he refused, it "would harden the suspicion [of guilt] that he was trying to dispel."

NO SANE CRIMINAL WOULD VOLUNTARILY CONSENT:

Defendants sometimes attempt to prove they did not voluntarily consent by asserting that no lucid criminal would freely agree to a search that might uncover proof of their guilt. As noted earlier, however, these arguments are routinely rejected because there are several logical reasons why a criminal would freely do so.

Circumstantial evidence of voluntariness

Even if there was some circumstantial evidence of coercion, the suspect's consent may be deemed voluntary if there was some overriding circumstantial evidence of voluntariness,48 which often consists of one or more of the following:

> "YOU CAN REFUSE": Officers are not required to notify a suspect that he has a right to refuse to consent,49 but it is a relevant circumstance.50 Thus in *United States v. Mendenhall* the Supreme Court observed that "the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive."51

OFFICERS' MANNER

A courteous attitude toward the suspect is highly relevant because it would ordinarily communicate to him that the officers were seeking his assistance, not demanding it. Thus it would be relevant that the officers displayed a "pleasant manner and tone of voice that is not insisting,"52 as opposed to one that was "officious and authoritative."53

"ASKING" IMPLIES A CHOICE

The fact that officers asked the suspect for consent to search is, itself, an indication that he should have known he could have refused the request. As the California Supreme Court observed, "[W]hen a person of normal intelligence is expressly asked to give his consent to a search of his premises, he will reasonably infer he has the option of withholding that consent if he chooses."54

SUSPECT SIGNED CONSENT FORM

It is relevant that the suspect signed a form in which he acknowledged that his consent was given voluntarily.55 But an acknowledgment will have little or no weight if he was coerced into signing it.56

SUSPECT WAS COOPERATIVE

That the suspect was generally cooperating with the officers, or that he suggested the officers conduct a search of his property is a strong indication that his consent was voluntary.57

SUSPECT INITIALLY REFUSED

It is relevant that the suspect initially refused the officers' request or that he permitted them to search only some things, as this tends to demonstrate his awareness that he could not be compelled to consent.58

EXPERIENCE WITH POLICE, COURTS

Another example of circumstantial evidence of voluntariness is that the suspect had previous experience with officers and the courts. Thus, in *People v. Coffman* the California Supreme Court observed that, "given Marlow's maturity and criminal experience (he was over 30 years old and a convicted felon at the time of the interrogation) it was unlikely Marlow's will was thereby overborne."59

MIRANDA WAIVER

Giving the suspect a Miranda warning before seeking consent has a slight tendency to indicate the consent was voluntary. A Miranda warning, said the Court of Appeal, "was an additional factor tending to show the voluntariness of appellant's consent."60

Suspect's mental state

So long as the suspect answered the officers' questions in a rational manner, consent is not apt to be involuntary merely because he was under the influence of drugs or alcohol, had a mental disability, was uneducated, or was emotionally upset or distraught. As the Eighth Circuit noted, "Although lack of education and lower-than-average intelligence are factors in the voluntariness analysis, they do not dictate a finding of involuntariness, particularly when the suspect is clearly intelligent enough to understand his constitutional rights."[61] Nevertheless, a suspect's lack of mental clarity may invalidate consent if a court finds that officers obtained authorization by exploiting it.[62]

Scope and Intensity of Search

Before beginning a consensual search, officers must understand what they may search and the permissible intensity of the search. This requirement will be easy to satisfy if the suspect authorized a search of a single and indivisible object, such as a pants pocket or cookie jar. But in most cases they will be searching something (especially a home or car) in which there are containers, compartments, or separate spaces. So, how can officers determine the permissible scope of such a search?

Actually, it is not difficult because the Supreme Court has ruled that, in the absence of an express agreement, the scope and intensity of a consent search is determined by asking: What would a reasonable person have believed the search would encompass?[63] As the Court put it, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[64] In this section, we will discuss how the courts answer this question.

Scope of the search

The "scope" of a search refers to physical boundaries of the search and whether there were any restrictions as to what places and things within these boundaries may be searched.[65] As we will now discuss, scope is usually based on what the officers told the suspect before consent was given.

OFFICERS SPECIFIED THE OBJECT OF SEARCH

If officers obtained consent to search for a specific thing or class of things (e.g., drugs), they may ordinarily search any spaces and containers in which such things may reasonably be found.[66] As the Tenth Circuit put it, "Consent to search for specific items includes consent to search those areas or containers that might reasonably contain those items."[67] For example, because drugs, weapons, and indicia can be found in small spaces and containers,[68] the permissible scope of a search for these things in a home would include boxes, briefcases, and the various compartments in household furniture.[69] Or, if officers were searching for such things in a car, the scope would include a paper bag and other containers,[70] the area behind driver's seat and door panels,[71] a side panel compartment,[72] behind the vents,[73] under loose carpeting,[74] the trunk,[75] under the vehicle,[76] the area between the bed liner and the side of the suspect's pickup.[77] Note that if the suspect authorized a search for "anything you're not supposed to have," officers may interpret this as consent to search for drugs.[78]

OFFICERS SPECIFIED THE NATURE OF CRIME

Instead of specifying the type of evidence they wanted to search for, officers will sometimes seek consent to search for evidence pertaining to a certain crime. If the suspect consents, the scope of the search would be quite broad because the evidence pertaining to most crimes frequently includes small things such as documents, clothing, weapons, and ammunition. Thus in *People v. Jenkins* the court ruled that, having obtained consent to search for evidence in a shooting, officers could search a briefcase because it "is obviously a container that readily may contain incriminating evidence, including weapons."[79]

SCOPE NOT SPECIFIED

If neither the officers nor the suspect placed any restrictions on the search, or if they did not discuss the matter, the search must simply be "reasonable" in its scope. As the Eleventh Circuit explained, "When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass."[80] Officers may, however, infer that a suspect who authorizes an unrestricted search had authorized them to look for evidence of a crime which, as noted, frequently consists of things that are very small.[81]

SEARCHING CONTAINERS IN SEARCHABLE AREAS

While conducting a search that is otherwise lawful in its scope and intensity, officers may ordinarily open and search any containers in which the sought-after evidence might reasonably be found.82 A container may not, however, be searched if it reasonably appeared to be owned, used, controlled, and accessed exclusively by someone other than the consenting person. This exception is discussed in the accompanying article, "Third Party Consent."

Intensity of the search

The term "intensity" of the search refers to how thorough or painstaking it may be. But if, as is usually the case, the officers and suspect did not discuss the subject, the search must simply be "reasonable" in its intensity, as follows:

A "THOROUGH" SEARCH

Officers may presume that the suspect was aware they would be looking for evidence of a crime and would therefore be conducting a "thorough" search.83 As the court observed in *U.S. v. Snow*, "[T]he term 'search' implies something more than a superficial, external examination. It entails looking through, rummaging, probing, scrutiny, and examining internally."84 But, as noted below in "Length of search," officers may not be permitted to conduct a thorough search if they implied that they only wanted to conduct a quick or cursory one.

NOT DESTRUCTIVE

It would be unreasonable for officers to interpret consent to search something as authorization to destroy or damage it in the process. Thus, in discussing this issue in *Florida v. Jimeno*, the United States Supreme Court said, "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."85 Similarly, in *U.S. v. Strickland* 86 a suspect gave officers consent to search "the entire contents" of his car for drugs. During the search, an officer noticed some things about the spare tire that caused him to think it might contain drugs. So he cut it open. His suspicions were confirmed (the tire contained ten kilograms of cocaine), but the court ruled the search was unlawful because "a police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or the property contained within it."

In contrast, in *People v. Crenshaw* 87 the Court of Appeal ruled that an officer did not exceed the permissible intensity of a search for drugs in a vehicle when he unscrewed a plastic vent cover to look inside. This was because the officer "did not rip the vent from the door; he merely loosened a screw with a screwdriver and removed it."

LENGTH OF SEARCH

The permissible length of a consent search depends mainly on how large an area must be searched, the difficulties in searching the area and its contents (e.g. heavily cluttered home), the extent to which the sought-after evidence can be concealed, and whether the officers claimed they would be conducting only a cursory search. For example, in People v. $48,715 88 a Kern County sheriff 's deputy found almost $80,000 in cash during a consent search of a pickup truck that had broken down near Bakersfield. In the subsequent appeal of a forfeiture order, the driver argued that the search was too lengthy, but the court pointed out that the contents of the pickup included large bags of pasture seed and several suitcases, and that a "typical reasonable person" in the driver's position "would have expected that [the deputy] intended, in some manner, to inspect the contents of the seed bags and the suitcases. Thus, the seizure would be extended and the search would be extensive."

In contrast, in *People v. Cantor* 89 the court ruled that a search of a car took too long because, in obtaining consent, the officer had asked the driver, "Nothing illegal in the car or anything like that? Mind if I check real quick and get you on your way?" The entire search lasted about 30 minutes but court ruled it was excessive because a 30-minute search cannot reasonably be classified as "real quick."

CONDUCTING A PROTECTIVE SWEEP

Officers who have lawfully entered a home to conduct a consent search may conduct a protective sweep of the premises if (1) they reasonably believed there was someone hiding on the premises who posed a threat to them or the evidence, and (2) this belief materialized after they entered; i.e., they must have not entered with the secret intention of conducting an immediate sweep.90

CONSENT TO "ENTER" OR "TALK"

If officers obtained consent to enter a home ("Can we come inside?"), they have the "latitude of a guest"91 which generally means they may not wander into other rooms,92 immediately conduct a protective sweep;93 or immediately arrest an occupant.94

SEARCH BY K-9

Officers who have obtained consent to search a car for drugs or explosives may use a K9 to help with the search unless the suspect objects.[95] As the Ninth Circuit observed, "Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching."[96]

CONDUCTING MULTIPLE SEARCHES

When officers have completed their search, they may not ordinarily conduct a second search because, as the Court of Appeal observed, consent to search "usually involves an understanding that the search will be conducted forthwith and that only a single search will be made."[97]

Consent withdrawn

The consenting person may modify the scope of consent or withdraw it altogether at any time before the evidence was discovered.[98] In such cases, the following legal issues may arise.

EXPRESS AND IMPLIED WITHDRAWAL

A withdrawal or restriction of consent may be express or implied. However, neither an express nor implied withdrawal will result unless the suspect's words or actions unambiguously demonstrated an intent to do so. As the Court of Appeal explained, "Although actions inconsistent with consent may act as a withdrawal of it, these actions, if they are to be so construed, must be positive in nature."[99] For example, the courts have ruled that the following words or actions sufficiently demonstrated an unambiguous intent to withdraw or restrict consent:

- After officers had searched the outer pockets of a backpack, and just before they were about to search the inside pockets, the suspect said, "Leave them alone."[100]
- After the suspect consented to a search of his home, an officer went outside to call for backup; while she was on the radio, the suspect shut and locked the front door.[101]
- When asked for the keys to the trunk of his car, a suspect who had consented to a search of it threw the keys into some bushes.[102]
- An officer who was conducting a consent search of a woman's apartment was about to enter her bedroom when the woman "raced in front of the officer and started to close the partially open door."[103]

In contrast, the courts have ruled that the following words or conduct were too ambiguous to constitute a withdrawal of restriction of consent:

- A suspect in a hate crime who had consented to a search of his home initially tried to mislead officers as to the location of his home.[104]
- A person who had consented to a search of his home said he was uncertain as to his address.[105]
- A suspect verbally consented but refused to sign a consent form.[106]
- After the occupants of a car consented to a search of the vehicle, they refused to tell the officers how to open a hidden compartment the officers had discovered.[107]

SECURING THE PREMISES

Even if the suspect withdrew his consent, officers may secure the premises pending issuance of a search warrant if they reasonably believed there was probable cause for a warrant.[108]

Consent By Trickery

Obtaining consent to enter a home by means of a ruse or other misrepresentation is legal—most of the time. That is because consent, unlike a waiver of constitutional rights, need not be "knowing and intelligent."[109] But, as we will discuss, there are limits that seem to be based mainly on whether the courts thought the officers' conduct was unseemly.

CONSENT FOR ILLEGAL PURPOSE

The most common type of consent by trickery occurs when a suspect invites an informant or undercover officer into his home to plan, commit or facilitate a crime; e.g. to buy or sell drugs. Although the suspect is unaware of the visitor's true identity and purpose, the consent is valid because a criminal who invites someone into his home or business for an illicit purpose knows he is

taking a chance that the person is an officer or informant. As the Supreme Court explained, “A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purpose contemplated by the occupant.”110

For example, in *Lopez v. United States* 111 a cabaret owner in Massachusetts, German Lopez, tried to bribe an IRS agent who had figured out that Lopez was cheating on his business taxes. One day, the agent came to the cabaret and suggested that he and Lopez meet privately in Lopez’s office to discuss the bribe. Lopez agreed and their subsequent conversation was surreptitiously recorded and used against Lopez at his trial. He appealed his conviction to the Supreme Court, arguing that the recording of the conversation should have been suppressed because the agent had “gained access to [his] office by misrepresentation.” The Court disagreed, saying that the IRS agent “was not guilty of an unlawful invasion of [Lopez’s] office simply because his apparent willingness to accept a bribe was not real. He was in the office with [Lopez’s] consent.”

Perhaps the most famous of all the trickery cases is *Hoffa v. United States* 112 in which Teamsters boss Jimmy Hoffa was being tried in Nashville on charges of labor racketeering. One of Hoffa’s associates was Edward Partin, a federal informant.

While the trial was underway, Hoffa permitted Partin to hang out in a hotel room that Hoffa was using as a command post. Among other things, Partin overheard Hoffa saying that they were “going to get to one juror or try to get to a few scattered jurors and take their chances.” The racketeering trial ended with a hung jury, but Hoffa was later convicted of attempting to bribe one of the jurors.

On appeal to the United States Supreme Court, Hoffa argued that Partin’s testimony should have been suppressed because, even though Hoffa had consented to Partin’s entries into his room, his consent became invalid when Partin misrepresented his true mission. Of course he did, but the Court ruled it didn’t matter because “Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.”

Note that some untrusting criminals still think they can protect themselves from such trickery by simply refusing to admit a suspected undercover agent into their homes unless he first expressly denies that he is a cop (“You gotta say it else you ain’t comin’ in”). This is pure urban legend.113 As the Ninth Circuit observed, “If a lie in response to such a question made all evidence gathered thereafter the inadmissible fruit of an unlawful entry, all dealers in contraband could insulate themselves from investigation merely by asking every person they contacted in their business to deny that he or she was a law enforcement agent. This is not the law.”114

CONSENT FOR LEGAL PURPOSE

The rules on trickery are not so permissive if the undercover officer or informant was neither a friend nor associate of the suspect but, instead, had gained admittance by falsely representing that he needed to come inside for some legitimate purpose. As the Ninth Circuit explained, “Not all deceit vitiates consent. The mistake must extend to the essential character of the act itself … rather than to some collateral matter which merely operates as an inducement. . . . Unlike the phony meter reader, the restaurant critic who poses as an ordinary customer is not liable for trespass”115 For example, consent to enter a suspect’s home has been deemed ineffective when undercover officers claimed they were deliverymen, building inspectors, or property managers; or if the officers obtained consent by falsely stating they had received a report that there were bombs on the premises.116

There is also a case winding its way through the federal courts in which FBI agents disrupted the internet connection into a villa at Caesar’s Palace that had been rented by a suspect in an illegal gambling operation. An agent then gained admittance to the room by posing as a technician who needed to come in and restore the service. While inside, the agent videotaped various instrumentalities of this type of crime, and the video was later used to convict the suspect. In light of the cases discussed earlier, this could be trouble.

There is, however, an exception to this rule: If a house was for sale and the owner or his agent had an open house, an entry by an undercover officer is not invalid merely because the officer was not really interested in buying the house.117 This is because the whole purpose of an open house is to get people to come in, look around, and maybe become interested. And that’s just what the officer did.

References

1. People v. Wheeler (1971) 23 Cal.App.3d 290, 302 [overturned on other grounds in People v. Wheeler (1978) 22 Cal.3d 258].
2. People v. Meredith (1992) 11 Cal.App.4th 1548, 1562.

3. People v. James (1977) 19 Cal.3d 99, 144.
4. Schneckloth v. Bustamonte (1973) 412 U.S. 218, 227-28. Also see United States v. Drayton (2002) 536 U.S. 194, 207 [“Police officers act in full accord with the law when they ask citizens for consent.”].
5. See People v. James (1977) 19 Cal.3d 99, 113 [“[T]here is no talismanic phrase which must be uttered by a suspect in order to authorize a search.”]; U.S. v. Carter (6th Cir. 2004) 378 F.3d 584, 589 [“trumpets need not herald an invitation [to search]”].
6. See Illinois v. Rodriguez (1990) 497 U.S. 177, 185; U.S. v. Guerrero (10th Cir. 2007) 472 F.3d 784, 789-90
7. Nerell v. Superior Court (1971) 20 Cal.App.3d 593, 599 [edited].
8. See People v. Carvajal (1988) 202 Cal.App.3d 487, 497; U.S. v. Zapata (1st Cir. 1994) 18 F.3d 971, 977. Also see People v. Quinn (1961) 194 Cal.App.2d 172, 175; People v. Panah (2005) 35 Cal.4th 395, 467.
9. See People v. Superior Court (Henry) (1974) 41 Cal.App.3d 636, 639; U.S. v. Reynolds (1st Cir. 2011) 646 F.3d 63, 73.
10. See People v. Nelson (1985) 166 Cal.App.3d 1209, 1215; People v. Timms (1986) 179 Cal.App.3d 86, 90.
11. Florida v. Royer (1983) 460 U.S. 491, 497.
12. See Schneckloth v. Bustamonte (1973) 412 U.S. 218, 228; Florida v. Bostick (1991) 501 U.S. 429, 438.
13. Bumper v. North Carolina (1968) 391 U.S. 543, 550.
14. People v. Ibarra (1980) 114 Cal.App.3d 60, 65.
15. (6th Cir. en banc 2004) 378 F.3d 584, 588-89.
16. See Robbins v. MacKenzie (1st Cir. 1966) 364 F.2d 45, 50 [“Bowing to events, even if one is not happy about them, is not the same thing as being coerced.”]; U.S. v. Gorman (1st Cir. 1967) 380 F.2d 158, 165.
17. U.S. v. Faruolo (2nd Cir. 1974) 506 F.2d 490, 495.
18. See People v. Perillo (1969) 275 Cal.App.2d 778, 782 [“I don’t care”]; U.S. v. Canipe (6th Cir. 2009) 569 F.3d 597, 604 [no problem]; U.S. v. $117,920 (8th Cir. 2005) 413 F.3d 826, 828 [“I guess if you want to”]; U.S. v. Zubia-Melendez (10th Cir. 2001) 263 F.3d 1155, 1163 [“Yeah, no matter”]; U.S. v. Franklin (1st Cir. 2011) 630 F.3d 53, 60 [“do what you got to do”].
19. See Hayes v. Florida (1985) 470 U.S. 811, 814-15.
20. See Parrish v. Civil Service Commission (1967) 66 Cal.2d 260, 270-75.
21. See U.S. v. Soriano (9th Cir. 2003) 361 F.3d 494 502. NOTE: The Court of Appeal has ruled that a DUI arrestee’s consent to submit to a warrantless blood draw was not involuntary merely because the officer notified him of California’s Implied Consent law and the consequences of refusing to consent. People v. Harris (2015) Cal.App.4th [2015 WL 708606].
22. (1979) 95 Cal.App.3d 972, 976. Also see U.S. v. Winsor (9th Cir. en banc 1988) 846 F.2d 1569, 1573, fn.3 [“compliance with a police command is not consent”].
23. People v. Poole (1986) 182 Cal.App.3d 1004, 1012.
24. See People v. Challoner (1982) 136 Cal.App.3d 779, 782; U.S. v. Robertson (4th Cir. 2013) 736 F.3d 677, 680 [a “police-dominated atmosphere”]. But also see People v. Ibarra (1980) 114 Cal.App.3d 60, 65 [“Defendant claims coercion from the fact that he was surrounded by police cars when originally stopped. But again, police domination does not necessarily vitiate consent.”]; U.S. v. Chaney (1st Cir. 2011) 647 F.3d 401, 407 [consent was given after “the excitement of the initial entry had passed”].
25. (2000) 83 Cal.App.4th 7, 13. Also see Estes v. Rowland (1993) 14 Cal.App.4th 508, 527.
26. People v. McKelvy (1972) 23 Cal.App.3d 1027.
27. People v. Poole (1986) 182 Cal.App.3d 1004, 1012.
28. People v. Dickson (1983) 144 Cal.App.3d 1046, 1051-52.
29. See People v. Hamilton (1985) 168 Cal.App.3d 1058, 1067 [“Neither does it appear, as a matter of law, that the persistence of the officers constituted coercion.”]; U.S. v. Cormier (9th Cir. 2000) 220 F.3d 1103, 1109 [“not unreasonably persistent”].
30. See Fare v. Michael C. (1979) 442 U.S. 707, 727; People v. Perdomo (2007) 147 Cal.App.4th 605, 618; People v. Benson (1990) 52 Cal.3d 754, 780 [“Everything totally aboveboard with the officers. No coercion, no harassment. No heavy-handedness.”].
31. See People v. Gurtenstein (1977) 69 Cal.App.3d 441, 451; People v. Weaver (2001) 26 Cal.4th 876, 924; Orhorhaghe v. I.N.S. (9th Cir. 1994) 38 F.3d 488, 500; U.S. v. Price (3rd Cir. 2009) 558 F.3d 270, 279.
32. See People v. Monterroso (2004) 34 Cal.4th 743, 758; People v. Ratliff (1986) 41 Cal.3d 675, 686; People v. James (1977) 19 Cal.3d 99, 109 [“custody” is of “particular significance,” but “not conclusive”].
33. United States v. Watson (1976) 423 U.S. 411, 424.
34. See People v. Challoner (1982) 136 Cal.App.3d 779, 782; People v. Fields (1979) 95 Cal.App.3d 972, 976.

35. See People v. Parker (1975) 45 Cal.App.3d 24, 31; People v. Ratliff (1986) 41 Cal.3d 675, 686.
36. (1968) 391 U.S. 543, 550. Also see People v. Baker (1986) 187 Cal.App.3d 562, 571 [“Baker’s consent cannot be disentangled from the news that a search warrant was imminent.”]; Trulock v. Freeh (4th Cir. 2001) 275 F.3d 391, 402 [police agent told the suspect that “the FBI had a search warrant”].
37. See Florida v. Royer (1983) 460 U.S. 491, 497 [consent is involuntary when it is “a mere submission to a claim of lawful authority”]; Lo-Ji Sales v. New York (1979) 442 U.S. 319, 329 [“Any ‘consent’ given in the face of colorably lawful coercion cannot validate the illegal acts shown here.”]; People v. Valenzuela (1994) 28 Cal.App.4th 817, 832 [“Where the circumstances indicate that a suspect consents because he believes resistance to be futile ... the search cannot stand.”].
38. Orhorhaghe v. I.N.S. (9th Cir. 1994) 38 F.3d 488, 500.
39. See People v. Goldberg (1984) 161 Cal.App.3d 170, 188 [“[C]onsent to search is not necessarily rendered involuntary by the requesting officers’ advisement that they would try to get a search warrant should consent be withheld.”]; U.S. v. Rodriguez (9th Cir. 2006) 464 F.3d 1072, 1078 [“A statement indicating that a search warrant would likely be sought and the apartment secured could not have, by itself, rendered [the] consent involuntary as a matter of law.”]; U.S. v. Alexander (7th Cir. 2009) 573 F.3d 465, 478 [“[A]n officer’s factually accurate statement that the police will take lawful investigative action in the absence of cooperation is not coercive conduct.”].
40. (1977) 69 Cal.App.3d 441, 450.
41. (2nd Cir. 1974) 506 F.2d 490.
42. See People v. Rodriguez (2014) 231 Cal.App.4th 288, 303 [“the trial court was entitled to find this was only a declaration of the officer’s legal remedies”]; People v. McClure (1974) 39 Cal.App.3d 64, 69 [officers had probable cause when they said “they would obtain a search warrant”]; U.S. v. Hicks (7th Cir. 2011) 630 F.3d 1058, 1066 [“[T]he ultimate question is the genuineness of the stated intent to get a warrant.”]; Edison v. Owens (10th Cir. 2008) 515 F.3d 1139, 1146 [“An officer’s threat to obtain a warrant may invalidate the suspect’s eventual consent if the officer’s lack the probable cause necessary for a search warrant.”].
43. U.S. v. Kaplan (9th Cir. 1990) 895 F.2d 618, 622.
44. (7th Cir. 1992) 957 F.2d 499, 502.
45. (1981) 121 Cal.App.3d 717, 725. Edited.
46. See U.S. v. Erwin (6th Cir. 1998) 155 F.3d 818, 823 [“Although it was not a neutral question, it plainly sought Erwin’s permission to search the vehicle; the defendant still could have refused to consent to the search.”]; U.S. v. Ledesma (10th Cir. 2006) 447 F.3d 1307, 1315 [“Nothing about this line of questioning ... suggests coercion or intimidation.”].
47. (1st Cir. 1967) 380 F.2d 158, 165.
48. See United States v. Drayton (2002) 536 U.S. 194, 207 [“[T]he Court has repeated that the totality of the circumstances must control”]; Schneckloth v. Bustamonte (1973) 412 U.S. 218, 227, 233 [“[I]t is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.”]; U.S. v. Morning (9th Cir. 1995) 64 F.3d 531, 533 [“Every encounter has its own facts and its own dynamics. So does every consent.”].
49. See United States v. Drayton (2002) 536 U.S. 194, 206 [“The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.”]; People v. Tully (2012) 54 Cal.4th 952, 983, fn.10; People v. Monterroso (2004) 34 Cal.4th 743, 758.
50. See Schneckloth v. Bustamonte (1973) 412 U.S. 218, 249 [“the suspect’s knowledge of a right to refuse is a factor to be taken into account”]; People v. Profit (1986) 183 Cal.App.3d 849 [“[T]he delivery of such a warning weighs heavily in favor of finding voluntariness and consent.”].
51. (1980) 446 U.S. 544, 559.
52. U.S. v. Ledesma (10th Cir. 2006) 447 F.3d 1307, 1314. Also see People v. Williams (2007) 156 Cal.App.4th 949, 961 [the officers “went out of their way to be courteous”]; People v. Linke (1968) 265 Cal.App.2d 297, 302 [the officers were “polite and courteous”].
53. Orhorhaghe v. INS (9th Cir. 1994) 38 F.3d 488, 495. Also see People v. Boyer (1989) 48 Cal.3d 247, 268 [“The manner in which the police arrived at defendant’s home, accosted him, and secured his ‘consent’ to accompany them suggested they did not intend to take ‘no’ for an answer.”].
54. People v. James (1977) 19 Cal.3d 99, 116. Also see People v. Fields (1979) 95 Cal.App.3d 972, 976; People v. Bustamonte (1969) 270 Cal.App.2d 648, 653 [seeking consent “carries the implication that the alternative of a refusal existed”].
55. See People v. Ramirez (1997) 59 Cal.App.4th 1548, 1558; People v. Weaver (2001) 26 Cal.4th 876, 924; People v. Avalos (1996) 47 Cal.App.4th 1569, 1578; U.S. v. Rodrigues (9th Cir. 2006) 464 F.3d 1072, 1078.

56. See Haley v. Ohio (1947) 332 U.S. 596, 601 ["Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."]; Haynes v. Washington (1963) 373 U.S. 503, 513 ["[I]f the authorities were successful in compelling the totally incriminating confession of guilt ... they would have little, if any, trouble securing the self-contained concession of voluntariness."].
57. See People v. Rupar (1966) 244 Cal.App.2d 292, 298 [suspect "indicated a desire to fully cooperate"]; People v. Ramos (1972) 25 Cal.App.3d 529, 536; People v. Wheeler (1971) 23 Cal.App.3d 290, 304; U.S. v. Morning (9th Cir. 1995) 64 F.3d 531, 533; U.S. v. Sandoval-Vasquez (7th Cir. 2006) 435 F.3d 739, 744-45; U.S. v. Brown (9th Cir. 2009) 563 F.3d 410, 413.
58. See People v. Aguilar (1996) 48 Cal.App.4th 632, 640 ["The fact that Daniel refused consent to search appellant's room shows that he was aware of his right to refuse consent and shows that his consent to search the rest of the home was not the product of police coercion."]; U.S. v. Mesa-Corrales (9th Cir. 1999) 183 F.3d 1116, 1125 ["[Defendant] had demonstrated by his prior refusal to consent that he knew that he had such a right—a knowledge that is highly relevant in our analysis of whether consent is voluntary."]; U.S. v. Welch (11th Cir. 2012) 683 F.3d 1304, 1309 ["But Welch must not have felt coerced into consenting when they first asked, because he declined to consent."].
59. (2004) 34 Cal.4th 1, 58-59. Also see Fare v. Michael C. (1979) 442 U.S. 707, 726 ["He was a 16½-year-old juvenile with considerable experience with the police."]; People v. Williams (1997) 16 Cal.4th 635. 659 ["The [trial] court described defendant as a 'street kid, street man,' in his 'early 20's, big, strong, bright, not intimidated by anybody, in robust good health,' and displaying 'no emotionalism [or signs of] mental weakness'"]; In re Aven S. (1991) 1 Cal.App.4th 69, 77 ["The minor, while young, was experienced in the ways of the juvenile justice system."].
60. (1974) 39 Cal.App.3d 64, 70. Also see Schneckloth v. Bustamonte (1973) 412 U.S. 218, 248 ["the lack of any effective warnings to a person of his rights" is relevant].
61. U.S. v. Vinton (8th Cir. 2011) 631 F.3d 476, 482. Also see United States v. Mendenhall (1980) 446 U.S. 544, 558 [consent not involuntary merely because the suspect was a high school dropout]; U.S. v. Soriano (9th Cir. 2003) 361 F.3d 494, 502 ["While a court must look at the possibly vulnerable subjective state of the person who consents, the court must also look at the reasonableness of that fear."].
62. See Reck v. Pate (1961) 367 U.S. 433 [officers exploited the mental condition of the defendant who was described as "mentally retarded and deficient"]; Brewer v. Williams (1977) 430 U.S. 387, 403 [exploitation of religious beliefs].
63. See People v. Tully (2012) 54 Cal.4th 952, 984 ['The question is what a reasonable person would have understood from his or her exchange with the officer about the scope of the search."]; People v. Jenkins (2000) 22 Cal.4th 900, 974 [prosecutors must demonstrate that it was "objectively reasonable … to believe that the scope of the consent given encompassed the item searched."]; People v. Crenshaw (1992) 9 Cal.App.4th 1403, 1409 ["But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization."].
64. Florida v. Jimeno (1991) 500 U.S. 248, 251.
65. See People v. Jenkins (2000) 22 Cal.4th 900, 974 [prosecution must prove "the scope of the consent given encompassed the item searched"]; People v. Crenshaw (1992) 9 Cal.App.4th 1403, 1409 ["A consensual search may not legally exceed the scope of the consent supporting it."]; People v. Oldham (2000) 81 Cal.4th 1, 11 ["[I]t is also the People's burden to show the warrantless search was within the scope of the consent given."]; U.S v. McWeeney (9th Cir. 2006) 454 F.3d 1030, 1034 ["It is a violation of a suspect's Fourth Amendment rights for a consensual search to exceed the scope of the consent given."].
66. See Florida v. Jimeno (1991) 500 U.S. 248, 251 ["The scope of a search is generally defined by its expressed object."]; People v. Jenkins (2000) 22 Cal.4th 900, 975 ["a general consent to search includes consent to pursue the stated object of the search"]; U.S. v. Zapata (11st Cir. 1999) 180 F.3d 1237, 1243 ["A general consent to search for specific items includes consent to search any compartment or container that might reasonably contain those items."].
67. U.S. v. Kimoana (10th Cir. 2004) 383 F.3d 1215, 1223.
68. See People v. Miller (1999) 69 Cal.App.4th 190, 203 ["The scope of a consensual search for narcotics is very broad and includes closets, drawers, and containers."]; U.S. v. Anderson (8th Cir. 2012) 674 F.3d 821, 827.
69. See People v. Jenkins (2000) 22 Cal.4th 900, 976 [briefcase]; U.S. v. Canipe (6th Cir. 2009) 569 F.3d 597, 606 [box in a truck].
70. See Florida v. Jimeno (1991) 500 U.S. 248, 251 [closed paper bag on the floor of the suspect's car].
71. See People v. Crenshaw (1992) 9 Cal.App.4th 1402, 1415; People v. Avalos (1996) 47 Cal.App.4th 1569, 1579.
72. U.S. v. Gutierrez-Mederos (9th Cir. 1992) 965 F.2d 800, 803-804.
73. See U.S. v. Torres (10th Cir. 1981) 664 F.3d 1019 [officers were permitted to remove "the air-vent cover in the side of the door"].

74. See U.S. v. McWeeney (9th Cir. 2006) 454 F.3d 1030, 1035.
75. See U.S. v. McWeeney (9th Cir. 2006) 454 F.3d 1030, 1035.
76. See U.S. v. Anderson (10th Cir. 1997) 114 F.3d 1059, 1065; U.S. v. Perez (9th Cir. 1994) 37 F.3d 510, 516.
77. See People v. $48,715 (1997) 58 Cal.App.4th 1507, 1516.
78. See U.S. v. McWeeney (9th Cir. 2006) 454 F.3d 1030, 1035; U.S. v. Canipe (6th Cir. 2009) 569 F.3d 597, 606.
79. (2000) 22 Cal.4th 900, 976.
80. U.S. v. Strickland (11th Cir. 1990) 902 F.2d 937, 941.
81. See People v. Williams (1980) 114 Cal.App.3d 67, 74; U.S. v. Coleman (4th Cir. 2009) 588 F.3d 816 [unrestricted consent authorized a search under a mattress].
82. See Frazier v. Cupp (1969) 394 U.S. 731, 740; People v. Schmeck (2005) 37 Cal.4th 240, 281,
83. See U.S. v. Snow (2nd Cir. 1995) 132 F.3d 133, 135. U.S. v. Torres (10th Cir. 1981) 663 F.2d 1019, 1027 [“permission to search contemplates a thorough search. If not thorough it is of little value
84. (2nd Cir. 1995) 44 F.3d 133, 135.
85. (1991) 500 U.S. 248, 251-52. Also see U.S. v. Osage (10th Cir. 2000) 235 F.3d 518, 522 [“[B]efore an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other lawful basis upon which to proceed.”]. Compare U.S. v. Gutierrez-Mederos (9th Cir. 1992) 965 F.2d 800, 804 [“The record indicates that [the officer] did not pry open or break into the side panel, but instead used the key. Nor did [the officer] force the loose cardboard divider apart, but rather pulled it back. Because a reasonable person would believe that appellant had authorized these actions, the search was permissible.”].
86. (11th Cir. 1990) 902 F.2d 937, 941-42.
87. (1992) 9 Cal.App.4th 1403, 1415.
88. (1997) 58 Cal.App.4th 1507.
89. (2007) 149 Cal.App.4th 961. Also see People v. Cruz (1964) 61 Cal.2d 861, 866 [The general consent given by Ann and Susan that the officers could ‘look around’ did not authorize [the officer] to open and search suitcases and boxes”]; People v. Williams (1979) 93 Cal.App.3d 40, 58 [“The officer’s journey to the back of the home and into a bedroom where they found defendant was a journey beyond the scope of the consent—to enter—extended by [the consenting person].”]; U.S. v. Wald (10th Cir. 2000) 216 F.3d 1222, 1228 [where officers asked to “take a quick look” inside the suspect’s car, they exceeded the permissible scope when they searched the trunk]; U.S. v. Quintero (8th Cir. 2011) 648 F.3d 660, 670 [a “full-scale” search].
90. See U.S. v. Gandia (2nd Cir. 2005) 424 F.3d 255, 262 [“[T]here is concern that generously construing Buie will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home.”]; U.S. v. Scroggins (5th Cir. 2010) 599 F.3d 433, 443 [protective sweep OK because grounds for search developed upon entry]; U.S. v. Crisolis-Gonzalez (8th Cir. 2014) 742 F.3d 830, 836 [protective sweep OK because grounds for search developed upon entry].
91. U.S. v. Carter (6th Cir. en banc 2004) 378 F.3d 584, 589.
92. See Lewis v. United States (1966) 385 U.S. 206, 210 [officers did not “see, hear, or take anything that was not contemplated” by the suspect]; People v. Williams (1979) 93 Cal.App.3d 40, 58 [“The officer’s journey to the back of the home and into a bedroom where they found defendant was a journey beyond the scope of the consent—to enter—extended by [the consenting person].”].
93. See U.S. v. Gandia (2nd Cir. 2005) 424 F.3d 255, 262 [“[W]hen police have gained access to a suspect’s home through his or her consent, there is a concern that generously construing [the protective sweep rules] will enable and encourage officers to obtain that consent as a pretext for conducting a warrantless search of the home.”].
94. See In re Johnny V. (1978) 85 Cal.App.3d 120, 130 [“A right to enter for the purpose of talking with a suspect is not consent to enter and effect an arrest.”]; U.S. v. Johnson (9th Cir. 1980) 626 F.2d 753 [arrest after obtaining consent to “talk” with suspect].
95. See People v. $48,715 (1997) 58 Cal.App.4th 1507, 1516 [“[U]se of the trained dog to sniff the truck, although not reasonably contemplated by the exchange between the officer and the suspect, did not expand the search to which the [suspect] had consented”]; People v. Bell (1996) 43 Cal.App.4th 754, 770-71, fn.5.
96. U.S. v. Perez (9th Cir. 1994) 37 F.3d 510, 516.
97. People v. Valencia (2011) 201 Cal.App.4th 922, 937.
98. See U.S. v. Jachimko (7th Cir. 1994) 19 F.3d 296, 299 [“[I]f Jachimko attempted to withdraw his consent after [the DEA informant] saw the marijuana plants, he could not withdraw his consent.”]; U.S. v. Booker (8th Cir. 1999) 186 F.3d 1004, 1006

["[T]he seizure was valid, because at the time the consent was revoked the officers had probable because to believe that the truck was carrying drugs."].

99. People v. Botos (1972) 27 Cal.App.3d 774, 779. Also see People v. Hamilton (1985) 168 Cal.App.3d3 1058, 1068l U.S. v. LopezMendoza (8th Cir. 2010) 601 F.3d 861, 867 [withdrawal of consent "must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both"].
100. Crofoot v. Superior Court (1981) 121 Cal.App.3d 717, 726.
101. In re Christopher B. (1978) 82 Cal.App.3d 608, 615.
102. People v. Escollias (1968) 264 Cal.App.2d 16, 18.
103. People v. Hamilton (1985) 168 Cal.App.3d 1058, 1066.
104. People v. MacKenzie (1995) 34 Cal.App.4th 1256, 1273-74.
105. People v. Garcia (1964) 227 Cal.App.2d 345, 351.
106. People v. Gurtenstein (1977) 69 Cal.App.3d 441, 451.
107. See U.S. v. Barragan (8th Cir. 2004) 379 F.3d 524.
108. See Segura v. United States (1984) 468 U.S. 796; Illinois v. McArthur (2001) 531 U.S. 326, 331-32.
109. Schneckloth v. Bustamonte (1973) 412 U.S. 218, 243 ["[I]t would be next to impossible to apply to a consent search the standard of an intentional relinquishment or abandonment of a known right or privilege."].
110. Lewis v. United States (1966) 385 U.S. 206, 211.
111. (1963) 373 U.S. 427.
112. (1966) 385 U.S. 293.
113. See On Lee v. United States (1951) 343 U.S. 747, 752; Maryland v. Macon (1985) 472 U.S. 463, 469; Toubus v. Superior Court (1981) 114 Cal.App.3d 378, 383 [entry to buy drugs; "There was no ruse."]; U.S. v. Lyons (D.C. Cir. 1983) 706 F.2d 321, 329; U.S. v. Bullock (5th Cir. 1979) 590 F.2d 117 [undercover ATF agent obtained consent from Bullock, a Ku Klux Klan member, to enter Bullock's house to discuss becoming a member of the Klan].
114. U.S. v. Bramble (9th Cir. 1996) 103 F.3d 1475.
115. Theofel v. Farley-Jones (9th Cir. 2004) 359 F.3d 1066, 1073.
116. See Mann v. Superior Court (1970) 3 Cal.3d 1, 9 ["Cases holding invalid consent to entry obtained by ruse or trick all involve some positive act of misrepresentation on the part of officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity."]; People v. Reyes (2000) 83 Cal.App.4th 7, 10 [officer identified himself as the driver of a car that had just collided with the suspect's car outside his home]; People v. Mesaris (1970) 14 Cal.App.3d [officer identified himself as a friend of the Sears repairman who was working inside the defendant's home]; In re Robert T. (1970) 8 Cal.App.3d 990, 993-94 [apartment manager and undercover officer obtained consent to enter to "check the apartment"]; U.S. v. Harrison (10th Cir. 2011) 639 F.3d 1273, 1280 [officer said they needed to investigate a report of bombs on the premises].
117. See People v. Lucatero (2008) 166 Cal.App.4th 1110; People v. Jaquez (1985) 163 Cal.App.3d 918, 928.

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6.2: Pat Searches

"American criminals have a long tradition of armed violence."[1]

The statistics are chilling: Over 93% of the officers killed in the line of duty since 1968 were killed by gunfire. And since 1995 [2] most of these shootings occurred when the officers were detaining or pursuing the killer.[3]

And yet, neither of these statistics is surprising. After all, with a thriving underground market for firearms, it has become increasingly likely that a detainee will have one; and that he'll try to use it if he thinks he is about to be arrested, especially if he is a two or three striker.[4]

In addition, the very nature of detentions puts officers in a precarious position. As the United States Supreme Court pointed out, a detention "involves a police investigation at close range, when the officer remains particularly vulnerable."[5] And even though the detainee is technically under the officer's "control" in the sense that he is not free to leave, the Court noted that he still might "reach into his clothing and retrieve a weapon."[6] The Ninth Circuit captured the essence of the problem when it said:

> It is a difficult exercise at best to predict a criminal suspect's next move, and it is both naïve and dangerous to assume that a suspect will not act out desperately despite the fact that he faces the barrel of a gun.[7]

To help reduce this danger, the Supreme Court ruled that officers may conduct warrantless pat searches of detainees to determine whether they are carrying a weapon "and to neutralize the threat of physical harm."[8] There is, however, one restriction—and it's a big one: they may do this only if they have reason to believe that the detainee is armed or dangerous.

The question has been asked: Why can't officers pat search all detainees? It's a legitimate question, especially considering that the "armed or dangerous" requirement was established 40 years ago when weapons and violence were much less prevalent than they are now.[9] Still, there are reasons for not permitting indiscriminate pat searches. As the Supreme Court observed in the landmark case of *Terry v. Ohio*, the pat search is a "sensitive area of police activity"[10] which "must surely be an annoying, frightening, and perhaps humiliating experience."[11] The Court went on to say:

> [I]t is simply fantastic to urge that [a pat search] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[12]

Consequently, it is essential that officers understand when pat searches are, and are not, permitted. And that is the subject of the first half of this article. In the second half, we will discuss the other important limitation on pat searches: the permissible scope of the search. Taking note of these fundamental restrictions, the Court in Terry said, "[O]ur 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."[13]

Before we begin, however, we must acknowledge that officers will sometimes encounter situations in which they reasonably conclude that a pat search is necessary even though the grounds for it are questionable, or maybe even nonexistent. Or they might have reason to believe that it would be too dangerous to follow the required procedure. In either situation, officers should do what they think is necessary for their safety, and not worry too much about whether the search will stand up in court. As the California Court of Appeal observed, "Ours is a government of laws to preserve which we require law enforcement officers—live ones."[14]

"ARMED OR DANGEROUS"

As noted, pat searches are permitted only if officers reasonably believe that the detainee is presently armed or dangerous. But unless they actually see a weapon, or unless the detainee is outwardly hostile, this determination must be based on circumstantial evidence.[15] What circumstances are considered significant? And how do the courts evaluate them? These are the questions we will now examine.

General principles

ARMED OR DANGEROUS

In Terry, the Court said that pat searches are permitted only if officers reasonably believed that the detainee was armed "and" dangerous. Almost immediately, however, the lower courts understood that the use of the conjunctive "and" was an unfortunate lapse—that pat searches would be justified whenever officers reasonably believed that a detainee was armed or dangerous. After

all, it is apparent that every suspect who is armed with a weapon is necessarily dangerous to any officer who is detaining him, even if the detainee was cooperative and exhibited no hostility.16

Furthermore, although the courts still routinely quote Terry's "armed and dangerous" language, they understand that a pat search will be justified if officers reasonably believed that a detainee constituted an immediate threat, even if there was no reason to believe he was armed.17 As the Sixth Circuit put it, "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."18

THE "REASONABLE OFFICER" TEST

To determine whether an officer reasonably believed that a detainee was armed or dangerous, the courts employ the "reasonable officer" test. Specifically, they permit pat searches if the threat would have been apparent to a reasonable officer in the same situation.19 As the Eighth Circuit put it, "[T]he facts must be such that a hypothetical officer in exactly the same circumstances reasonably could believe that the individual is armed and dangerous."20

It is therefore immaterial that the officer testified that he did not feel "threatened" or "scared."21 But it is also immaterial that the officer believed in good faith that a pat search was justified.22 Again, what matters is how the circumstances would have appeared to an objective observer.

THE NEED FOR FACTS

A determination that a suspect was armed or dangerous must be based on specific facts.23 Feelings, hunches, and unsupported conclusions are irrelevant.

"ROUTINE" PAT SEARCHES

Because facts are required, pat searches can never be conducted as a matter of routine.24 In fact, judges will usually conclude that an officer has no understanding of the law if he testifies that he always or usually pat searches the people he detains.25 For example, the courts have summarily invalidated pat searches when the officer, when asked why he searched the defendant, replied as follows:

- "Standard procedure, officer's discretion and my training."26
- "Pat down everyone that I talk to, for safety reasons." 27
- "Officer safety and because [the suspect] may have been armed." 28
- "As far as I am concerned, anybody I stop could possibly have a weapon on them." 29 In contrast, in *People v. Juarez* the court noted that the officer "testified that he was always in fear of harm when questioning a detained suspect but not that he always and without articulable reason allayed that fear by a frisk." 30

TRAINING AND EXPERIENCE

The courts may consider an officer's opinion, based on training and experience, as to whether certain facts or circumstances demonstrated a legitimate threat.31

TOTALITY OF CIRCUMSTANCES

The courts will take into account all of the relevant circumstances surrounding the encounter—the total atmosphere. As the Seventh Circuit observed, "[T]he standard is whether the pat-down search is justified in the totality of circumstances, even if each individual indicator would not by itself justify the intrusion."32

For example, in *People v. Avila* the court pointed out, "All of these factors, although perhaps individually harmless, could reasonably combine to create fear in a detaining officer. The [pat search] test does not look to the individual details in its search for a reasonable belief that one's safety is in danger; rather it looks to the totality of the circumstances."33 Similarly, the court in *People v. Satchell* noted that, while none of the various circumstances clearly demonstrated a threat, when considered as a whole "there was something fishy in the situation and the officers were certainly entitled to contemplate the possibility of violence."34

POSSIBILITY OF AN "INNOCENT" EXPLANATION

A pat search will not be invalidated merely because there might also have been an "innocent" or non-threatening explanation for the circumstances.35

"CLOSE" CASES

Finally, in close cases the courts are apt to uphold an officer's determination that a detainee was armed or dangerous. As the Court of Appeal put it, "The judiciary should not lightly second-guess a police officer's decision to perform a pat down search for officer safety."[36]

Having discussed the general principles, we will now look at the circumstances that are relevant in determining whether it is reasonable to believe that a detainee is armed or dangerous.

Nature of crime under investigation

Grounds for a pat search will automatically exist if the suspect was detained to investigate a crime that is closely linked to weapons or violence,[37] such as the following:

DRUG SALES

At the top of the list of "armed or dangerous" crimes is drug trafficking. As the Court of Appeal observed in *People v. Simpson*, "Illegal drugs and guns are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons."[38] Or, as the court pointed out in *People v. Thurman*:

> Rare is the day which passes without fresh reports of drug related homicides, open street warfare between armed gangs over disputed drug turf, and police seizures of illicit drug and weapon caches in warranted searches of private residences and other locales.[39]

Consequently, officers may pat search any detainee who is reasonably believed to be a drug dealer.[40] In addition, as discussed later, officers who are executing a warrant to search a residence for drugs are also permitted to pat search everyone on the premises.

VIOLENT CRIMES

A pat search is, of course, also warranted if the detainee was reasonably suspected of having committed a crime of violence, such as murder, assault with a deadly weapons, robbery, or carjacking.[41]

BURGLARY

A suspected burglar may be pat searched because burglars often carry weapons or tools that could serve as weapons.[42] As the Court of Appeal observed, "It is reasonable for an officer to believe that a burglar may be armed with weapons, or tools such as knives and screwdrivers which could be used as weapons, and that a pat-down search is necessary for the officer's safety."[43]

CAR THEFT

Because car thieves also frequently carry tools, they too may be pat searched.[44]

VEHICLE PURSUITS

Officers may pat search all occupants of a vehicle that has been stopped following a pursuit, regardless of the initial justification for the stop.[45]

TRAFFIC VIOLATIONS

While traffic stops are inherently dangerous, the likelihood that a violator is armed or dangerous is too remote to justify a pat search.[46] As the court said in *U.S. v. Brown*, "Although the confrontation between a police officer and a citizen stopped for a traffic violation can be fraught with danger, this fact alone does not justify a patdown."[47]

A bulge

A bulge under the detainee's clothing will warrant a pat search if it might have been caused by a conventional weapon or an object that could readily be used as a weapon. As the Ninth Circuit pointed out, "[W]e have given significant weight to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon."[48] In determining whether a bulge appeared to constitute a threat, the following circumstances are relevant, oftentimes determinative:

SIZE AND SHAPE

A pat search will always be warranted if the size and shape of the bulge was consistent with the size and shape of a weapon.

HEAVY OBJECT

As discussed later, officers who are conducting a pat search may remove objects that feel hard to the touch. Consequently, officers may ordinarily pat search a suspect if there was reason to believe that the bulge under his clothing was caused by a heavy object. For example, in *People v. Miles* the court ruled a pat search was justified because "the officer saw an exaggerated bulge in defendant's left jacket pocket and that the jacket 'swung pretty freely' in the officer's direction. Because of the bulge and the manner in which the jacket swung, the police officer knew it was some type of heavy object, possibly a gun."[49]

LOCATION OF THE BULGE

A suspicious bulge is even more cause for alarm if it was located in a place where weapons are commonly concealed; e.g., at the waist, in a pants or jacket pocket.[50] For example, in upholding a pat search in *People v. Brown*, the court noted that the officer's decision to pat search the defendant "was based on his observation of a bulge under [defendant's] jacket and his experience that weapons are commonly carried under clothing in that approximate location of the waistband."[51]

HIDING THE BULGE

A bulge is especially suspicious if the suspect was attempting to keep it hidden from officers. For example, in *People v. Superior Court (Brown)* the court noted, among other things, "[D]efendant was holding his hands clasped together in front of a bulge in the waistband in the middle of his waist . . . ."[52]

MAKING A GRAB

A bulge takes on even more significance if the suspect suddenly reached for it.[53]

Furtive gestures

A so-called "furtive gesture" is a movement by a suspect, usually of the hands or arms, that, (1) reasonably appeared to have been made in response to seeing an officer or a patrol car;[54] and (2) was secretive in nature, meaning that it appeared the suspect did not want the officer to see what he was doing. A furtive gesture is, of course, a concern because of the possibility that the suspect may be attempting to hide or retrieve a weapon.

Nevertheless, the courts will not uphold a pat search simply because an officer testified that the suspect made a "furtive gesture." This is mainly because "furtiveness" is highly subjective, plus the term "furtive gesture" has been overused (and occasionally abused) by officers to the point that judges have become skeptical whenever they hear it.

Instead, officers must explain exactly what the suspect did and why it appeared threatening, or at least suspicious.[55] For example, in *People v. King* [56] a San Diego police officer was on patrol in an area plagued by gang activity when he stopped a car for expired registration. As he walked up to the car, he saw the driver, King, "reach under the driver's seat" and do something that caused a sound—a sound that the officer described as "metal on metal." In ruling that the officer's subsequent pat search was lawful, the court noted that, "in addition to King's movement, we have the contemporaneous sound of metal on metal and the officer's fear created by the increased level of gang activity in the area."

In the following examples, note how the officers elaborated, at least somewhat, on the detainee's actions:

- He "lifted himself up from the seat with both arms in his rear portion of his body behind his back, both arms went up and down rapidly."[57]
- He "reached back inside the car toward his waistband."[58]
- He "clutched his stomach as he got out of the car, as if he were trying to keep something held against the front part of his body."[59]
- The officer "noticed Edmonds reaching under the driver's seat as though he were attempting to conceal something. 'I saw the Defendant lean all of the way forward,' he recalled, 'almost ducking out of my sight. I could see his head above the dashboard, and then I saw him lean back, up, seated upright in the vehicle.'"[60]
- "[The officer] noticed the driver lean to the right as if to conceal or obtain something."[61]
- "[D]efendant crouched forward and placed his left hand toward the lower middle portion of his body. Defendant fumbled with his left hand in the right front portion of his body."[62]
- "[T]he officers saw appellant reach into the back of his waistband and secrete in his hands an object which he had retrieved."[63]
- "[The officer] saw two passengers in the truck making 'quick and furtive movements' below the dashboard."[64]

Sudden movement

A sudden movement by a detainee may justify a pat search, especially a reaching movement. As the Ninth Circuit explained, "We have also considered sudden movements by defendants, or repeated attempts to reach for an object that was not immediately visible, as actions that can give rise to a reasonable suspicion that a defendant is armed."[65] Thus, in upholding pat searches, the courts have noted the following:

- "When defendant [a suspected street-level drug dealer] turned toward the patrol car and placed his hand inside his jacket, [the officer] believed that he was reaching for a weapon."[66]
- "When defendant [a suspected heroin dealer] suddenly put his hand into the bulging pocket, [the officer] reasonably believed he was, or could be, reaching for a weapon."[67]
- After the detainee produced an ID card from his rear pocket, the officer saw him "make a sudden gesture with his right hand to his left T-shirt pocket."[68]
- The officer testified that "all three suspects alighted from the vehicle almost simultaneously. They all got out on us . . . "[69]
- "Just after [the officer] started the search around defendant's waistband, defendant abruptly grabbed for his outside upper jacket pocket."[70]
- "Upon the officers' approach, defendant lunged forward thrusting his right hand into one of the bag's open pockets."[71]
- "When the officer approached the defendant he reached into his right rear pocket and appeared to be trying to get something out, and it was a jerking motion as though he were trying desperately to get something out of his pocket."[72]
- "Appellant was combative and reached towards the front of his pants several times."[73]

As we discuss later, when a detainee suddenly reaches into a location where weapons are commonly concealed, officers may usually dispense with the pat search procedure and immediately reach inside.

Refusal to comply

A detainee's refusal to comply with an officer's request or command may indicate defiance, which is certainly a relevant circumstance. For example, in *People v. Superior Court (Brown)* the court ruled a pat search of a detainee was warranted largely because the officer "twice called to defendant to stop but defendant without hesitation or turning around continued walking away from him."[74]

A refusal to comply is especially likely to justify a pat search if the objective of the officer's request or command was to restrict the detainee's ability to secretly obtain a weapon. For example, in *Adams v. Williams* the United States Supreme Court ruled that an officer was justified in conducting a protective search of the defendant because, among other things, "[W]illiams rolled down his window, rather than comply with the policeman's request to step out of the car so that his movements could more easily be seen."[75] Some other examples:

- After twice ignoring the officer's command to raise his hands, the defendant "turned his back" and started to walk away.[76]
- "[A]ppellant refused to drop the object in his hands when asked to do so by the police officers."[77]
- "[The officer] asked Ratcliff to show what he had in his pocket, but he did not comply."[78]
- "Haynie also failed to obey [the officer's] orders to spread his legs and keep his head facing forward."[79]
- "[The FBI agent] ordered Bell to put his hands on the dashboard of the car. Bell did not move his hands from their position on his lap or thighs. The agent repeated his command to no avail."[80]
- "Frank's starting for his pockets again, after being told to take his hands out, provided an additional factor justifying a pat down search for weapons."[81]
- "The deputy asked defendant to put the [fanny pack] on the hood of the patrol car, but defendant put it on the ground."[82]

Detainee's mental state

HOSTILE, AGITATED

A detainee's overt hostility toward officers or an agitated mental state are both highly relevant. For example, in *People v. Michael S.* officers who had detained a juvenile for mildly suspicious behavior testified that he "started breathing very rapidly, hyperventilating, and became boisterous and angry and very antagonistic [and] clenched and unclenched his fists" and was "borderline combative." In ruling the subsequent pat search was justified, the court noted that the defendant "displayed aggressive conduct and was either unable or unwilling to control himself."[83]

Similarly, in *U.S. v. Michelletti* the court ruled that a pat search was justified because "Michelletti, a large and imposing man, was heading straight toward [the officer] with a 'cocky,' perhaps defiant attitude and his right hand concealed precisely where a weapon could be located."[84]

It is also relevant that the detainee, although not overtly hostile at the time, had a history of hostility toward officers. For example, in *Amacher v. Superior Court* the Court of Appeal upheld a pat search mainly because the officer "personally had words with petitioner when he stopped him for a traffic violation. He knew that petitioner had had numerous hostile run-ins with other officers, and that petitioner had little or no respect for law enforcement officers."[85]

NERVOUSNESS

A detainee's display of nervousness has little relevance unless it was extreme or unusual.[86] This occurred in *U.S. v. Brown* in which the court noted, among other things, that the detainee's demeanor "was more nervous than one would expect in a routine traffic stop," plus he kept "repeatedly glancing back towards the car in question."[87]

UNDER THE INFLUENCE

A detainee who is under the influence of alcohol or drugs may be considered dangerous if his behavior was unpredictable, or if he was otherwise unable to control himself.[88]

Criminal history, gang affiliation

A detainee's criminal history (especially involving violence or weapons) is another circumstance that will be considered.[89] For example, in *People v. Bush* the court noted that the defendant "had a history of violence, possession of weapons and was reported to be a kick-boxer."[90]

It is also relevant that the detainee was a known gang member or affiliate.[91] For example, in *U.S. v. Flett* the court ruled that a pat search was warranted because, among other things, the officer knew that the detainee was a member of "a national motorcycle gang which had violent propensities, including charges of using firearms, assault and resisting arrest."[92] Similarly, in *U.S. v. Garcia* one of the reasons the court upheld the pat search of the defendant was that he was a known gang member, and the officer had testified that, "based on his training and experience he knew that guns are often part of the gang environment." The court added, "In our society today this observation resonates with common sense and ordinary human experience."[93]

Presence during execution of drug warrant

As noted earlier, officers may ordinarily pat search anyone who is lawfully detained to investigate drug sales. This is because of the close connection between guns and drug trafficking. For this reason, the United States Supreme Court has also ruled that officers who are executing a warrant to search a residence for drugs may pat search everyone who is on the premises when they arrive.[94]

For example, in *People v. Thurman* [95] officers in Vallejo had just entered a home to execute a warrant to search for drugs when they saw Thurman sitting on a sofa in the living room. An officer then patted him down and, in the process, discovered rock cocaine. Although Thurman had done nothing to indicate he posed a threat to anyone, the court ruled the pat search was justified because of the significant potential for violence in these situations. Said the court, "That appellant's posture, at that moment, was nonthreatening does not in any measure diminish the potential for sudden armed violence that his presence within the residence suggested."

For the same reasons that justify pat searching the occupants of drug houses, the California Supreme Court has ruled that officers may also detain people who arrive on the premises while the search is underway, at least if the manner of their arrival indicates they live there or are otherwise closely associated with the occupants.[96]

Nature of location

HIGH CRIME AREA

The fact that a detention occurred in an area where crime, gang, or drug problems are prevalent is a relevant circumstance,[97] but it will not automatically justify a patdown.[98] As the U.S. Court of Appeals put it, "The police do not have carte blanche to pat down anyone in a dangerous neighborhood."[99] Or, as the court explained in *People v. King*, "[T]he fact that an area involves increased gang activity may be considered if it is relevant to an officer's belief that the detainee is armed and dangerous. While this factor alone may not justify a weapon search, combined with additional factors it may."[100]

DESERTED AREA

It is relevant that the detention occurred in a place where there were few, if any, other people around. This is mainly because the lack of witnesses and potential assistance to the officer may motivate the detainee to take chances that he would not otherwise have taken.[101]

NIGHTTIME, DARKNESS

The fact that a detention occurred in a dark or relatively dark place is a circumstance that indicates increased danger because officers may not be able to see the detainee's hands, movements by the detainee's companions, or potential weapons nearby.[102] As the court observed in *People v. Satchell*, "The area was dark and preparatory movements by defendant and his two companions might easily go unnoticed."[103] That the detention occurred in a dark location may be especially significant if the officers were outnumbered, or if their duties prevented them from giving their full attention to the detainee.[104]

Some courts have indicated there is increased danger when a detention occurs at night.[105] It is not clear whether these courts meant that increased danger resulted from darkness or whether they view nighttime detentions as inherently dangerous, even if they occur in well-lighted places. In any event, if officers or prosecutors cite "nighttime" as a factor indicating increased danger, they should explain why this is so.[106]

Tips from citizens, informants

A pat search will be warranted if officers received a tip from a citizen or a tested informant that the detainee is currently carrying a concealed weapon. For example, in *Adams v. Williams* [107] a tested police informant approached a Connecticut police sergeant at about 2:15 A.M. and said that a man who was sitting inside a car parked nearby "had a gun at his waist." The United States Supreme Court ruled that the officer's subsequent protective search of the man was lawful, noting that the informant "was known to him personally and had provided him with information in the past."

On the other hand, a tip from an anonymous or untested informant would not justify a pat search unless there was some reason to believe his information was accurate. For example, in *Florida v. J.L.* [108] an anonymous person called the Miami-Dade police department's non-emergency number and reported that a "young black male" wearing a plaid shirt was standing at a certain bus stop and that he was carrying a gun. When officers arrived they saw a man who matched the description given by the caller. So they pat searched him, and found a gun. But the United States Supreme Court ruled the search was unlawful because there was simply no reason to believe the informant was reliable.

Said the Court:

> All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.

Other circumstances

COMPANION ARRESTED, ARMED

The question arises: If two people are detained together, can both of them be pat searched if officers reasonably believed that one of them was armed or dangerous? Some federal courts have resolved this question by devising a so-called "automatic companion" rule by which grounds to pat search a person are said to exist automatically if his companion was being arrested and was "capable of accomplishing a harmful assault on the officer."[109]

The "automatic companion" rule may, however, be contrary to rulings of the United States Supreme Court that grounds to pat search cannot be based on mere proximity to someone else.[110] It is, however, a circumstances that may be considered.[111]

POSSESSION OF OTHER WEAPON

If officers seize a gun, knife, or other conventional weapon from the detainee—even a legal weapon [112]—they may pat search him to determine if he has any more.[113]

The question arises whether such a search would be justified if the detainee possessed a virtual weapon; i.e., an object that could conceivably be used as a weapon, such as a baseball bat or a hammer. Although this issue has not been resolved,[114] it seems likely that a pat search would be upheld if, based on the nature of the object, its location or other circumstances, there was reason to believe it was being used as a weapon; e.g., baseball bat located between bucket seats. In one case, the court upheld a search based

mainly on an officer's observation of a "long black metal object" similar to a Mag flashlight in the detainee's truck, and the object was "within eight or ten inches of [his] left hand."115

DETAINEE'S SIZE

Although a pat search would not be justified merely because the detainee was "big," his size would be a relevant circumstance if he was bigger than the officer.116

OFFICERS' OUTNUMBERED

The courts often note whether the number of detainees was greater than the number of officers on the scene, the relevance being the increased danger to officers who are outnumbered.117

HAND IN POCKET

It is relevant that the detainee was keeping a hand inside a pocket, even though he did not do so suddenly or furtively.118

ASSUMING THE POSITION

A detainee's act of spontaneously "assuming the position" for a pat search is a suspicious circumstance.119

PASSENGER IN POLICE CAR

The following is an exception to the "armed or dangerous" requirement: Any person may be pat searched before being transported in a police car if officers had a duty to transport him; e.g., he had to be removed from a freeway for his safety; he was a crime victim and he was going to be transported for showup.120 If, however, officers did not have a duty to transport him, a pat search is permitted only if they notified him that, (1) he had a right to refuse the ride, and (2) he would be pat searched if he accepted it.121

SEARCH PROCEDURE

Having grounds to pat search a detainee does not give officers free rein to search him from top to bottom, rummaging through pockets or under clothing, indiscriminately probing and prodding, pulling out anything that seems remotely suspicious. Nor may officers adjust his clothing to see what's inside, or compel him to empty his pockets. As the Seventh Circuit observed, "An officer is not justified in conducting a general exploratory search for evidence under the guise of a stop-and-frisk."122

Instead, officers must follow a carefully circumscribed procedure. As the U.S. Supreme Court noted:

> The sole justification of the search is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.123

This procedure, which has aptly been described as "coldly logical,"124 starts out relatively unobtrusively with a pat down of the outer clothing. If nothing suspicious is felt, the search must be terminated. But if officers detect an object that feels as if it might be a weapon or something that could readily be used as a weapon, they may take certain steps to confirm or dispel their suspicion.

Furthermore, if at any point during the process they develop probable cause to believe that the object is a weapon, they may disregard the procedure and immediately seize it. The subject of expedited emergency searches for weapons is discussed later in this article.

Step 1: "Any needles?"

In the past, the first step in conducting the search was to start patting the detainee's clothing. But that changed with the increased threat of exposure to viruses resulting from concealed syringes, especially HIV and hepatitis. As a result, officers will often begin the process by asking the detainee if he has any needles or other sharp objects in his possession. Such a question does not impermissibly enlarge the scope of the search because it is reasonably necessary for officer safety. Nor does it require a Miranda waiver because, even if the detainee was "in custody," it would fall within Miranda's public safety exception.125

Of course, if he says he has a syringe in his possession, officers may remove it before beginning the patdown.126

Step 2: Patdown

The United States Supreme Court has explained that the search begins with a "careful exploration" of the outside surfaces of the detainee's clothing, "all over his or her body."127 The Court added, "A thorough search must be made of the [detainee's] arms and

armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."[128]

MANIPULATING OBJECTS

If officers detect an object under the detainee's clothing, and if they cannot immediately rule out the possibility it is a weapon, they may grasp or otherwise manipulate it to try to determine what it is. As the court explained in *People v. Lee*:

> Recognizing that the purpose of the pat-down is to dispel the suspicion that a person is armed, it seems to us that something more is contemplated than a gingerly patting of the clothing. [I]n order to rule out the presence of a weapon the officer may have to determine an object's weight and consistency. We fail to see how this can be accomplished without using some sort of gripping motion.[129] Officers may also manipulate any container in the detainee's possession if it is, (1) large enough to hold a weapon, and (2) sufficiently pliable to permit officers to feel some or all of its contents; e.g., a purse or backpack.[130] If, however, the container is not pliable, it appears that officers may not open it to determine its contents unless there was reason to believe it contained a weapon.

This occurred in *People v. Hill* in which the court noted, "The box was much heavier than an ordinary matchbox and the rattling sounds indicated that it contained metallic objects other than matches."[131] Note that a container may be pat searched even if the detainee had been separated from it after he was detained; e.g. officers had taken possession of it, or the detainee had put it on the ground.[132]

"EMPTY YOUR POCKETS"

In the absence of an emergency, officers may not bypass the pat down procedure by, for example, reaching inside the detainee's clothing or pockets, by lifting up his clothing, or ordering him to empty his pockets.[133]

THE NEXT STEP

What happens next depends on what the officers felt. If they felt a weapon or something that reasonably felt like a weapon or an object that could be used as a weapon, they may remove it. If they felt nothing suspicious, the search must be discontinued.[134] But if they felt something suspicious, and if they could not rule out the possibility that it was a weapon, they may go to step 3.

Step 3: Reaching inside

If officers detect something that feels like it might be a weapon, they will ordinarily have four options: (1) question the detainee about it,[135] (2) lift up his clothing if that would help them determine what it is,[136] (3) reach inside the detainee's clothing and feel the object directly, or (4) reach in and remove it.[137]

Because officers are not required to employ the least intrusive means of determining the nature of a suspicious object,[138] they may do any of these things. But they must have sufficient reason to believe that the object they felt could have been a weapon or an object that could have been used as a weapon.[139] This is often the key issue in pat search cases because the courts, over the years, have become somewhat skeptical of such claims. As the California Supreme Court observed, "On occasion, the police have used the excuse that an object in a person's pocket felt like a weapon to perform an exploratory search of the person's clothing and empty the citizen's pockets of everything."[140] For this reason, officers who are testifying at a suppression hearing must be very specific as to why the object felt as if it could have been a weapon. For instance, they should, if possible, describe its apparent weight, size, and shape.

Note that many of the circumstances that are relevant in determining whether officers reasonably believed that a detainee was armed or dangerous (discussed earlier) are also relevant in determining whether they reasonably believed that a concealed object under his clothing could be used as a weapon. For example, its location would be significant if it was a place where weapons are commonly secreted, or if it was a place in which objects are not ordinarily kept; e.g., inside the detainee's boot.[141] It would also be significant that the detainee had a history of carrying concealed handguns or engaging in gang violence, as this would rightly cause officers to view any suspicious object under his clothing with extra concern.

The question, then, is what types of objects will ordinarily justify a more intrusive search?

CONVENTIONAL WEAPONS

If the object felt like a conventional weapon, such as a gun or knife, officers may of course remove it.[142] The following are examples:

- “a hard, rectangular object,” maybe a knife, “either folded or in a case” (hide-a-key box containing heroin)143
- “a hard object which [the officer] thought was a knife” (gun clip with live rounds)144
- “[s]ome type of heavy object, possibly a gun” (loaded revolver)145
- “a sharp object like a knife blade” (watch and bracelet)146
- “a hard object,” maybe a knife (straight-edge razor)147
- “a long hard object which could have been a knife” (long stem pipe)148
- “a bulge and a lump near the right jacket pocket,” maybe “the butt of a hand gun” (baggie containing 14 grams of rock cocaine)149
- “a cylindrical object several inches long in the defendant’s pocket . . . large enough that it could have been a knife” (drugs)150

VIRTUAL WEAPONS

A virtual weapon is an object that, although not commonly used to inflict bodily injury, is readily capable of doing so. Examples include baseball bats, razor blades, hypodermic needles, and bottles. If officers reasonably believe that an object they felt could have been a virtual weapon, they may remove it.151

ATYPICAL WEAPONS

An atypical weapon is an object that could conceivably harm someone, but is seldom used for that purpose; e.g., a ball point pen could be used as a stabbing instrument. The rules pertaining to atypical weapons are fairly strict: Officers may remove them only if they reasonably believed that removal was necessary for officer safety. 152 The key word here is “reasonably.” Officers cannot satisfy this requirement by engaging in “fanciful speculation” about an object’s potential dangerousness. 153 For example, in *People v. Leib* the court ruled that an officer’s act of removing a pill bottle from under the suspect’s clothing was unlawful because, said the court, “Even if a pill bottle could in some fanciful or extraordinary circumstances feel like a weapon, it is quite clear [the officer] knew the bottle was not in fact a weapon.” 154

HARD OBJECTS

If the object felt hard to the touch, officers may ordinarily remove it unless it clearly did not present a threat.155 For example, the courts have ruled that officers were justified in removing the following objects:

- a hard object which the officer could not identify because the suspect was wearing heavy jeans (three car keys solidly taped together)156
- a “hard rectangular object” (stack of 12 credit cards)157
- a “large, hard object” (brass door knob)158
- a “firm object 8-10 inches long” (two film cans containing marijuana)159
- two “bulky” objects inside the suspect’s boots (two baggies containing marijuana)160
- a “three-inch long, hard object” (matchbox)161

SOFT OBJECTS

Because most objects that can pose a threat to officers are hard to the touch, officers may remove a soft object only if they can cite specific facts that reasonably indicated it posed a real threat.162 As the California Supreme Court explained, “Feeling a soft object in a suspect’s pocket during a pat down, absent unusual circumstances, does not warrant an officer’s intrusion into a suspect’s pocket to retrieve the object.”163 For example, the courts have ruled that officers did not have sufficient justification to remove objects that felt as follows:

- “[s]ome soft bulky material” (a baggie of marijuana)164
- a “soft bulge” (a baggie of marijuana)165
- a “small round object” (a bottle of pills)166
- a “lump [maybe] pills” (LSD tablets in a plastic bag) 167

DRUGS

Under the “plain feel” rule, officers may remove an object that does not feel like a weapon if, (1) they have probable cause to believe it is an illegal drug or other contraband, and (2) probable cause existed at or before the time they determined it was not a weapon.168 The theory here is that, because probable cause gives officers a right to arrest the suspect, their seizure of the object is

permitted as a search incident to arrest.[169] For example, in *People v. Thurman* the court upheld the removal of drugs because, "simultaneous with the [officer's] verification that the object was not a weapon" the officer realized that "the objects were pieces of rock cocaine contained in a baggie."[170]

In determining whether probable cause existed, officers may consider how the object felt and any other relevant circumstances. As the Court of Appeal observed, "The critical question is not whether [the officer] could identify the object as contraband based on only the 'plain feel' of the object, but whether the totality of circumstances made it immediately apparent to [the officer] when he first felt the lump that the object was contraband."[171]

For example, in *People v. Dibb* [172] an officer who was pat searching a detainee's pants felt an object he described as "lumpy, and it had volume and mass." He concluded that the lump was illegal drugs because, in addition to how it felt, officers who had just conducted a consensual search of the detainee's fanny pack had found a gun clip, a gram scale having "the odor of methamphetamine," a small plastic bag, and a beeper. In addition, the detainee had denied there was anything in his pocket, which was an obvious lie. In ruling the seizure of the lump (more methamphetamine) was lawful, the court said, "[The officer] had probable cause to arrest defendant when he first touched the object."

Another application of the "plain feel" rule is found in *People v. Lee*.[173] Here, an Oakland police officer on patrol in an area known for "high narcotic activity" lawfully detained a suspected drug dealer. While pat searching him, the officer felt some balloons in his jacket pocket. The officer testified that, as soon as he felt them, he recognized them as the heroin-filled variety and, just as important, he was able to articulate why: he had felt and seized heroin-filled balloons on at least 100 other occasions, and these balloons had an "unmistakable" feel associated with them; specifically, "each balloon has about the size and shape of a pea, with a textured rubber feeling and a bounce or bend that bounces back to its original shape."

In ruling the seizure of the balloons was lawful, the court said, "[The officer's] tactile perceptions coupled with the other facts known to him, furnished probable cause to believe that defendant's jacket contained heroin, and therefore to immediately arrest him. At that point the officer was entitled to conduct a more thorough search as an incident of which the contraband was seized."

In contrast, in *People v. Valdez* [174] the court ruled that an officer's removal of a film canister from the suspect's pocket was unlawful because the officer had no reason to believe it contained anything other than film.

REMOVING OTHER EVIDENCE

The "plain feel" doctrine is not limited to drugs. In fact, officers may remove any item they feel if, when they first felt it, they had probable cause to believe it was evidence of a crime.[175] For example, in *People v. Lennies H.*[176] a police officer in Vallejo detained a suspect in a carjacking that had occurred the day before in Sacramento. The suspect denied that he had the keys to the car, but the officer felt keys in his pocket when he pat searched him. So he reached in and retrieved them. In ruling the seizure of the keys was lawful, the court noted that although a key is not inherently illegal to possess, the officer "had probable cause to believe that the keys were evidence linking the minor to the carjacking at the time of the initial 'plain-feel' search."

Similarly, in *U.S. v. Bustos-Torres* [177] a sheriff's deputy felt a large amount of currency ($10,000) in the pockets of a suspected drug dealer. In ruling that the seizure of the money was lawful, the court asked rhetorically, "Were the bills, by their mass and contour, immediately identifiable to the Sergeant's touch as incriminating evidence?

Pondering the question with a dose of common sense, we believe they were."

Emergency procedure

As noted earlier, officers are not required to follow the standard pat search procedure if they reasonably believe that an attack is imminent or if they have probable cause (as opposed to reasonable suspicion) that the detainee possesses a concealed weapon.[178] Instead, they may take preemptive action, such as immediately going inside the clothing to locate and remove any weapons. This is permitted mainly because, as one court put it, "any other course of action would have been foolhardy and quite possibly suicidal."[179] The following are examples of circumstances that were found to justify an immediate search:

- The detainee jerked away when the officer started to pat search a bulge in the detainee's pocket; then he told the officer, "You cannot search me without a warrant even if I have a gun."[180]
- During a pat search, the detainee "abruptly grabbed for his outside upper jacket pocket; the officer could feel a "round cylindrical object" in the pocket.[181]

- During a contact, a suspected drug dealer “suddenly put his hand into [his] bulging pocket.”182
- A suspect who was detained in connection with a “shots fired” call, kept his left hand concealed in a jacket pocket; when the officer asked what he had had in the pocket, the suspect would not answer.183
- An officer who had detained a suspect for making threats saw what appeared to be the outline of a small handgun in the fanny pack he had been carrying.184

Officers may also bypass the standard procedure if they have probable cause to arrest the detainee, even though they had not yet done so.185 For example, if he had refused to comply with a safety-related command, officers would have probable cause to arrest him for a violation of Penal Code § 148 because he would have willfully resisted and obstructed an officer in the performance of his duties.186

In addition, officers may reach inside a detainee’s clothing or lift up his outer clothing without first pat searching him if he was wearing clothing that was so bulky or rigid that a pat down would not have revealed the presence of a weapon. As the court noted in *People v. William V.*, “In light of William’s bulky clothes, [the officer] reasonably lifted [his] jacket to search his waistband.”187

References

1. Terry v. Ohio (1968) 393 U.S. 1, 23.
2. Source: U.S. Department of Justice, Federal Bureau of Investigation, Law Enforcement Officers Feloniously Killed 1968-2005 (By type of weapon). ALSO SEE Terry v. Ohio (1968) 393 U.S. 1, 24 [“Virtually all of [the deaths of officers in the performance of their duties] and a substantial portion of the injuries are inflicted with guns and knives.”].
3. Source: U.S. Department of Justice, Federal Bureau of Investigation, Law Enforcement Officers Feloniously Killed 1995-2004 (By circumstances at scene of incident and type of assignment)
4. See Terry v. Ohio (1968) 393 U.S. 1, 24 [“The easy availability of firearms to potential criminals in this country is well known.”]; United States v. Robinson (1973) 414 U.S. 218, 234, fn.5 [“The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty”]; U.S. v. Holt (10th Cir. 2001) 264 F.3d 1215, 1223 [“Resort to a loaded weapon is an increasingly plausible option for [detainees].”].
5. See Michigan v. Long (1983) 463 U.S. 1032, 1052.
6. Michigan v. Long (1983) 463 U.S. 1032, 1051.
7. U.S. v. Reilly (9th Cir. 2000) 224 F.3d 986, 993.
8. Terry v. Ohio (1968) 393 U.S. 1, 24. NOTE: Because pat searches are permitted for the sole purpose of discovering weapons, officers may not, based on reasonable suspicion, pat search a suspect to determine whether he possesses ID. See People v. Garcia (2006) 145 Cal.App.4th 782, 788 [“[Terry] by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest.”].
9. See U.S. v. Hauk (10th Cir. 2005) 412 F.3d 1179, 1192 [“Police are predisposed by their instinct for self-preservation to assume that an unknown situation is dangerous. The Fourth Amendment limits officers’ ability to act on this assumption, but we must take care not to restrict officers’ common-sense precautions, particularly in cases involving reasonable suspicion.”]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1083 [“An officer in today’s reality has an objective, reasonable basis to fear for his or her life every time a motorist is stopped.”].
10. (1968) 393 U.S. 1, 9.
11. (1968) 393 U.S. 1, 25.
12. (1968) 393 U.S. 1, 16-7. NOTE: A pat search is both a “search” and a “seizure.” Id. at p. 19.
13. Terry v. Ohio (1968) 393 U.S. 1, 19-20.
14. People v. Koelzer (1963) 222 Cal.App.2d 20, 27. ALSO SEE People v. Dumas (1967) 251 Cal.App.2d 613, 617 [“The realities of present day law enforcement dictate that a failure to make such a search, in many cases, might mean death to policemen.”].
15. See People v. Thurman (1989) 209 Cal.App.3d 817, 823 [it would be “utter folly” to require an officer “to await an overt act of hostility before attempting to neutralize the threat of physical harm”]; People v. Samples (1992) 11 Cal.App.4th 389, 393 [“Our courts have never held that an officer must wait until a suspect actually reaches for an apparent weapon before he is justified in taking the weapon.”].
16. See Michigan v. Long (1983) 463 U.S. 1032, 1049 [“Our past cases indicate that the protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger”]; Pennsylvania v. Mimms (1977) 434 U.S. 106, 112 [“The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and

present danger to the safety of the officer." Emphasis added]; People v. Superior Court (Brown) (1980) 111 Cal.App.3d 948, 956 ["[A] pat-down search for weapons may be made predicated on specific facts and circumstances giving the officer reasonable grounds to 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"]; People v. Avila (1997) 58 Cal.App.4th 1069, 1074 ["[T]he crux of the issue is whether a reasonably prudent person . . . would be warranted in the belief that his or her safety was in danger."]; People v. Franklin (1985) 171 Cal.App.3d 627, 635 ["The issue rather is whether a reasonably prudent man under similar circumstances would be warranted in his belief that his safety was in danger."]; People v. Campbell (1981) 118 Cal.App.3d 588, 595 ["An officer is justified in making a pat-down search if he has objective cause to believe that the suspect is armed or that the search is necessary for the officer's own safety."]. NOTE: Even the Court in Terry acknowledged that an armed detainee is necessarily dangerous. See Terry v. Ohio (1968) 393 U.S. 1, 28 ["a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat"; emphasis added]. In another example of sloppy drafting in Terry, the Court said several times that the issue is whether the suspect is "potentially dangerous." But, as the Court of Appeal observed, "almost everyone could be described as 'potentially' dangerous." People v. Lafitte (1989) 211 Cal.App.3d 1429, 1433, fn.4.

17. See Michigan v. Long (1983) 463 U.S. 1032, 1049 ["Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger . . . ." The Long Court also noted that a pat search of a suspect known to be unarmed may be permissible because such a suspect "may be able to gain access to weapons" At p. 1049, fn14]; Sibron v. New York (1968) 392 U.S. 40, 65 [purpose of pat search is "disarming a potentially dangerous man."]; People v. Superior Court (Simon) (1972) 7 Cal.3d 186, 204 ["The critical question remains, is this the kind of confrontation in which the officer can reasonably believe in the possibility that a weapon may be used against him?"]; U.S. v. Brown (7th Cir. 2000) 232 F.3d 589, 592 [pat search of strangely-behaving detainee upheld even though there "was the lack of specific facts indicating that [he] possessed a weapon"].
18. U.S. v. Bell (6th Cir. 1985) 762 F.2d 495, 500, fn.7. ALSO SEE U.S. v. Flett (8th Cir. 1986) 806 F.2d 823, 828.
19. See Terry v. Ohio (1968) 392 U.S. 1, 21-2 ["[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?"]; Pennsylvania v. Mimms (1977) 434 U.S. 106, 112 ["[A]ny man of reasonable caution would likely have conducted the pat down."]; U.S. v. Price (D.C. Cir. 2005) 409 F.3d 436, 441 ["In reviewing such protective searches, we apply an objective test based on the facts available to the officer at the time of the search."]; U.S. v. Holt (10th Cir. 2001) 264 F.3d 1215, 1225 ["In the context of officer safety in particular, the Supreme Court has relied on an objective view of the circumstances."]; U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 866 ["[T]he test is objective, not subjective."]. NOTE: The "reasonable officer" test is sometimes phrased in terms of reasonable suspicion; i.e., a pat search is permitted if officers have reasonable suspicion to believe the detainee is armed or dangerous. See New York v. Class (1986) 475 U.S. 106, 117 ["When a search or seizure has as its immediate object a search for a weapon . . . only on a reasonable suspicion of criminal activity [is required]."]; U.S. v. Orman (9th Cir. 2007) 486 F.3d 1170, 1176 [reasonable suspicion "is all that is required for a protective search"]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1083 ["The reasonable suspicion required to justify a pat-down search represents a minimum level of objective justification."].
20. U.S. v. Hanlon (8th Cir. 2005) 401 F.3d 926, 929.
21. See U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1101 ["We know of no legal requirement that a policeman must feel 'scared' by the threat of danger."].
22. See People v. Adam (1969) 1 Cal.App.3d 486, 491 ["[S]imple good faith on the part of the arresting officer is not enough."].
23. See Terry v. Ohio (1968) 392 U.S. 1, 21 ["[T]he police officer must be able to point to specific and articulable facts"]; Sibron v. New York (1968) 392 U.S. 40, 64 [the officer "must be able to point to particular facts"]; People v. Glenn R. (1970) 7 Cal.App.3d 558, 561 [although the officer described his belief that the defendant was armed as a "sneaky hunch," it was actually based on specific facts]; U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1100 ["[T]he feelings or hunches of an officer are too lacking in substance to effectively guarantee protection of constitutional rights."].
24. See U.S. v. Post (9th Cir. 1979) 607 F.2d 847, 851 ["It is clear that an officer who has the right to stop a person does not necessarily have a concomitant right to search that person."]; U.S. v. Garcia (10th Cir. 2006) 459 F.3d 1059, 1063-4 [pat searches are "not to be conducted as a matter of course during every investigative detention"].
25. See, for example, People v. Lawler (1973) 9 Cal.3d 156, 162-3 ["The officer's testimony that he felt a 'routine' search for weapons was in order apparently betrays the presence of [an illegal police practice]."]; People v. Adam (1969) 1 Cal.App.3d

486, 490 [“The People interpret Terry as if it stood for the proposition that simply because an officer may temporarily seize a suspect it follows automatically that he may frisk him for weapons.”].

26. Santos v. Superior Court (1984) 154 Cal.App.3d 1178, 1181. ALSO SEE People v. Medina (2003) 110 Cal.App.4th 171, 176 [“standard procedure”]; People v. Adam (1969) 1 Cal.App.3d 486, 489[“ordinary precautions”].
27. People v. Hubbard (1970) 9 Cal.App.3d 827, 830 [“This undiscriminating approach does not meet the Supreme Court’s test.”].
28. People v. Dickey (1994) 21 Cal.App.4th 952, 956 [“Without specific and articulable facts . . . these conclusions add nothing.”]. ALSO SEE People v. Marcellus L. (1991) 229 Cal.App.3d 134, 138 [“for safety reasons”].
29. People v. Griffith (1971) 19 Cal.App.3d 948, 952.
30. (1973) 35 Cal.App.3d 631, 637.
31. See United States v. Arvizu (2002) 534 U.S. 266, 273 [“This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.”]; People v. Frank V. (1991) 233 Cal.App.3d 1232, 1240-1; U.S. v. Barlin (2nd Cir. 1982) 686 F.2d 81, 86 [“[W]e must view the surrounding circumstances . . . through the eyes of a reasonable and caution police officer on the scene guided by his training and experience.”]; U.S. v. Rideau (5th Cir. 1992) 969 F.2d 1572, 1575 [“Trained, experienced officers like Ellison may perceive danger where an untrained observer would not.”].
32. U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 865. ALSO SEE U.S. v. Barlin (2nd Cir. 1982) 686 F.2d 81, 86 [“[W]e must view the surrounding circumstances as a while, not as discrete and separate facts.”]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1085 [the trial court had “discounted the totality of the information known to the officers by focusing on the facts in isolation.”].
33. (1997) 58 Cal.App.4th 1069, 1074.
34. (1978) 81 Cal.App.3d 347, 354.
35. See People v. Ledesma (2003) 106 Cal.App.4th 857, 863 [“[The U.S. Supreme Court] has been sharply critical of lower court decisions precluding police reliance on facts consistent with an innocent as well as a guilty explanation.”]; People v. Brown (1989) 213 Cal.App.3d 187, 191 [“[I]t does not assist defendant that other explanations consistent with innocent activity might be equally reasonable.”]; People v. Frank V. (1991) 233 Cal.App.3d 1232, 1240-1.
36. People v. Dickey (1994) 21 Cal.App.4th 952, 957. ALSO SEE People v. Lafitte (1989) 211 Cal.App.3d 1429, 1433 [“[The U.S. Supreme Court] seemed willing to allow more leeway in the officer’s decision that a suspect is ‘armed and presently dangerous,’ even for minor offenses.”].
37. See U.S. v. Flatter (9th Cir. 2006) 456 F.3d 1154, 1158 [“[I]ndeed, some crimes are so frequently associated with weapons that the mere suspicion that an individual has committed them justifies a pat down search.”].
38. (1998) 65 Cal.App.4th 854, 862.
39. (1989) 209 Cal.App.3d 817, 822.
40. See Richards v. Wisconsin (1997) 520 U.S. 385, 391, fn.2 [“This Court has encountered before the links between drugs and violence.” Citations omitted]; People v. Glaser (1995) 11 Cal.4th 354, 367 [“In the narcotics business, firearms are as much ‘tools of the trade’ as are most commonly recognized articles of narcotics paraphernalia.” Quoting Ybarra v. Illinois (1979) 444 U.S. 86, 106 (dis. opn. of Rehnquist, J)]; People v. Osuna (1986) 187 Cal.App.3d 845, 856 [“It should come as no great surprise that those who would profit by the illicit manufacture and sale of drugs which so often destroy their customers’ very lives, are not above adopting lethal means to protect their products from seizure and themselves from apprehension.”]; People v. Lee (1987) 194 Cal.App.3d 975, 983 [“persons engaged in selling narcotics frequently carry firearms to protect themselves from would-be robbers.”]; People v. Limon (1993) 17 Cal.App.4th 524, 535 [It is not unreasonable to assume that a dealer in narcotics might be armed and subject to a pat-search.”]; People v. Samples (1996) 48 Cal.App.4th 1197, 1209; People v. Gallegos (2002) 96 Cal.App.4th 612, 629 [“It is common knowledge that drug dealers typically use firearms and ammunition in the course of their drug sale operations.”]; People v. Wigginton (1973) 35 Cal.App.3d 732, 737 [the officer knew that “users and sellers of narcotics more times than not have weapons readily available either on their person or on the premises”]; U.S. v. $109,179 (9th Cir. 2000) 228 F.3d 1080, 1084 [“Officer Jones had reasonable suspicion to believe that Maggio was involved in a narcotics operation, and thus that he might be armed.”]; U.S. v. Hudson (9th Cir. 1996) 100 F.3d 1409; U.S. v. Post (9th Cir. 1979) 607 F.2d 847 852 [“It is not unreasonable to suspect that a dealer in narcotics might be armed.”]; U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 865 [“Drug dealing is a crime infused with violence.”]; U.S. v. Barlin (2nd Cir. 1982) 686 F.2d 81, 87 [court notes “the violent nature of narcotics crime”]; U.S. v. Stowe (7th Cir. 1996) 100 F.3d 494, 499 [“[D]rug dealing is a crime infused with violence. . . . Guns and drugs together distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers—an important narrowing factor.”]; U.S. v. Bustos-Torres (8th Cir. 2005) 396 F.3d

935, 943 [“Because weapons and violence are frequently associated with drug transactions, it is reasonable for an officer to believe a person may be armed and dangerous when the person is suspected of being involved in a drug transaction.”]; U.S. v. Hauk (10th Cir. 2005) 412 F.3d 1179, 1192 [“Unlike some other crimes, involvement in the drug trade is not uncommonly associated with violence.”]; U.S. v. Price (D.C. Cir. 2005) 409 F.3d 436, 442 [pat search justified because officers reasonably believed the suspect was “transporting a stash of illegal drugs”]; U.S. v. Garcia (10th Cir. 2006) 459 F.3d 1059, 1064 [“[A] connection with drug transactions can support a reasonable suspicion that a suspect is armed and dangerous.”]. NOTE: In Santos v. Superior Court (1984) 154 Cal.App.3d 1178, 1185 and People v. Wright (1988) 206 Cal.App.3d 1107, 1112 the courts ruled that a pat search could not be justified merely because officers reasonably believed the detainee was selling drugs. These rulings were ludicrous in the ‘80’s and they are even more so today. Although defendant’s often cite them, the courts routinely ignore them.

41. See Terry v. Ohio (1968) 392 U.S. 1, 28 [the officer reasonably believed the suspect was “contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons”]; People v. Campbell (1981) 118 Cal.App.3d 588, 595 [“Officer Welch articulated his belief that the appellant was armed and justified this belief by testifying that there had been killings in connection with this investigation.”]; People v. Atmore (1970) 13 Cal.App.3d 244, 247, fn.1 [murder]; People v. Rico (1979) 97 Cal.App.3d 124, 132 [ADW]; People v. Stone (1981) 117 Cal.App.3d 15, 19 [strong-arm robbery]; People v. Gonzales (1998) 64 Cal.App.4th 432, 439 [armed robbery]; People v. Anthony (1970) 7 Cal.App.3d 751, 761 [armed robbery]; People v. Franklin (1985) 171 Cal.App.3d 627, 635-6 [armed robbery]; People v. Watson (1970) 12 Cal.App.3d 130, 134 [armed robbery]; People v. Craig (1978) 86 Cal.App.3d 905, 912 [armed robbery]; People v. Orozco (1981) 114 Cal.App.3d 435, 445 [shots fired]; People v. Lindsey (2007) 148 Cal.App.4th 1390, 1401 [shots fired]; People v. Superior Court (Holmes) (1971) 15 Cal.App.3d 806, 810 [shots fired]; People v. Woods (1970) 6 Cal.App.3d 832, 837 [shots fired, plus hand in pocket]; U.S. v. Hartz (9th Cir. 2006) 458 F.3d 1011, 1018 [carjacking]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1081 [preparing for a drive-by shooting].
42. See People v. Castaneda (1995) 35 Cal.App.4th 1222, 1230 [“burglary suspects frequently carry weapons”]; People v. Remiro (1979) 89 Cal.App.3d 809, 829 [“[The officer] suspected he was dealing with automobile burglars”]; People v. Smith (1973) 30 Cal.App.3d 277, 279 [“The officers had received a report of a possible burglary”]; People v. Juarez (1973) 35 Cal.App.3d 631, 636 [“appellant was a logical suspect in a recent burglary”]; People v. Suennen (1980) 114 Cal.App.3d 192, 199 [detention of suspect in “recent local pillowcase burglaries”]; People v. Garcia (1969) 274 Cal.App.2d 100, 106; People v. Allen (1975) 50 Cal.App.3d 896, 901 [auto burglary]; People v. Koelzer (1963) 222 Cal.App.2d 20, 27 [officers who had detained suspected burglars were “entitled to make a self-protective search of defendants’ persons”]; U.S. v. Mattarolo (9th Cir. 1999) 191 F.3d 1082, 1087 [the defendant was a suspected counterfeiter, “not a suspect caught possibly in the act of committing a nighttime burglary and therefore more likely to be armed”]; In re Sealed Case (D.C. Cir. 1998) 153 F.3d 759, 767 [“[I]t was appropriate for [the officers] to act on the basis of the kinds of risks burglaries normally present.”]; U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1100 [the officer “had information that the Tharpe brothers were known burglars; that they were now suspects in a recent unsolved burglary”].
43. People v. Myles (1975) 50 Cal.App.3d 423, 430.
44. See U.S. v. Hanlon (8th Cir. 2005) 401 F.3d 926, 929 [“[W]hen officers encounter suspected car thieves, they also may reasonably suspect that such individuals might possess weapons.”]; People v. Vermouth (1971) 20 Cal.App.3d 746, 753 [because the detainees were suspected of car theft, it was reasonable “to ask the two men out of the car and make a superficial search for possible weapons”]; People v Todd (1969) 2 Cal.App.3d 389, 393 [the circumstances “led the officers to believe there ‘was something wrong’ and the car was stolen”]. COMPARE U.S. v. Flatter (9th Cir. 2006) 456 F.3d 1154, 1158 [“Mail theft by postal employees is not a crime that is frequently associated with weapons”].
45. See People v. Hill (1974) 12 Cal.3d 731, 746, fn.13 [“It is reasonable for an investigating officer to take precautionary measures with respect to all occupants of a fleeing automobile.”]. ALSO SEE Haynie v. County of Los Angeles (9th Cir. 2003) 339 F.3d 1071, 1076 [failure to yield plus other circumstances].
46. See People v. Superior Court (Simon) (1972) 7 Cal.3d 186, 206 [“[T]he ordinary motorist who transgresses against a traffic regulation does not thereby indicate a propensity for violence of iniquity”]; People v. Superior Court (Kiefer) (1970) 3 Cal.3d 807, 830 [pat search of traffic violator unwarranted when she “promptly pulled his car to the side of the road” and was “pretty straight and admitted he was going fast”]; People v. Lawler (1973) 9 Cal.3d 156, 161 [“[N]o authority to pat down flowed from a mere traffic violation”]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1084 [“Although Officer Weakley could remove Rice

from the car as part of a routine traffic stop, he could not perform a pat-down search for weapons unless he reasonably suspected that Rice might be carrying one."].

47. (7th Cir. 1999) 188 F.3d 860, 864.
48. U.S. v. Flatter (9th Cir. 2006) 456 F.3d 1154, 1157. ALSO SEE People v. Guillermo M. (1982) 130 Cal.App.3d 642, 647 [bulges consistent with knives]; U.S. v. Meredith (5th Cir. 2007) 480 F.3d 366, 370 [observation of a "handgun-like bulge" provided grounds to pat search]; People v. Ritter (1997) 54 Cal.App.4th 274, 277 [bulge "appeared to be the outline of a small handgun"]; People v. Snyder (1992) 11 Cal.App.4th 389, 393 ["[T]he visible bulge created by the bulk of the liquor bottle announced to Officer Chase the potential of a weapon."].
49. (1987) 196 Cal.App.3d 612, 618.
50. See Pennsylvania v. Mimms (1977) 434 U.S. 106, 107, 112 [there was a "large bulge under [Mimms'] sports jacket" which "permitted the officer to conclude that Mimms was armed"]; People v. Snyder (1992) 11 Cal.App.4th 389, 391 ["a large bulge in the front waistband"]; People v. Methey (1991) 227 Cal.App.3d 349, 358 ["He was wearing a bulky outer jacket with bulging pockets."]; People v. Allen (1975) 50 Cal.App.3d 896, 899, 901 ["defendant's pockets appeared to be bulging"]; People v. Autry (1991) 232 Cal.App.3d 365, 367 ["He was wearing a zippered jacket which bulged around and concealed his waist."]; People v. Superior Court (Brown) (1980) 111 Cal.App.3d 948, 956 [the bulge was "in the waistband in the middle of his waist"]; People v. Armenta (1968) 268 Cal.App.2d 248, 249-50 ["[The officer] noticed a bulge in the lower portion beneath the belt of Mr. Armenta's trousers, on the inside of the trousers."]; People v. Guillermo M. (1982) 130 Cal.App.3d 642, 644 [bulge "in the front pockets of appellant's pants"].
51. (1985) 169 Cal.App.3d 159, 165.
52. (1980) 111 Cal.App.3d 948, 957. ALSO SEE People v. Glenn R. (1970) 7 Cal.App.3d 558, 561["He continually kept his right side averted from the officer and kept his right hand in his jacket pocket in such a manner as to lead any reasonable person to believe that he was attempting to conceal something from view."].
53. See People v. Rosales (1989) 211 Cal.App.3d 325, 330 [the suspect "suddenly put his hand into the bulging pocket," an indication that he "was or could be, reaching for a weapon."].
54. See U.S. v. Edmonds (D.C. Cir. 2001) 240 F.3d 55, 51 ["furtive gestures are significant only if they were undertaken in response to police presence"].
55. See People v. Frank V. (1991) 233 Cal.App.3d 1232, 1240-1 [furtive gesture may justify a pat search]. COMPARE People v. Dickey (1994) 21 Cal.App.4th 952, 956, fn2 ["Just how this activity ['moving around in the driver's seat'] is invested with 'guilty meaning' is not explained in the record.."].
56. (1989) 216 Cal.App.3d 1237.
57. People v. Clayton (1970) 13 Cal.App.3d 335, 337 ["When he observed Clayton's unusual movements within the car it became reasonable for him to make a weapon search of his person; failure to take similar precautions has resulted in the death of many law enforcement officers."].
58. U.S. v. Price (D.C. Cir. 2005) 409 F.3d 436, 442.
59. U.S. v. Raymond (4th Cir. 1998) 152 F.3d 309, 311.
60. U.S. v. Edmonds (D.C. Cir. 2001) 240 F.3d 55, 61.
61. Haynie v. County of Los Angeles (9th Cir. 2003) 339 F.3d 1071, 1076.
62. People v. Armenta (1968) 268 Cal.App.2d 248, 249.
63. People v. John C. (1978) 80 Cal.App.3d 814, 819.
64. U.S. v. Yamba (3d Cir. 2007) F.3d [2007 WL 3054387].
65. U.S. v. Flatter (9th Cir. 2006) 456 F.3d 1154, 1158.
66. People v. Lee (1987) 194 Cal.App.3d 975, 983.
67. People v. Rosales (1989) 211 Cal.App.3d 325, 330. COMPARE People v. Valdez (1987) 196 Cal.App.3d 799, 807 ["Torres's act of turning away from the police is at best mildly suspicious."]; Ybarra v. Illinois (1979) 444 U.S. 85, 93 ["[Ybarra] made no gestures or other actions indicative of an intent to commit an assault"].
68. People v. McLean (1970) 6 Cal.App.3d 300, 306.
69. People v. Hubbard (1970) 9 Cal.App.3d 827, 830. ALSO SEE U.S. v. Mattarolo (9th Cir. 1999) 191 F.3d 1082, 1087 ["[D]efendant got out of his car swiftly and walked quickly toward the squad car before the officer had the chance to get out of his car."].
70. People v. Atmore (1970) 13 Cal.App.3d 244, 246.

71. People v. Flores (1979) 100 Cal.App.3d 221, 226.
72. People v. Superior Court (Holmes) (1971) 15 Cal.App.3d 806, 808-9.
73. People v. Lopez (2004) 119 Cal.App.4th 132, 134.
74. (1980) 111 Cal.App.3d 948, 954-5.
75. Adams v. Williams (1972) 407 U.S. 143, 148. Edited.
76. People v. Wigginton (1973) 35 Cal.App.3d 732, 735. ALSO SEE U.S. v. Rideau (5th Cir. 1992) 969 F.2d 1572, 1575 [detainee's act of backing away from the officer could, under the circumstances, be construed as an attempt to "gain[] room to use a weapon"]; U.S. v. Bell (6th Cir. 1985) 762 F.2d 495, 501 ["Bell's failure to follow [the FBI agent's] instructions would significantly and immediately heighten the level of concern upon the part of the officer."].
77. 77 People v. John C. (1978) 80 Cal.App.3d 814, 819.
78. 78 People v. Glenn R. (1970) 7 Cal.App.3d 558, 560.
79. 79 Haynie v. County of Los Angeles (2003) 339 F.3d 1071, 1076.
80. U.S. v. Bell (6th Cir. 1985) 762 F.2d 495, 497. Edited.
81. People v. Frank V. (1991) 233 Cal.App.3d 1232, 1241. ALSO SEE U.S. v. Michelletti (5th Cir. 1994) 13 F.3d 838, 842 [suspect's right hand was "concealed precisely where a weapon could be located. That Officer Perry took special note of the location of Michelletti's right hand is a fact whose importance cannot be overstated."].
82. People v. Ritter (1997) 54 Cal.App.3d 274, 277.
83. (1983) 141 Cal.App.3d 814, 816-7. ALSO SEE People v. Lopez (2004) 119 Cal.App.4th 132, 135 ["Appellant was combative"]; U.S. v. Brown (7th Cir. 2000) 232 F.3d 589, 594 ["Brown was acting erratically and somewhat aggressively throughout the late afternoon to the early evening period and therefore posed some concern."].
84. (5th Cir. 1994) 13 F.3d 838, 842.
85. (1969) 1 Cal.App.3d 150, 154.
86. See People v. Lawler (1973) 9 Cal.3d 156, 162 ["Many individuals who are accosted and queried by a police officer become [upset]."]; People v. Brown (1985) 169 Cal.App.3d 159, 164 ["He began turning pale and his hands began to shake."]; U.S. v. Hanlon (8th Cir. 2005) 401 F.3d 926, 929 ["extreme nervousness, profuse shaking, and refusal to look [the officer] in the eye"]; U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 865 ["Nervousness or refusal to make eye contact alone will not justify a [pat search], but such behavior may be considered"].
87. (7th Cir. 1999) 188 F.3d 860, 865.
88. See Michigan v. Long (1983) 463 U.S. 1032, 1050 [Long "appeared to be under the influence of some intoxicant"]; People v. Avila (1997) 58 Cal.App.4th 1069, 1074; People v. Wigginton (1973) 35 Cal.App.3d 732, 737 [some of the detainees were "under the influence of narcotics"]; U.S. v. Salas (9th Cir. 1989) 879 F.2d 530, 535 ["It was also reasonable for the officers to suspect that Salas might be dangerous if he had recently used cocaine."]; U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1100 [the detainees "had evidently been drinking"].
89. See People v. Methey (1991) 227 Cal.App.3d 349, 352 ["[The officer] recognized Methey from numerous prior police contacts and arrests for drug-related crimes."]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1084 ["the computer check identified Rice as 'known to be armed and dangerous'"]; People v. Allen (1975) 50 Cal.App.3d 896, 899 ["[D]efendant admitted that he had been released from prison just three weeks earlier."]; People v. Autry (1991) 232 Cal.App.3d 365, 367 ["Autry told the officer he had recently done time for robbery."]; U.S. v. Jackson (7th Cir. 2002) 300 F.3d 740, 746 [the officer recognized defendant "from the two previous arrests in which he recovered drugs and a firearm from Jackson"]. COMPARE Ybarra v. Illinois (1979) 444 U.S. 85, 83 [the officers did not recognize the suspect "as a person with a criminal history"].
90. (2001) 88 Cal.App.4th 1048, 1050.
91. See People v. King (1989) 216 Cal.App.3d 1237, 1241 ["[D]etention of a known gang member would increase the likelihood of harm to an officer and further justify a search for weapons."]; People v. Guillermo M. (1982) 130 Cal.App.3d 642, 644 ["The agent knew that appellant had been in trouble before and associated with a gang."]; People v. William V. (2003) 111 Cal.App.4th 1464, 1472; U.S. v. Osbourne (1st Cir. 2003) 326 F.3d 274, 278 [defendant "was a member of a violent street gang"]. NOTE: The court in People v. King (1989) 216 Cal.App.3d 1237, 1241 noted it is not necessary for officers or prosecutors to prove the suspect was, in fact, a member of a gang.
92. (8th Cir. 1986) 806 F.2d 823, 827.
93. (10th Cir. 2006) 459 F.3d 1059, 1066.

94. See Michigan v. Summers (1981) 452 U.S. 692, 702 ["[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence"]; People v. Valdez (1987) 196 Cal.App.3d 799; People v. Roach (1971) 15 Cal.App.3d 628, 632 ["Defendant's self-induced presence at an apartment where dangerous drugs were sold provided rational support for [the officer's belief that the occupants were dangerous]."]; U.S. v. Fountain (9th Cir. 1993) 2 F.3d 656 [officers may detain residents and people who are on the premises when officers arrive]; U.S. v. Stowe (7th Cir. 1996) 100 F.3d 494, 499 ["Guns and drugs together distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers—an important narrowing factor."]. ALSO SEE People v. Samples (1996) 48 Cal.App.4th 1197 [detainee was driving a car which officers had stopped to search a passenger for drugs pursuant to a search warrant].
95. (1989) 209 Cal.App.3d 817.
96. See People v. Glaser (1995) 11 Cal.4th 354, 365 [detainee "appeared to be more than a stranger or casual visitor"]; People v. Huerta (1990) 218 Cal.App.3d 744, 750 ["It was reasonable to believe a person entering a residence of illicit drug activity might be armed."]; U.S. v. Bohannon (6th Cir. 2000) 225 F.3d 615, 616 [officers may detain people who arrive at the scene after officers arrived]; Burchett v. Kiefer (6th Cir. 2002) 310 F.3d 937, 943-4 [officers may detain a person "who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down."]; People v. Roach (1971) 15 Cal.App.3d 628, 632..
97. See Maryland v. Buie (1990) 494 U.S. 325, 334, fn.2 ["in high crime areas . . . the possibility that any given individual is armed is significant"]; Illinois v. Wardlow (2000) 528 U.S. 119, 124 ["But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."]; Adams v. Williams (1972) 407 U.S. 143, 147 ["a high-crime area"]; People v. Limon (1993) 17 Cal.App.4th 524, 534 ["The connection between weapons and an area can provide further justification for a pat-search."]; People v. Frank V. (1991) 233 Cal.App.3d 1232, 1241; People v. King (1989) 216 Cal.App.3d 1237, 1241 ["[T]he fact that an area involves increased gang activity may be considered if it is relevant to an officer's belief the detainee is armed and dangerous. While this factor alone may not justify a weapon search, combined with additional factors it may."]; People v. Hill (1974) 12 Cal.3d 731, 746, fn.13 ["high incidence of crime" was "another factor" which supported the pat search]; People v. Stephen L. (1994) 162 Cal.App.3d 257, 260 ["Failure to cursorily search suspects for weapons in a confrontation situation in an area where gang activity usage is known from the officers' past experience would be most careless."]; People v. Barnes (1983) 141 Cal.App.3d 854, 856; People v. Allen (1975) 50 Cal.App.3d 896, 901; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1084 ["a high crime area"]; U.S. v. Rideau (5th Cir. 1992) 969 F.2d 1572, 1575 ["But when someone engages in suspicious activity in a high crime area, where weapons and violence abound, police officers must be particularly cautious in approaching and questioning him."]; U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 865 ["the exchange took place in a high crime area where there had been drug activity, shootings, and gang violence."].
98. See Maryland v. Buie (1990) 494 U.S. 325, 334, fn.2 ["Even in high crime areas, where the possibility that any given individual is armed is significant, Terry requires reasonable, individualized suspicion before a frisk for weapons can be conducted."]; People v. Marcellus L. (1991) 229 Cal.App.3d 134, 138, fn.2; People v. Medina (2003) 110 Cal.App.4th 171, 178 [pat search unlawful because it "was based solely on his presence in a high crime area late at night"].
99. U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 865.
100. (1989) 216 Cal.App.3d 1237, 1241.
101. See Michigan v. Long (1983) 463 U.S. 1032, 1050 ["The hour was late and the area rural."]; People v. Lafitte (1989) 211 Cal.App.3d 1429, 1433 ["late at night in a rural area"]; People v. Superior Court (Brown) (1980) 111 Cal.App.3d 948, 956 [the area "was all but deserted of traffic with only a few cars passing through the intersection"]; People v. Allen (1975) 50 Cal.App.3d 896, 901 [officer "was alone at 2:30 in the morning"]; U.S. v. Mattarolo (9th Cir. 2000) 209 F.3d 1153, 1158 [the detention occurred "on a remote section of road at midnight"]; U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1100 ["[Officer] was alone, at night, in a poorly lit area, facing three men who had evidently been drinking."]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1084 ["there were no other cars or people around"].
102. See People v. Stone (1981) 117 Cal.App.3d 15, 19 ["a poorly lit alley"]; People v. Suennen (1980) 114 Cal.App.3d 192, 199 ["it was dark"]; U.S. v. Salas (9th Cir. 1989) 879 F.2d 530, 535 [it was "10:30 p.m., when a hand movement to a weapon may be masked by the night's shadows"]; U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1100 [the officer "was alone, at night, in a poorly lit area"]; Michigan v. Long (1983) 463 U.S. 1032, 1050 ["It was 3:30 in the morning and fairly dark"]. COMPARE Ybarra v. Illinois (1979) 444 U.S. 85, 93 ["the lighting was sufficient for [the officers] to observe the customers."]; People v. Samples (1996) 48 Cal.App.4th 1197, 1210-1.

103. (1978) 81 Cal.App.3d 347, 354.
104. See People v. Superior Court (Brown) (1980) 111 Cal.App.3d 948, 956 ["It was dark, and any preparatory movements of defendant for possible violence most likely would go unnoticed because of the officers' preoccupation with writing citations for defendant and his companion."]; People v. Barnes (1983) 141 Cal.App.3d 854, 856; People v. Satchell (1978) 81 Cal.App.3d 347, 354; People v. Suennen (1980) 114 Cal.App.3d 192, 199 ["Moreover, it was dark, and two officers did not outnumber the suspects so as to negate any threat or danger."]; People v. Hubbard (1970) 9 Cal.App.3d 827, 830; U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1100.
105. See Adams v. Williams (1972) 407 U.S. 143, 147 ["a high-crime area at 2:15 in the morning"]; People v. Frank V. (1991) 233 Cal.App.3d 1232, 1241; People v. Barnes (1983) 141 Cal.App.3d 854, 856 [detention occurred in "early morning hours" but at a "well-lighted gas station"]. COMPARE: People v. Hana (1970) 7 Cal.App.3d 664, 669 [pat search not justified because, among other things, it was broad daylight].
106. See People v. Medina (2003) 110 Cal.App.4th 171, 177 [nighttime, in and of itself, has, at most, "minimal importance"].
107. (1972) 407 U.S. 143. ALSO SEE People v. Richard C. (1979) 89 Cal.App.3d 477, 488 ["[T]he officer was advised by a private citizen that the minor had exhibited and attempted to load a pistol in the citizen's driveway."]; U.S. v. Poms (4th Cir. 1973) 484 F.2d 919, 921 ["Here, the officers had received information from a reliable informant that Poms always carried a weapon in his shoulder bag."].
108. (2000) 529 U.S. 266. COMPARE People v. Superior Court (Saari) (1969) 2 Cal.App.3d 197, 201 [officers "verified the accuracy of this report in several particulars"].
109. See U.S. v. Berryhill (9th Cir. 1971) 445 F.2d 1189, 1193 ["All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory pat-down reasonably necessary to give assurance that they are unarmed."].
110. See Ybarra v. Illinois (1979) 444 U.S. 85, 93-4 ["[Terry] does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked"]; U.S. v. Bell (6th Cir. 1985) 762 F.2d 495, 498 ["We decline to adopt an 'automatic companion' rule, as we have serious reservations about the constitutionality of such a result under existing precedent."]; U.S. v. Flett (8th Cir. 1986) 806 F.2d 823, 829, fn.9 [[T]his court in no way condones the policy of the sheriff's office which provides that all males present at arrests such as these are to be subjected to cursory pat-down search."]. ALSO SEE U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1101 ["We need not go so far as the Ninth Circuit's rule of general justification conferring categorical reasonableness upon searches of all companions of the arrestee"]. NOTE: California courts have not yet ruled on the validity of the automatic companion rule. See People v. Samples (1996) 48 Cal.App.4th 1197, 1212 ["We need not decide whether such an 'automatic companion' rule is appropriate under Terry"].
111. See People v. Wright (1988) 206 Cal.App.3d 1107, 1112 ["[D]efendant's companion, Reed, had a history of carrying concealed weapons."]; U.S. v. Bell (6th Cir. 1985) 762 F.2d 495, 498, 499, fn.4 ["We do not read Ybarra as holding that 'mere propinquity' cannot be considered as a factor in determining the legitimacy of a frisk; rather, the case held that proximity cannot be the sole legitimizing factor."]; U.S. v. Barlin (2nd Cir. 1982) 686 F.2d 81, 87 ["Fantauzzi was not innocuously present in a crowd at a public place. Instead, she entered in tandem with Frank and Gleckler, whose involvement in an ongoing narcotics transaction seemed apparent."]; U.S. v. Rice
112. (10th Cir. 2007) 483 F.3d 1079, 1085 ["A reasonable officer can infer from the behavior of one of a car's passengers a concern that reflects on the actions and motivations of the other passengers."]. 112 See Adams v. Williams (1972) 407 U.S. 143, 146 ["[T]he frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law."]; Michigan v. Long (1983) 463 U.S. 1032, 1052, fn.16 ["[W]e have expressly rejected the view that the validity of a Terry search depends on whether the weapon is possessed in accordance with state law."]; People v. Lafitte (1989) 211 Cal.App.3d 1429, 1433.
113. See Michigan v. Long (1983) 463 U.S. 1032, 1050 [officer saw "a large knife in the interior of the car"]; People v. Brown (1989) 213 Cal.App.3d 187, 191 ["Because defendant was carrying two weapons, it was prudent to suspect defendant might be carrying other weapons as well."]; People v. Britton (1968) 264 Cal.App.2d 711, 715 ["When the officer saw the barrel of the .22 rifle protruding from under the front seat, they were indeed justified in making a frisk"]; People v. Castaneda (1995) 35 Cal.App.4th 1222, 1230 ["And once the magazine was found, the fear of further weapons and ammunition was increased"]; People v. Methey (1991) 227 Cal.App.3d 349, 358 [detainee was carrying a "pry bar or billy club"]; U.S. v. Hartz (9th Cir. 2006) 458 F.3d 1011, 1018 [the officer "had already observed a knife, a gun, and ammunition in the truck"].

114. See People v. Lafitte (1989) 211 Cal.App.3d 1429, 1433, fn.5 [“Just how far this rule extends is unclear. As Justice Brennan pointed out, a baseball bat or hammer can be a lethal weapon; does this mean a policeman could reasonably suspect a person is dangerous because these items are observed in his or her car?”].
115. People v. Avila (1997) 58 Cal.App.4th 1069, 1073. ALSO SEE People v. Lafitte (1989) 211 Cal.App.3d 1429, 1433 [knife “resting on the open glove box door, with the handle extended over the edge toward the driver’s seat”].
116. See People v. Michael S. (1983) 141 Cal.App.3d 814, 817 [“The officers were here faced with a suspect who was nearly six feet tall and weighed approximately 190 pounds.”]; People v. Methey (1991) 227 Cal.App.3d 349, 352 [“He was larger than [the officer]”]; U.S. v. Michelletti (5th Cir. 1994) 13 F.3d 838, 842 [“Michelletti, a large and imposing man”].
117. See People v. Limon (1993) 17 Cal.App.4th 524, 531 [“[The officers] were outnumbered not only by the three suspects but also by the other people in the immediate area” which was “known for gang activity, violence, and drugs.”]; People v. Stephen L. (1984) 162 Cal.App.3d 257; People v. Samples (1996) 48 Cal.App.4th 1197, 1210; People v. Suennen (1980) 114 Cal.App.3d 192, 199 [“two officers did not outnumber the suspects”]; People v. Remiro (1979) 89 Cal.App.3d 809, 829; People v. Smith (1973) 30 Cal.App.3d 277, 280 [“there were four adult males . . . and only two police officers”]; People v. Wigginton (1973) 35 Cal.App.3d 732, 737 [the officer was “guarding five male adults”]; People v. Hubbard (1970) 9 Cal.App.3d 827, 830; People v. Satchell (1978) 81 Cal.App.3d 347, 354 [“One of the officers would soon be preoccupied with paperwork, which left only one officer to guard against possible violence from three separate sources.”]; People v. Allen (1975) 50 Cal.App.3d 896, 901 [“he was alone”]; People v. Barnes (1983) 141 Cal.App.3d 854, 856; U.S. v. Tharpe (5th Cir. 1976) 536 F.2d 1098, 1100 [“[The officer] was alone, at night, in a poorly lit area, facing three men who had evidently been drinking.”].
118. See People v. Woods (1970) 6 Cal.App.3d 832, 837 [suspect in a “shots fired” call had “one of his hands in a jacket pocket”]; People v. Wigginton (1973) 35 Cal.App.3d 732, 737-8 [detainee’s “right hand remain[ed] near the right hand pocket of his jacket”]; People v. Glenn R. (1970) 7 Cal.App.3d 558, 561 [detainee “kept his right hand in his jacket pocket in such a manner as to lead any reasonable person to believe that he was attempting to conceal something from view”]; U.S. v. Michelletti (5th Cir. 1994) 13 F.3d 838, 842 [the detainee kept “his right hand concealed precisely where a weapon could be located”].
119. See People v. Avila (1997) 58 Cal.App.4th 1069, 1074 [[D]efendant immediately assumed a standard search position.”]; U.S. v. Rice (10th Cir. 2007) 483 F.3d 1079, 1085 [“Rice immediately assumed the position for a weapons search upon exiting the car.”].
120. See People v. Tobin (1990) 219 Cal.App.3d 634, 641 [“The appellate courts of this state have long recognized that the need to transport a person in a police vehicle in itself is an exigency which justifies a pat search for weapons.”]; People v. Ramos (1972) 26 Cal.App.3d 108, 112 [“[P]olicemen have been attacked and killed by back seat passengers with concealed guns and knives.”]; U.S. v. Madrid (10th Cir. 1994) 30 F.3d 1269, 1277.
121. See People v. Scott (1976) 16 Cal.3d 242.
122. U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 866. ALSO SEE Terry v. Ohio (1968) 392 U.S.1 28 [“The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all.”]; U.S. v. Hanlon (8th Cir. 2005) 401 F.3d 926, 930 [“Because safety is the sole justification for a pat-down search for weapons, only searches reasonably designed to discover concealed weapons are permissible.”]; People v. Garcia (1969) 274 Cal.App.2d 100, 106-7 [“[T]he manner of conducting an otherwise justified precautionary search is of vital importance.”]; Byrd v. Superior Court (1968) 268 Cal.App.2d 495, 496 [“The manner of the search for weapons, however, is important.”].
123. Terry v. Ohio (1968) 392 U.S.1 29.
124. See People v. Atmore (1970) 13 Cal.App.3d 244, 248.
125. See New York v. Quarles (1984) 467 US 649, 658-9; People v. Simpson (1998) 65 Cal.App.4th 854, 861, fn.3 [“It is settled that the public safety exception applies even when police questioning is designed solely to protect the lives of police officers and the lives of other are not at stake.”]; U.S. v. Carrillo (9th Cir. 1994) 16 F.3d 1046, 1049; People v. Cressy (1996) 47 Cal.App.4th 981, 986-8. ALSO SEE Johnetta J. v. Municipal Court (1990) 218 Cal.App.3d 1255, 1278 [“[T]he governmental interests behind [the mandatory AIDS testing procedure] including the assaulted officer’s fear that he or she has in fact been infected, outweighs the psychological impact of the assailant’s receipt of a positive test for HIV.”]; Love v. Superior Court (1990) 226 Cal.App.3d 736, 746.
126. NOTE: If the syringe was not in a container that met federal and state standards, the detainee would be arrestable for possession of drug paraphernalia, in which case officers could dispense with the pat search procedure and conduct a full search incident to the arrest. See Health & Safety Code § 11364(b).
127. Terry v. Ohio (1968) 392 U.S. 1, 16.

128. Terry v. Ohio (1968) 392 U.S. 1, 17, fn.13. ALSO SEE People v. Avila (1997) 58 Cal.App.4th 1069, 1075, fn.4 [“It is not unreasonable to pat the legs when searching for a concealed weapon.”].
129. (1987) 194 Cal.App.3d 975, 985. ALSO SEE U.S. v. Yamba (3d Cir. 2007) F.3d [2007 WL 3054387] [“[The officer] is allowed to slide or manipulate an object in a suspect’s pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon.”]. NOTE: The need to manipulate an object is especially strong if the detainee’s clothes were so rigid that it was difficult to determine the nature of the object by feeling the outside of the clothes. See People v. Watson (1970) 12 Cal.App.3d 130, 135 [“The leather-type material of the jacket would make it difficult to feel the outline of the object”]; People v. Allen (1975) 50 Cal.App.3d 896, 902 [“[T]he heavy levis worn by the defendant made it difficult for the officer to feel the outline of the hard object and prevented him from immediately determining what it actually was.”].
130. See Michigan v. Long (1983) 463 U.S. 1032, 1050; People v. Ritter (1997) 54 Cal.App.4th 274, 280 [fanny pack]; U.S. v. Vaughan (9th Cir. 1983) 718 F.2d 332, 335 [“The briefcase was soft and thin. Any weapons could have been felt through the cover.”]; U.S. v. Barlin (2nd Cir. 1982) 686 F.2d 81, 87 [“a lady’s handbag is the most likely place for a woman to conceal a weapon.”].
131. (1974) 12 Cal.3d 731, 747. COMPARE Amacher v. Superior Court (1969) 1 Cal.App.3d 150, 154 [insufficient reason to open a cigarette package]; People v. John C. (1978) 80 Cal.App.3d 814, 820 [insufficient reason to open a cigarette package].
132. See Michigan v. Long (1983) 463 U.S. 1032, 1048 [“[S]uspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed.”]; People v. Ritter (1997) 54 Cal.App.4th 274, 280 [“the deputy’s prudence should not be faulted for a failure to pat down the fanny pack while defendant was wearing it.”].
133. See People v. Lennies H. (2005) 126 Cal.App.4th 1232, 1237 [“As a general rule, an officer may not search a suspect’s pockets during a patdown unless he or she encounters an object there that feels like a weapon.”]; People v. Mosher (1969) 1 Cal.3d 379, 394 [“Unless the officer feels an object which a prudent man could believe was an object usable as an instrument of assault, the officer may not remove the object from the inside of the suspect’s clothing, require the suspect to take the object out of his pocket, or demand that the suspect empty his pockets.”]; People v. Britton (1968) 264 Cal.App.2d 711, 717 [“By requiring defendant to empty his pockets . . . the search exceeded the bounds of a permissible ‘frisk.’”]; People v. Aviles (1971) 21 Cal.App.3d 230, 234 [“[The officer] flipped open appellant’s coat: ‘I didn’t know what I was going to find. I knew he put something in there but I didn’t know what.’ The search clearly was exploratory, and not justified under the law.”]; Byrd v. Superior Court (1968) 268 Cal.App.2d 495, 496 [“[The officer] grabbed petitioner’s sweater and pulled it up.”]. NOTE: The courts are aware that patdowns are “not an infallible method of locating concealed weapons,” but they are sufficiently trustworthy to justify the intrusion. People v. Carlos M. (1990) 220 Cal.App.3d 372, 385; Minnesota v. Dickerson (1993) 508 U.S. 366, 376.
134. See Minnesota v. Dickerson (1993) 508 U.S. 366 [“[T]he officer’s continued exploration of respondent’s pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search, the protection of the police officer and others nearby.”]; People v. Valdez (1987) 196 Cal.App.3d 799, 804; People v. John C. (1978) 80 Cal.App.3d 814, 820; People v. Dickey (1994) 21 Cal.App.4th 952.
135. See People v. Avila (1997) 58 Cal.App.4th 1069, 1075 [“Officer Jones felt a bulky and somewhat hard object, and did not know if it was a weapon or not. He then asked defendant what the object was, without removing it. Defendant told the officer that it was ‘meth’”]. COMPARE People v. Valdez (1987) 196 Cal.App.3d 799, 807 [“The question [‘What is this?’] was not justified by the pat-search for weapons since [the officer] knew it was not a weapon.”]. ALSO SEE Terry v. Ohio (1968) 392 U.S. 1, 33 (conc. opn. by Harlan, J.) [“There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.”].
136. See People v. Limon (1993) 17 Cal.App.4th 524, 536 [“The police are not required to grab blindly after a frisk reveals a possible weapon.”].
137. See People v. Watson (1970) 12 Cal.App.3d 130, 135 [“Where it is found that an object feels reasonably like a knife, gun or club to the searcher, he may properly withdraw the item from the clothing of the suspect.”]; People v. Collins (1970) 1 Cal.3d 658, 662 [officers may remove an object only if “he discovers specific and articulable facts reasonably supporting his suspicion.”]
138. See Michigan v. Long (1983) 463 U.S. 1032, 1052 [“[W]e have not required that officers adopt alternate means to ensure their safety in order to avoid the intrusion involved in a Terry encounter.”]; People v. Lafitte (1989) 211 Cal.App.3d 1429, 1433; People v. Ritter (1997) 54 Cal.App.4th 274, 280.

139. See People v. Thurman (1989) 209 Cal.App.3d 817, 826 [officers may expand the search if "an outside clothing search reveals the presence of an object of a size and density that reasonably suggests the object might be a weapon"]; People v. Rosales (1989) 211 Cal.App.3d 325, 329 ["A police officer is entitled to reach inside the suspect's clothing and remove objects therefrom only if the officer has reason to believe the object is usable as a weapon."].
140. People v. Mosher (1969) 1 Cal.3d 379, 393. ALSO SEE People v. Thurman (1989) 209 Cal.App.3d 817, 826 ["We can impose a condition that an officer's belief that the object is a weapon be reasonably grounded and not a mere subterfuge for a random search."].
141. See People v. Willie L. (1976) 56 Cal.App.3d 256, 262 ["The only logical reason a person would place items in boots is for concealment; it is not unusual for weapons to be concealed there."].
142. See People v. Watson (1970) 12 Cal.App.3d 130, 135 ["Where it is found that an object feels reasonably like a knife, gun or club to the searcher, he may properly withdraw the item from the clothing of the suspect."].
143. People v. Limon (1993) 17 Cal.App.4th 524, 535-6. ALSO SEE U.S. v. Hanlon (8th Cir. 2005) 401 F.3d 926, 930 ["small object" that "could have been a pocketknife"]; People v. Wright (1988) 206 Cal.App.3d 1107, 1111 ["[It] felt like it was a knife." Ten baggies of methamphetamines]; People v. Hana (1970) 7 Cal.App.3d 664, 670 ["[It] "felt like a pocket knife." Harmonica].
144. People v. Orozco (1981) 114 Cal.App.3d 435, 445.
145. See People v. Miles (1987) 196 Cal.App.3d 612, 618. ALSO SEE U.S. v. Brown (7th Cir. 1999) 188 F.3d 860, 866 ["Even if [the officer] would have been more reasonable to think the hard object was drugs rather than a gun, that does not mean he would have been unreasonable to conclude that it was a gun."].
146. People v. Mosher (1969) 1 Cal.3d 379, 393.
147. People v. Donald L. (1978) 81 Cal.App.3d 770, 774.
148. People v. Watson (1970) 12 Cal.App.3d 130, 135.
149. U.S. v. Salas (9th Cir. 1989) 879 F.2d 530, 533.
150. U.S. v. Mattarolo (9th Cir. 1999) 191 F.3d 1082, 1088.
151. See People v. Snyder (1992) 11 Cal.App.4th 389, 393 ["A full liquor bottle carries significant weight and the neck of the bottle may serve as a handle, two characteristics of a club."]; People v. Autry (1991) 232 Cal.App.3d 365, 369 ["It hardly takes the imagination of Alfred Hitchcock to think up any number of nasty ways a hypodermic needle and syringe can do grievous injury, at least in close combat."]; People v. Franklin (1985) 171 Cal.App.3d 627, 636 ["There is case authority to the effect that a shotgun shell could be used as a detonator. As a consequence, the shotgun shell may quality as a [weapon]."]; People v. Atmore (1970) 13 Cal.App.3d 244, 247 [shotgun shell]; People v. Anthony (1970) 7 Cal.App.3d 751, 763 [bullets].
152. See People v. Collins (1970) 1 Cal.3d 658, 663; People v. Brisendine (1975) 13 Cal.3d 528, 543-4; People v. Mack (1977) 66 Cal.App.3d 839, 849.
153. People v. Collins (1970) 1 Cal.3d 658, 663. ALSO SEE People v. Brisendine (1975) 13 Cal.3d 528, 543 ["Nor can the People's burden be discharged by the assertion that the bottle and envelopes might possibly contain unusual or atypical weapons."].
154. (1976) 16 Cal.3d 868, 876.
155. See People v. Limon (1993) 17 Cal.App.4th 524, 535 ["When a police officer's frisk of a detainee reveals a hard object that might be a weapon, the officer is justified in removing the object into view."]; People v. Allen (1975) 50 Cal.App.3d 896, 902 ["Any hard object which feels like a weapon may be removed from pockets of clothing."]; People v. Mack (1977) 66 Cal.App.3d 839, 849; People v. Brown (1989) 213 Cal.App.3d 187, 192 ["they were hard objects which he was justified in removing"]. COMPARE U.S. v. Holmes (D.C. Cir. 2007) F.3d [2007 WL 3071629] [But there is no claim here that the keys constituted contraband, and the officer had no right to take them from Holmes's pocket during the patdown."].
156. People v. Allen (1975) 50 Cal.App.3d 896, 902. ALSO SEE People v. Brown (1989) 213 Cal.App.3d 187, 192 ["hard object"]; Amacher v. Superior Court (1969) 1 Cal.App.3d 150, 152 ["a hard object in a front jacket pocket [cigarette package].
157. People v. Mack (1977) 66 Cal.App.3d 839, 851.
158. People v. Roach (1971) 15 Cal.App.3d 628, 633.
159. People v. Lacey (1973) 30 Cal.App.3d 170, 176.
160. People v. Willie L. (1976) 56 Cal.App.3d 256, 262.
161. People v. Hill (1974) 12 Cal.3d 731, 747.
162. See People v. Collins (1970) 1 Cal.3d 658, 663 ["[A]n officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club must be able to point to specific and articulable facts which reasonably support

a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down."].

163. People v. Collins (1970) 1 Cal.3d 658, 662. ALSO SEE People v. Dickey (1994) 21 Cal.App.4th 952, 957.
164. People v. Hana (1970) 7 Cal.App.3d 664.
165. People v. Britton (1968) 264 Cal.App.2d 711.
166. People v. Leib (1976) 16 Cal.3d 869.
167. Kaplan v. Superior Court (1971) 6 Cal.3d 150.
168. See Minnesota v. Dickerson (1993) 508 U.S. 366, 376 ["[T]he Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures."]; People v. Lennies H. (2005) 126 Cal.App.4th 1232, 1237 ["[U]nder what has been termed the 'plain-touch' exception to the warrant requirement, the officer may seize an object that is not a weapon if its incriminating character is immediately apparent."]; People v. Avila (1997) 58 Cal.App.4th 1069, 1075 ["However, if contraband is found while performing a permissible Terry search, the officer cannot be expected to ignore that contraband."]; People v. Armenta (1968) 268 Cal.App.2d 248, 253 ["The officer was not required to blind himself to the heroin simply because it was disconnected from the initial purpose of the search."]. ALSO SEE Arizona v. Hicks (1987) 480 U.S. 321, 326.
169. See People v. Dibb (1995) 37 Cal.App.4th 832, 837; People v. Valdez (1987) 196 Cal.App.3d 799, 806; People v. Holt (1989) 212 Cal.App.3d 1200, 1204 ["[A]n officer's entry into a person's pocket for narcotics can be justified only if the officer had probable cause to arrest the defendant for possession of narcotics before the entry into the pocket."].
170. (1989) 209 Cal.App.3d 817, 826. ALSO SEE U.S. v. Mattarolo (9th Cir. 1999) 191 F.3d 1082, 1088 [officer was "alerted immediately to the presence of drugs by the familiar sensation of plastic sliding against a granular substance"].
171. People v. Dibb (1995) 37 Cal.App.4th 832, 836-7. ALSO SEE U.S. v. Yamba (3d Cir. 2007) F.3d [2007 WL 3054387] [the officer felt "a plastic bag containing a soft, spongy-like substance" plus some "small buds and seeds"].
172. (1995) 37 Cal.App.4th 832.
173. (1987) 194 Cal.App.3d 975.
174. (1987) 196 Cal.App.3d 799, 806. ALSO SEE Kaplan v. Superior Court (1971) 6 Cal.3d 150, 153 [officer merely "had an idea" the objects he felt were pills]; Remers v. Superior Court (1970) 2 Cal.3d 659, 663-4 [possession of a foil-wrapped package in high-drug area did not establish probable cause]; People v. Holt (1989) 212 Cal.App.3d 1200, 1206-7 [possession of foil-wrapped container]; People v. Nonnette (1990) 221 Cal.App.3d 659, 666-8 [baggies].
175. See People v. Donald L. (1978) 81 Cal.App.3d 770, 775 [the officer "could have reasonably believed that the assorted objects of jewelry, including women's jewelry, were probably stolen."]; U.S. v. Bustos-Torres (8th Cir. 2004) 396 F.3d 935, 944 ["[W]e do not doubt the plain-touch doctrine extends to the lawful discovery of any incriminating evidence, not just contraband such as drugs."]; People v. Chavers (1983) 33 Cal.3d 462, 471 ["[T]he knowledge [gained by the officer through sense of touch] was as meaningful and accurate as if the container had been transparent and he had seen the gun within the container."].
176. (2005) 126 Cal.App.4th 1232.
177. (8th Cir. 2005) 396 F.3d 935. COMPARE U.S. v. Garcia (6th Cir. 2007) F.3d [2007 WL 2254435] [officers lacked probable cause to believe a pager was evidence].
178. See Adams v. Williams (1972) 407 U.S. 143, 147-9 [based on reliable informant's tip and some corroboration, the officer had probable cause to believe the suspect was carrying a concealed gun]; U.S. v. Orman (9th Cir. 2007) 486 F.3d 1170, 1172 [officer had probable cause because the detainee admitted he was carrying a gun].
179. People v. Superior Court (Holmes) (1971) 15 Cal.App.3d 806, 813.
180. People v. Todd (1969) 2 Cal.App.3d 389, 393-4.
181. People v. Atmore (1970) 13 Cal.App.3d 244, 248.
182. People v. Rosales (1989) 211 Cal.App.3d 325, 330.
183. People v. Woods (1970) 6 Cal.App.3d 832, 838.
184. People v. Ritter (1997) 54 Cal.App.4th 274, 280.
185. See People v. Jonathan M. (1981) 117 Cal.App.3d 530, 536 ["Once there is probable cause for an arrest it is immaterial that the search preceded the arrest."]; People v. Limon (1993) 17 Cal.App.4th 524, 538 ["An officer with probable cause to arrest can search incident to the arrest before making the arrest."].
186. See People v. Lopez (2004) 119 Cal.App.4th 132, 136 [suspect was "lawfully arrested for violating section 148" mainly because he "refused to keep his hands visible, and refused to submit to a patdown."].

187. (2003) 111 Cal.App.4th 1464, 1472.

Contributors and Attributions

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6.3: Searches Incident to Arrest

Every arrest must be presumed to present a risk of danger to the arresting officer.[1]

Taking a suspect into custody is an extremely "tense and risky undertaking." [2] This is especially true when the crime is a felony because many of today's felons are not only violent and well armed, they are often desperate. After all, they know they may be facing a lengthy prison term thanks to the various sentencing enhancements for felonies in California, including the three strikes law.

But even when the crime was not a high-stakes felony, there is always a threat of violence because people who are about to lose their freedom—even for a short time—may act impulsively and "attempt actions which are unlikely to succeed."[3] Taking note of this, the United States Supreme Court pointed out that "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."[4] Or, as the Ninth Circuit aptly observed, "It is a difficult exercise at best to predict a criminal suspect's next move."[5]

To help reduce these dangers, and also to make it harder for arrestees to destroy evidence, the U.S. Supreme Court ruled that officers who have made a custodial arrest may, as a matter of routine, conduct a type of search known as a search incident to arrest. Said the Court:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search.[6]

Writing on this subject a few years ago, we happily mentioned in passing that this was an area of the law in which the courts had provided officers and prosecutors with rules that were easy to understand and apply. We had no idea that a sudden and dramatic upheaval was looming.

From Clarity To Perplexity

Because the circumstances surrounding most arrests are fluid, unpredictable, and dangerous, the courts have long understood that the rules pertaining to searches incident to arrest needed to be "easily applied and predictably enforced."[7] And so, in 1969 the United States Supreme Court ruled in the landmark case of *Chimel v. California* that officers who have made a custodial arrest may, as a matter of routine, search those places and things over which the suspect had "immediate control." [8]

The Court also broadly defined the term "immediate control" to encompass "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." [9] (Today, this searchable area has become popularly known as "grabbing space" or "grabbing radius."[10]) In explaining why it decided not to restrict these searches to explorations of the arrestee's person, the Court pointed out that "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested."

In the following years, many of the lower courts reached the conclusion that it would be unwise to strictly interpret the terms "immediate control" and "grabbing" space to cover only those places and things to which the arrestee had actual control at the time of the search. This was because such an interpretation would produce two troublesome situations. First, an arrestee who did not want officers to search a place or thing in his immediate control when officers sought to arrest him would be given a powerful incentive to break away from the officers and separate himself from it, even a short distance. Second, officers who have arrested a suspect will often have significant safety reasons for restraining the arrestee or moving him a short distance away before searching those things that were under his control when he was arrested. For this reason, the courts would consistently rule that it would be imprudent to require that officers choose between conducting a search and taking reasonable safety precautions. Thus, comments such as the following would regularly appear in the cases:

- "[I]t does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures."[11]
- "[I]t makes no sense to condition a search incident to arrest upon the willingness of police to remain in harms way while conducting it."[12]
- "[I]f the police could lawfully have searched the defendant's grabbing radius at the moment of arrest, he has no legitimate complaint if, the better to protect themselves from him, they first put him outside that radius."[13]

But one type of arrest situation remained problematic: searches of vehicles incident to the arrest of the driver or other occupant. The problem was that these arrestees were almost always restrained in some manner outside the vehicle before the search began; e.g., handcuffed, surrounded by officers, locked in a patrol car. Consequently, some courts would rule that officers could not search the passenger compartment in these situations, while others would rule they could because, again, if something could have been searched legally one minute, it seems irrational to rule it could not be searched a few seconds later because the officers had taken reasonable safety precautions.

This dilemma was finally resolved by the United States Supreme Court in 1981. In its landmark decision in the case of *New York v. Belton*,14 the Court noted that these vehicle-search cases had become "problematic" because the lower courts had failed to provide officers with "a set of rules which, in most instances, makes it possible to reach a correct determination" of what places and things they may search. So, after noting that weapons and evidence inside "the relatively narrow compass of the passenger compartment" of an automobile are "in fact generally, even if not inevitably" within the arrestee's reach at some point, the Court announced the following "bright line" rule: Officers who have made a custodial arrest of an occupant of a vehicle may search the passenger compartment—regardless of whether the arrestee had physical access to the vehicle when the search occurred.

Consequently, it soon became standard police procedure throughout the country that if officers could conduct the search immediately after the arrest, they should do so. But if there were matters that needed their attention beforehand, they could address them so long as there was no unnecessary delay. Here are two examples of circumstances that were found to justify searches of places and things that were not within the arrestee's immediate control at the time of the search:

- Officers delayed searching the arrestee's car until it had been towed from the scene of the arrest because "gunfire and subsequent crash of [their] car had attracted a crowd so large that extra policemen had to be summoned [to control] the mob that was forming."15
- Officers delayed searching the arrestee's car because they were dispatched to a priority auto accident.16

In contrast, a search would not be deemed contemporaneous with an arrest if the delay was not reasonably necessary; e.g., officers delayed the search for 30-45 minutes in order to question the arrestee.17

***Arizona v. Gant:* Back to uncertainty**

For almost 30 years, Chimel and Belton provided officers and the courts with a coherent set of rules that clearly defined the parameters of these searches. But that changed in 2009 when a bare majority of the Supreme Court announced its opinion in the case of *Arizona v. Gant*. (Although Gant technically upended only those rules pertaining to vehicle searches, as we will discuss shortly, it effectively dismantled the entire structure of this area of the law and left it in a "confused and unstable" state.18) Stripped of all its verbiage and dissembling (and there was a lot of both), the Court's decision in Gant prohibited all vehicle searches unless they occurred at a time when the arrestee was both unrestrained and sufficiently close to the vehicle that he might have been able to reach inside.

Because the Gant justices were presumably aware that officers never turn their backs on unrestrained arrestees—and not under any circumstances while preoccupied with a search—they must also have been aware that their decision would effectively abolish Belton searches and render Belton a nullity. And yet, for some curious reason they felt compelled to engage in blatant subterfuge and claim they had no intention of overturning Belton, even though they must have known that no one would believe them.19 As Justice Alito observed in his dissenting opinion: "Although the Court refuses to acknowledge that it is overruling Belton," there "can be no doubt that it does so."

While there is much to criticize about Gant, there is no escaping the fact that Belton and Chimel were occasionally producing strange results that were taxing the credibility of the courts. For instance, judges would sometimes uphold searches of places and things that were nowhere near the arrestee when the search occurred, so long as there was a theoretical—sometimes fanciful—possibility that he might have been able to reach it. In one such case, *United States v. Tejada*, the court ruled that although the arrestee was "[h]andcuffed, lying face down on the floor and surrounded by police," and although it was unlikely that he would be able to make a "successful lunge" at anything, a search of the room in which he was arrested was warranted because the officers "did not know how strong he was, and he seemed desperate." 20

As a result of such rulings, some courts started to express concern that this area of the law had become untethered. One of them pointed out that "where there is no threat to the officers because the suspect has been immobilized, removed, and no one else is

present, it makes no sense that the place he was removed from remains subject to search merely because he was previously there."[21] Another observed that, "[a]s with most other legal doctrines, that of Chimel can be reduced to logical absurdity if one is so disposed."[22]

True enough. But instead of fixing this particular problem, the Court in Gant effectively overturned or at least cast into doubt a wealth of thoughtful legal analysis—spanning nearly three decades—in which the lower courts had sought to balance the safety needs of officers and the privacy rights of arrestees.

Gant's unresolved issues

Before we discuss the law as it exists today in the wake of Gant, it is necessary to address three issues that the Court neglected to address, issues that cannot be ignored in this article because they will be critical in determining the lawfulness of all four types of searches incident to arrest.

IS GANT LIMITED TO VEHICLE SEARCHES?

Although Gant technically restricts only vehicle searches incident to the arrest of an occupant, it is hard to avoid the conclusion that it will be interpreted as restricting all of the other types of searches incident to arrest, such as containers near the arrestee and homes in which the arrest occurred.[23] That is because the privacy expectations in homes and many closed containers are significantly greater than those in the passenger compartments of cars.[24] To put it another way, if something in a car cannot be searched because it was inaccessible to the arrestee, it is difficult to imagine a court ruling that a similarly inaccessible item could be searched if it were located in the arrestee's home.[25] Again quoting Justice Alito, "[T]here is no logical reason why the same rule [that applied to the arrests of vehicle occupants] should not apply to all arrestees."

Furthermore, the Court in Gant phrased its ruling in sweeping terms that are flatly inconsistent with such a restricted interpretation. Here is an example: *If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, [the] justifications for the search-incident-toarrest exception are absent and the rule does not apply*. In fact, there is already a California case— *People v. Leal*—in which the California Attorney General conceded that Gant applies equally to searches of homes.[26] (In another case, it was argued that Gant even applied to pat searches; i.e., that officers should not be permitted to pat down any part of the suspect's body unless they could prove it was immediately accessible to the arrestee. This silly argument was, however, rejected.[27])

HOW MUCH ACCESS IS REQUIRED

Because officers need to have some idea of how much access is necessary before they can search an item near the arrestee, it might be assumed that the Gant Court would have provided some guidance. Instead, in the span of just a few pages it announced a test that was subsequently rendered unintelligible by a second test. And then it propounded a third test that differed somewhat from the first two. Specifically, at one point it said the test is access; i.e., a search is permitted if the arrestee had "access" to his car. Then it changed its mind and announced a more restrictive test: a search is permitted only if the arrestee was within actual "reaching distance" of the passenger compartment. And then it proclaimed that access and reaching distance were not enough—that the arrestee must also have been unsecured, which presumably meant that he must not have been handcuffed and otherwise restrained.

One of the first courts that tried to make sense of this gibberish was the Third Circuit which, having given up in its attempt to discern the correct test from the Court's words, was forced to resort to a "close reading" of the text. And after having done so, it formulated the following hypothesis:

> [T]he Court's reference to a suspect being "unsecured" and being "within reaching distance" of a vehicle are two ways of describing a single standard rather than independent prongs of a two-part test. In later formulations of its holding, the Gant Court omitted any reference to whether Gant was secured or unsecured, and looked instead simply to Gant's ability to access his vehicle.[28]

Thus, the court interpreted Gant as prohibiting searches of places and things if there was "no reasonable possibility" the arrestee might access it.

HOW STRICTLY WILL GANT BE INTERPRETED?

The last—and most uncertain—question is whether the courts will engage in "an aggressive reading of Gant"[29] and ignore the large body of law—some of it from the Supreme Court itself—in which searches were upheld when they were "roughly" or

"substantially" contemporaneous with the arrest.[30]

A related question is whether the courts will invalidate searches because there was some uncertainty as to whether the arrestee did, in fact, have access. In addressing this issue, it is hoped that the courts will take into account the D.C. Circuit's observation that, because custodial arrests are dangerous, "the police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[31] It should be noted that three courts have already refused to apply Gant in a hypertechnical manner, having ruled that it did not prohibit a vehicle search when, although the arrestee had been restrained, there were other suspects who had immediate access to the vehicle.[32]

One last thing: On November 1, 2010, the Supreme Court decided to review the case of Davis v. U.S. in which it is expected to determine whether Gant must be applied retroactively.

Requirements

Having reviewed the state of the law, we will now examine the requirements for conducting these types of searches. Although there are four distinct searches incident to arrest, they all have the same basic requirements, as follows:

1. Lawful arrest: The suspect must have been lawfully arrested.
2. Custodial arrest: The arrest must have been custodial in nature.
3. Contemporaneous search: The search must have been contemporaneous with the arrest.

It should be noted that the first two requirements were not affected by Gant, which means they are fairly easy to understand. It was the third requirement—contemporaneousness—that is uncertain.

Lawful arrest

In the context of searches incident to arrest, an arrest is deemed "lawful" if officers had probable cause to arrest the suspect.[33] This rule has several practical consequences.

SEARCH BEFORE ARREST

If officers had probable cause, some searches (especially pat downs) may be deemed incident to an arrest even though the suspect had not yet been arrested.[34] As the Court of Appeal explained, "Once there is probable cause for an arrest it is immaterial that the search preceded the arrest."[35]

OFFICERS UNSURE ABOUT PROBABLE CAUSE

If a court determines that the officers had probable cause, the "lawful arrest" requirement is satisfied even if they were unsure that it existed. "It is not essential," said the court in People v. Le, "that the arresting officer at the time of the arrest or search have a subjective belief that the arrestee is guilty of a particular crime . . . so long as the objective facts, when fully determined, afford probable cause."[36]

For example, in *People v. Loudermilk* [37] two Sonoma County sheriff 's deputies detained a hitchhiker at about 4 A.M. because he matched the description of a man who had shot another man about an hour earlier in nearby Healdsburg. When the hitchhiker Loudermilk, claimed he had no ID, one of the deputies started searching his wallet and, just as he found some, Loudermilk spontaneously exclaimed, "I shot him. Something went wrong in my head." Loudermilk contended that his admission should have been suppressed because it was prompted by the search of his wallet which, he contended, did not qualify as a search incident to arrest because one of the deputies testified he didn't think he had probable cause to arrest Loudermilk for the shooting. The court said it didn't matter what the deputy thought—what counts is what the court thought. And it thought the deputy had it.

ARREST FOR "WRONG" CRIME

If a court rules that officers arrested the suspect for a crime that was not supported by probable cause, the arrest will nevertheless be deemed "lawful" if there was probable cause to arrest him for some other crime.[38] As the Tenth Circuit put it, "[T]he probable cause inquiry is not restricted to a particular offense, but rather requires merely that officers had reason to believe that a crime—any crime—occurred."[39]

For example, in In *re Donald L.*[40] a Martinez police officer detained a minor, Donald, at about 9 P.M. because he resembled a person who was suspected of having just cased a house for a burglary. The officer also noticed that Donald was carrying a "club type" instrument, so he patted him down and discovered rings, watches, and necklaces. Thinking it was loot from a recent break-in,

the officer arrested him for burglary. Although it was later determined that the jewelry had, in fact, just been stolen from a nearby home, Donald contended that the search could not be upheld as incident to his arrest because the officer did not have probable cause to arrest him for burglary, at least before the jewelry was discovered. Even if that were true, said the court, it wouldn't matter because the officer "had probable cause to arrest [Donald] for unlawful possession of a 'billy' or 'blackjack.'"

Custodial arrest

The second requirement—that the arrest must have been "custodial"—means that the officers must have decided to transport the arrestee to jail, a police station, or other place of confinement or treatment; i.e., he will not be cited and released. This requirement was imposed because the main justification for these searches is the increased danger that necessarily results from the "extended exposure which follows the taking of a suspect into custody" and the "attendant proximity, stress and uncertainty."41

For these reasons, an arrest will be deemed custodial regardless of whether the crime was "minor,"42 or that officers were aware that the suspect would immediately post bail or would otherwise be released after a short stay.43 For example, in *People v. Sanchez* 44 the defendant argued that a search of his pocket was unlawful because he had been arrested for merely being drunk in public. In summarily rejecting the argument, the court pointed out that "the officer testified he fully intended to book appellant into jail; he did not plan to release appellant."

Because an arrest becomes "custodial" when officers decide to transport the arrestee, a search will also be permitted if officers had decided to take him to a detox facility, mental health facility, or hospital.45 Similarly, the arrest of a minor is custodial if he will be taken to school, home, a curfew center; or if he will be taken into protective custody.46

On the other hand, an arrest will not be deemed custodial if officers had decided not to transport the suspect or if they had not yet decided what to do. For example, in *U.S. v. Parr* 47 an officer in Portland, Oregon searched Parr after learning he was driving on a suspended license. Although the officer found stolen mail in the course of the search, and although he also had probable cause to arrest Parr for driving on a suspended license, he released him, having decided to submit the case to prosecutors. After Parr was charged with possessing stolen mail, he argued the search could not be upheld as a search incident to arrest because the officer did not take him into custody and, moreover, there was no evidence to suggest that he ever intended to do so. The court agreed, saying "it is not clear that the police action taken here is the type of 'custodial arrest' necessary to support a search incident to arrest."

It should be noted that several California statutes require or authorize a custodial arrest depending on the nature of the crime and other circumstances. For example, the law requires that officers book every person who was arrested for a felony or certain misdemeanors such as DUI, and misdemeanors that were reasonably likely to continue.48 What if officers transported the arrestee even though they were not authorized to do so by statute? In the case of *Atwater v. City of Lago Vista* the U.S. Supreme Court ruled that such an arrest is nevertheless "custodial" because it is the decision to transport the arrestee—not the statutory authority to do so—that justifies the search.49

For example, in *People v. McKay* 50 a Los Angeles County sheriff 's deputy stopped McKay for riding a bicycle in the wrong direction on a street. Although McKay had verbally identified himself and also provided his date of birth, he had no ID in his possession so the deputy decided to take him into custody. He then conducted a search incident to the arrest and found a baggie of methamphetamine in one of McKay's socks. On appeal to the California Supreme Court, McKay argued that the search could not qualify as a search incident to arrest because he had, in fact, satisfactorily identified himself and, therefore, the officer was required by state law to cite and release him. But the court ruled the search was lawful, saying, "[S]o long as the officer has probable cause to believe that an individual committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."

This should not be interpreted to mean that the courts are encouraging officers to transport arrestees in violation of California state law. On the contrary, the California Supreme Court has said "we in no way countenance violations of state arrest procedure," 51 and the United States Supreme Court noted that such conduct may demonstrate "extremely poor judgment." 52

Contemporaneous Search

The third requirement for a search incident to arrest is that the arrest and search must have been contemporaneous. Although the word "contemporaneous" in common usage refers to situations in which two acts occur at about the same time, the courts have consistently ruled that the circumstances surrounding most arrests are much too erratic and unpredictable to require a strict

succession of events. Instead, the United States Supreme Court ruled on two occasions that the arrest and search need only be "substantially" contemporaneous.[53]

And yet, as noted earlier, the Court in Gant seemed to downplay the importance of temporal proximity as it looked mainly to the physical proximity between the unrestrained arrestee and the place or thing that was searched. So the question arises: How will the lower courts resolve the apparent inconsistency between the established and somewhat-flexible requirement of "substantial" contemporaneousness and the seemingly rigid test imposed in Gant? Here are some thoughts.

SUBSTANTIAL PHYSICAL PROXIMITY

In determining whether an arrestee had sufficient access to the place or thing that was searched, it seems likely that the courts will continue to apply the following rules which, apart from making good sense, are consistent with the Court's "substantiality" principle:

- LUNGING DISTANCE VS. GRABBING DISTANCE: While the area that is accessible to an arrestee is sometimes called "grabbing distance,"[54] it should not be limited to places and things that were literally within his "wingspan."[55] Instead, it appears likely that the courts will continue to permit officers to search places and things that were within the arrestee's "lunging" distance.[56]
- EXPECT IRRATIONALITY, NOT ACROBATICS: In determining whether something was within lunging distance, officers should be permitted to consider that arrestees may act irrationally—that their fear of incarceration may motivate them to attempt to reach places some distance away.[57] As the D.C. Circuit observed, "A willful and apparently violent arrestee, faced with the prospect of long-term incarceration, could be expected to exploit every available opportunity."[58] Still, the place or thing "must be conceivably accessible to the arrestee—assuming that he was neither an acrobat nor a Houdini."[59]

UNCERTAINTY AS TO ARRESTEE'S ACCESS

In the wake of Gant, it seems likely that one of the the most hotly contested issues will be whether a search should be invalidated because there was some uncertainty as to whether the arrestee did, in fact, have unfettered access to the place or thing that was searched. We hope, however, that the courts which face this issue will take into account that arrests are inherently dangerous and, to repeat the words of the D.C. Circuit, officers in the midst of making an arrest "cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[60]

For example, in the post-Gant case of *United States v. Shakir* [61] officers arrested Shakir on a warrant for bank robbery when he arrived in the lobby of a casino in Atlantic City. After handcuffing him, they searched a gym bag at his feet and found money that he had taken in another of his bank robberies. Shakir argued that the money should have been suppressed because he did not have actual access to the bag when it was searched. But the Third Circuit ruled the search was lawful, saying, "Although it would have been more difficult for Shakir to open the bag and retrieve a weapon while handcuffed, we do not regard this possibility as remote enough to render unconstitutional the search incident to arrest."

IF THE ARRESTEE FLED

Before Gant, if the arrestee fled when officers tried to arrest him, most courts would rule that the officers could search places and things that were under his immediate control when they attempted to arrest him, plus places and things under his immediate control when he was taken into custody. They reasoned that it was not in the public interest to provide arrestees with a way to impede or prevent the discovery of incriminating evidence by defying or fighting with officers and thereby forcibly distancing themselves from it. Although it appears these searches would not be permitted under a strict interpretation of Gant, the courts might find that Gant did not repudiate the conventional wisdom upon which the earlier opinions were based.[62]

EMERGENCIES

As noted earlier, before Gant was decided the courts would usually uphold a search that was not contemporaneous with an arrest if officers needed to delay the search because of exigent circumstances. To date, the courts in three post-Gant cases have applied a variation of this principle and ruled that, although the arrestee did not have immediate access to the thing that was searched, the search was lawful because there were other unrestrained suspects who did.[63] But this, too, has become a murky area of the law as the result of Gant.

Types of Searches

Officers who have made a lawful custodial arrest may, depending on the circumstances, conduct one or more of the following types of searches incident to arrest: (1) a search of the arrestee's person, (2) a search of things within the arrestee's immediate control, and (3) a limited search of the home in which the arrest occurred. Furthermore, if the arrest occurred inside a home, they may conduct a hybrid search that consists of a protective sweep of the area immediately adjoining the place of arrest. Finally, they may (albeit rarely) search the vehicle in which the arrestee was an occupant.

Searching the arrestee

When officers make an arrest, the first thing they will normally do is search the arrestee. This type of search should not be affected by Gant because the arrestee will necessarily have immediate control over everything on his person. While it might be argued that Gant would not permit a search if the arrestee had been handcuffed, such an argument would be fallacious because the handcuffs will necessarily be removed at some point. Furthermore, as the Fifth Circuit observed, "Albeit difficult, it is by no means impossible for a handcuffed person to obtain and use a weapon concealed on his person or within lunge reach."64

Although the United States Supreme Court vaguely described the scope of these intrusions as "full" searches,65 the courts have interpreted the term as encompassing the following:

PAT SEARCH

Officers may, of course, pat search the arrestee, a procedure which the Supreme Court described as follows: "The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."66

SEARCHES OF CLOTHING

The Court also ruled that officers may conduct a "relatively extensive exploration" of the arrestee's clothing, including his pockets.67 And because of the threat resulting from syringes, the Court of Appeal ruled that, before conducting the search, officers may ask the arrestee whether there are any needles or other sharp objects in his pockets or anywhere else on his person.68

SEARCHING CONTAINERS

Officers may search containers that the arrestee was carrying when the search occurred, such as a wallet, purse, backpack, pockets, cigarette box, pillbox, envelope.69

NO EXTREME SEARCHES

Officers may not conduct strip searches or any other exploration that is "extreme or patently abusive."70 Furthermore, in the unlikely event that it becomes necessary to remove some of the arrestee's clothing in order to conduct a full search, officers must do so with due regard for the arrestee's legitimate privacy interests.71

Searching things nearby

In the past, officers could search all containers and other things that were within grabbing distance of the arrestee when the arrest occurred.72 Although Gant still permits officers to search things near the arrestee, these searches must now be limited to items that were reasonably accessible to him when the search occurred. That was the situation in *U.S. v. Shakir*, noted earlier, in which the court ruled that officers did not violate Gant when they searched a gym bag at the feet of the defendant because, "[a]lthough he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor."73

In determining whether a place or thing was reasonably accessible to the arrestee at the time of the search, the following pre-Gant law is consistent with Gant and should still be valid:

CONTAINERS UNDER OFFICERS' CONTROL

Because an arrestee has no control over a container at the moment that officers are searching it, it might be argued that all searches of containers are prohibited as the result of Gant. But the Supreme Court flatly rejected this "fallacious" theory in *New York v. Belton* 74 (which, as noted earlier, it did not overturn) and there is nothing in Gant to suggest that it intended to impose such an extreme rule.

CONTAINERS "IMMEDIATELY ASSOCIATED"

Nor is there anything in Gant to suggest that the Court was overturning another of its longstanding rules: that officers may search a container that was not under the arrestee's immediate control if it was the type of property that is "immediately associated with the person of the arrestee"; e.g., purses.75

CONTAINERS TO GO

If the arrestee wants to take an item with him (e.g., a jacket), and if officers permit it, Gant would not restrict their ability to search it even if it was not under the arrestee's immediate control when he was arrested or when the search occurred. This is because the item would presumably be returned to him at some point.76 Officers may not, however, compel an arrestee to take a certain item, then search it on the theory the search was incident to the arrest or was necessary for officer safety.77

SEARCHING PAGERS, CELL PHONES

Because so many arrestees carry pagers and cell phones nowadays, the question has frequently arisen: Can these searches be upheld as an incident to an arrest? Although it is questionable in light of Gant (mainly because there is no officer-safety justification 78) the California Supreme Court ruled on January 3, 2011 that cell phone searches fall under the Supreme Court's warrant exception for containers that are "immediately associated with the person of the arrestee."79 This means cell phones may be searched incident to an arrest even if the search occurred hours after the arrest occurred, and even though there was no threat that the information stored on the cell phone could be destroyed. The case is *People v. Diaz* 80 and we have posted a report on Online. Second, a search of cell phones and such things might be upheld under an exigent circumstances theory if (1) officers had probable cause to believe that telephone numbers, text messages, or other data stored in the device are evidence of a crime; and (2) officers reasonably believed that the data might be lost unless a search was conducted immediately; e.g., digitally-stored data might be automatically deleted as new calls are received.81

Searching vehicles

As discussed earlier, the Supreme Court in Gant ruled that officers may not search the passenger compartment of a vehicle incident to the arrest of an occupant unless there was a reasonable possibility that the arrestee had access to the passenger compartment when the search occurred.82 In those rare cases in which these types of searches are permitted, it appears that officers may search the entire passenger compartment, including all containers (regardless of whether the container was open or closed);83 and all storage areas, such as the glove box, console, and map holder.84 Officers may not, however, search the trunk or damage the car in the course of the search.85

Searching homes (Chimel searches)

The term "Chimel search" refers to a search of a place or thing inside a residence that was within the grabbing or lunging area of the arrestee. Prior to Gant, the courts ordinarily interpreted this to mean that officers could search places and things that were within this area at the time of the search. But, as we will now discus, that is likely to change.

POST-GANT LAW

For reasons discussed earlier, it is likely that the courts will rule that, pursuant to Gant, the search must be limited to places and things that were within the arrestee's grabbing distance when the search occurred. For example, officers would be permitted to search under a bed on which the arrestee was lying,86 inside a duffel bag at the foot of a bed on which the arrestee was lying,87 under a sofa cushion that was two feet away from the unhandcuffed arrestee when the search occurred.88

Although there is authority for permitting a search of a place or thing that was not within the arrestee's immediate control when there was good reason to move him away before starting the search,89 this authority appears to have been undermined by Gant.90

PRE-GANT LAW CONSISTENT WITH GANT

While the following rules predate Gant, they are probably still good law:

ARRESTS OUTSIDE THE RESIDENCE

A Chimel search will not be permitted if the arrest occurred outside the premises.91 As the United States Supreme Court observed, "If a search of a house is to be upheld as incident to an arrest, that arrest must take place inside the house, not somewhere outside—whether two blocks away, twenty feet away, or on the sidewalk near the front steps."92

SEARCHING OTHER ROOMS

Even before Gant was decided, the courts would rule that officers may not routinely search beyond the room in which the arrest occurred.93 There is, however, an exception to this rule that will probably not be affected by Gant: if the arrestee requests permission to go into another room to, for example, obtain clothing or identification, officers may, in the words of the Supreme Court, stay "literally at [his] elbow at all times."94 Furthermore, if officers have permitted the arrestee to enter another room, they may search places and things in that room that are within his grabbing area. This is because, as the California Supreme Court pointed out, an arrestee's request to move to another room might be "a ruse to permit him to get within reach of a weapon or destructible evidence."95 But such a search would not be permitted if officers compelled the arrestee to enter the room without good cause.96

Vicinity sweeps of homes

A vicinity sweep is a type of search incident to arrest that is limited to a cursory inspection of spaces "immediately adjoining the place of arrest from which an attack could be immediately launched."97 It is apparent that vicinity sweeps will not be affected by Gant because the threat presented by hidden friends or associates in the vicinity will exist regardless of whether the arrestee had been handcuffed or removed from the immediate area.98 To put it another way, an officer's act of moving the arrestee from the arrest site will not reduce the threat caused by any lurking companions

Vicinity sweeps are similar to Chimel searches in that both may be conducted as a matter of routine, meaning that officers will not be required to prove there was reason to believe that any dangerous people were nearby.99 There are, however, two important differences. First, the sole objective of a vicinity sweep is to locate people, not weapons or evidence. Consequently, officers may search only those places and things in which "unseen third parties" might be hidden;100 e.g., officers are not permitted to open drawers or look under rugs.

Second, there is a difference in scope between grabbing area and spaces "immediately adjoining the place of arrest." Although both cover a fairly small amount of territory, the area "immediately adjoining" the place of arrest will usually extend well beyond the arrestee's grabbing distance. This is because an arrestee can only grab so far; while a friend, relative, or accomplice might be able to launch a sneak attack from any hidden space in the immediate vicinity.101 (In reality, an accomplice could launch an attack from virtually anywhere on the premises. But, like many types of warrantless searches, vicinity sweeps represent an imperfect compromise between the safety interests of officers and the privacy interests of others.)

For example, in *U.S. v. Curtis* 102 officers in Washington, D.C. lawfully arrested Curtis and Melvin in the living room of their two-bedroom apartment. While two officers guarded the arrestees, two other officers looked inside a living room closet, the adjoining kitchen, and two bedrooms located "down the hall." In the course of the sweep, they found drugs in the bedrooms. While the court had no problem with the officers looking into the closet and the kitchen, it ruled that the search of the bedrooms was unlawful because "[t]here was no justification for a sweep of such remote areas."

References

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2. State v. Murdock (Wis. 1990) 155 Wis.2d 217, 231.
3. U.S. v. McConney (9th Cir. 1984) 728 F.2d 1195, 1207.
4. Washington v. Chrisman (1982) 455 U.S. 1, 7.
5. U.S. v. Reilly (9th Cir. 2000) 224 F.3d 986, 993.
6. United States v. Robinson (1973) 414 U.S. 218, 235. Edited. ALSO SEE Washington v. Chrisman (1982) 455 U.S. 1, 7 ["an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation"]; United States v. Chadwick (1977) 433 U.S. 1, 15 [officers are not required "to calculate the probability that weapons or destructible evidence may be involved"]; U.S. v. Osife (9th Cir. 2004) 398 F.3d 1143, 1145 ["[C]ourts are not to decide on a case-by-case basis whether the arresting officers' safety is in jeopardy or whether evidence is in danger of destruction."]. NOTE: In some older California cases the courts ruled that officers could conduct a search incident to arrest only if they had probable cause to believe they would find a weapon or evidence. See, for example, People v. Flores (1979) 100 Cal.App.3d 221, 229. Those rulings were abrogated by Proposition 8. See In re Demetrius A. (1989) 208 Cal.App.3d 1245, 1247.
7. New York v. Belton (1981) 453 U.S. 454, 459. ALSO SEE Dunaway v. New York (1979) 442 U.S. 200, 213-14 [officers need "[a] single, familiar standard"].

8. (1969) 395 U.S. 752, 763. ALSO SEE Michigan v. Long (1983) 463 U.S. 1032, 1049, fn.14 ["[P]art of the reason to allow area searches incident to an arrest is that the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity."
9. (1969) 395 U.S. 752, 763.
10. See U.S. v. Tejada (7th Cir. 2008) 524 F.3d 809, 811 [officers can search "the area within grabbing distance"]; U.S. v. Hudson (9th Cir. 1996) 100 F.3d 1409, 1420 ["grab area"]; U.S. v. Goodwin-Bey (8th Cir. 2009) 584 F.3d 1117, 1119 ["reaching area"]. ALSO SEE Chimel v. California (1969) 395 U.S. 752, 763 ["And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."].
11. U.S. v. Fleming (7th Cir. 1982) 677 F.2d 602, 607. ALSO SEE People v. Pressley (1966) 242 Cal.App.2d 555, 560 [although "the arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away," the process of arrest "had begun at the door"]; People v. Williams (1967) 67 Cal.2d 226, 229 ["Of no legal significance is the fact that defendant, through his efforts to escape, succeeded in separating himself from the car by a distance of about one block."]; U.S. v. Nohara (9th Cir. 1993) 3 F.3d 1239, 1243 ["the officers here did not make the search unreasonable by handcuffing Nohara, seating him in the hallway, and searching the black bag within two to three minutes of his arrest"].
12. People v. Rege (2005) 130 Cal.App.4th 1584, 1590 [quoting from People v. Summers (1999) 73 Cal.App.4th 288, 295 (conc. opn. of Bedsworth, J.).
13. U.S. v. Tejada (7th Cir. 2008) 524 F.3d 809, 812.
14. (1981) 453 U.S. 454.
15. People v. Webb (1967) 66 Cal.2d 107, 125.
16. People v. McBride (1969) 268 Cal.App.2d 824, 829.
17. U.S. v. Vasey (9th Cir. 1987) 834 F.2d 782, 787.
18. Arizona v. Gant (2009) U.S. [129 S.Ct. 1710, 1731 (dis. opn. of Alito, J.).
19. NOTE: The Gant majority also claimed that its decision was necessary because the lower courts had been grossly misinterpreting Chimel and Belton. This, too, was disingenuous, especially considering these two opinions were broadly interpreted for almost 30 years without even a hint of reproval from the Supreme Court.
20. (7th Cir. 2008) 524 F.3d 809, 812. ALSO SEE In re Sealed Case (D.C. Cir. 1998) 153 F.3d 759, 769 [search of upstairs bedroom was permissible even though the suspect was "at the bottom of the stairs at the time of the search" and was being held by other officer
21. People v. Summers (1999) 73 Cal.App.4th 288, 290-91. ALSO SEE U.S. v. Weaver (9th Cir. 2006) 433 F.3d 1104, 1107 ["Here, where the arrestee was handcuffed and secured in a patrol car before police conducted the search, the rational underpinnings of Belton— officer safety and preservation of evidence—are not implicated. We are hardly the first to make this observation. We respectfully suggest that the Supreme Court may wish to re-examine this issue."]; U.S. v. Queen (7th Cir. 1988) 847 F.2d 346, 3545 ["Indeed, the Supreme Court—as well as several courts of appeal, including our own—have upheld searches incident to arrest where the possibility of an arrestee's grabbing a weapon or accessing evidence was at least as remote as in the situation before us."].
22. People v. Mendoza (1986) 176 Cal.App.3d 1127, 1132.
23. See U.S. v. Perdoma (8th Cir. 2010) F.3d [2010 WL 3528579] ["the explanation in Gant of the rationale for searches incident to arrest may prove to be instructive outside the vehicle-search context in some cases"].
24. See Wyoming v. Houghton (1999) 526 U.S. 295, 303 ["Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars"]; Cardwell v. Lewis (1974) 417 U.S. 583, 590 ["One has a lesser expectation of privacy in [car] because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."].
25. NOTE: It is especially unlikely that searches of homes would be exempt from Gant because, as we discuss in the accompanying article, officers who reasonably believe there is someone on the premises who poses a threat to them can conduct a protective sweep.
26. (2009) 178 Cal.App.4th 1051, 1064 ["For their part, the People acknowledge that the search in this case would have violated the Fourth Amendment if it had taken place after the decision in Gant."]. ALSO SEE U.S. v. Perdoma (8th Cir. 2010) F.3d [2010 WL 3528579] [Gant applied to search of suitcase in a bus depot]; U.S. v. Shakir (3d Cir. 2010) F.3d [2010 WL 3122808] [Gant applied to search of gym bag at a hotel].
27. U.S. v. Vinton (D.C. Cir. 2010) 594 F.3d 14, 24, fn.3 ["We decline to read Gant so expansively."

28. See U.S. v. Shakir (3d Cir. 2010) F.3d [2010 WL 3122808] ["[W]e understand Gant to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it."].
29. U.S. v. Shakir (3rd Cir. 2010) F3 [2010 WL 3122808].
30. See Shipley v. California (1969) 395 U.S. 818, 820 ["substantially contemporaneous"]; Vale v. Louisiana (1970) 399 U.S. 30, 33 ["substantially contemporaneous"]; People v. Adams (1985) 175 Cal.App.3d 855, 861 ["substantially contemporaneous"]; U.S. v. Smith (9th Cir. 2004) 389 F.3d 944. 951 ["roughly contemporaneous"].
31. U.S. v. Lyons (D.C. Cir. 1983) 706 F.2d 321, 330.
32. See U.S. v. Davis (8th Cir. 2009) 569 F.3d 813, 817; U.S. v. Goodwin-Bey (8th Cir. 2009) 584 F.3d 1117; U.S. v. Shakir (3rd Cir. 2010) F3 [2010 WL 3122808] [court noted that the officers "had reason to believe that one or more of Shakir's accomplices was nearby"].
33. See Virginia v. Moore (2008) 553 U.S. 164, 177 ["we have equated a lawful arrest with an arrest based on probable cause"].
34. See Rawlings v. Kentucky (1980) 448 U.S. 98, 111 ["Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."]; People v. Limon (1993) 17 Cal.App.4th 524, 538 ["An officer with probable cause to arrest can search incident to the arrest before making the arrest."]; People v. Mims (1992) 9 Cal.App.4th 1244, 1251 ["[T]he fact that the search preceded the formal arrest is of no consequence."]; People v. Avila (1997) 58 Cal.App.4th 1069, 1076 ["[I]t is unimportant whether a search incident to an arrest precedes the arrest or vice versa"]. NOTES: This rule is especially important to prosecutors when a consent search, pre-arrest pat down, or other warrantless search is ruled unlawful as the search may be upheld as a search incident to arrest if there was probable cause. Also note that in People v. Superior Court (Hawkins) (1972) 6 Cal.3d 757 the California Supreme Court ruled that probable cause to arrest was not enough, that officers must actually inform the suspect he is under arrest before they may conduct a search incident to arrest. This rule was nullified by California's Proposition 8. See People v. Trotman (1989) 214 Cal.App.3d 430.
35. In re Jonathan M. (1981) 117 Cal.App.3d 530, 536.
36. (1985) 169 Cal.App.3d 186, 193.
37. (1987) 195 Cal.App.3d 996.
38. See People v. White (2003) 107 Cal.App.4th 636, 641 ["[A]n officer's reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant's conduct."]; In re Justin K. (2002) 98 Cal.App.4th 695, 699 ["[The officer's] subjective understanding of the statutory scheme respecting stoplamps is not dispositive [s]o long as his conduct was objectively reasonable"]; People v. Clark (1973) 30 Cal.Ap.3d 549, 557-58 [arrest for burglary was made without probable cause, but there was probable cause to arrest for prowling]; U.S. v. Wallace (9th Cir. 2000) 213 F.3d 1216 ["That [the officer] had the mistaken impression that all front-window tint is illegal is beside the point. [The officer] was not taking the bar exam. The issue is… whether he had objective, probable cause to believe that these windows were, in fact, in violation."]; U.S. v. Eckhart (10th Cir. 2009) 569 F.3d 1263, 1272 ["An officer need not be able to quote statutes, chapter and verse. Some confusion about the details of the law may be excused"].
39. U.S. v. Turner (10th Cir. 2009) 553 F.3d 1337, 1345.
40. (1978) 81 Cal.App.3d 770
41. United States v. Robinson (1973) 414 U.S. 218, 234 (fn.5), 235.
42. See Atwater v. City of Lago Vista (2001) 532 U.S. 318 [seatbelt violation]; Washington v. Chrisman (1982) 455 U.S. 1 [minor in possession of alcohol]; Gustafson v. Florida (1973) 414 US 260 [unlicensed driver]; U.S. v. Robinson (1973) 414 U.S. 218 [revoked driver's license]; People v. Hamilton (2002) 102 Cal.App.4th 1311, 1317 [displaying false registration tags]; People v. Sanchez (1985) 174 Cal.App.,3d 343, 349 [drunk in public]; People v. McKay (2002) 27 Cal.4th 601, 619-25 [riding bicycle in wrong direction]. 43 See People v. Castaneda (1995) 35 Cal.App.4th 1222, 1228 ["Whether the offense is bailable is not determinative."].
43. (1985) 174 Cal.App.3d 343. ALSO SEE People v. Humberto O. (2000) 80 Cal.App.4th 237, 244 [the officer "planned to" transport the minor]; U.S. v. Garcia (7th Cir. 2004) 376 F.3d 648, 650 [the reasonableness of a search incident to arrest "depends on what actually happens rather than what could have happened."]. People v. Hunt (1990) 225 Cal.App.3d 498, 507 ["No evidence supports defendant's speculation that the officer would not have bothered completing the booking process [for Pen. Code § 148.9] had no contraband been found."].
44. See Pen. Code § 647(g) [person arrested for plain drunk "shall be taken" into civil protective custody]; People v. Boren (1987) 188 Cal.App.3d 1171, 1177 [drunk in public]. NOTE: Proposition 8 nullified the rule of People v. Longwill (1975) 14 Cal.3d

943 that a person arrested for public drunkenness cannot be searched incident to arrest until it was determined that he would not be released after sobering up. See People v. Castaneda (1995) 35 Cal.App.4th 1222, 1228-29.

45. See In re Demetrius A. (1989) 208 Cal.App.3d 1245, 1248 [curfew violator transported home]; In re Charles C. (1999) 76 Cal.App.4th 420, 424 [curfew violator transported home]; People v. Humberto O. (2000) 80 Cal.App.4th 237 [truant transported to school]; In re Ian C. (2001) 87 Cal.App.4th 856, 860 [transport to curfew center]; People v. Breault (1990) 223 Cal.App.3d 125, 132 [protective custody].
46. (9th Cir. 1988) 843 F.2d 1228.
47. (9th Cir. 1988) 843 F.2d 1228
48. See Pen. Code §§ 849, 853.6(i)(7); Veh. Code § 40302(d).
49. (2001) 532 U.S. 318, 354. ALSO SEE Virginia v. Moore (2008) 553 U.S. 164, 174 ["A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional."]; People v. Gomez (2004) 117 Cal.App.4th 531, 539 [because the officer had probable cause to cite for a seatbelt] violation, "[h]e thus had probable cause to arrest defendant on that basis"]; U.S. v. Garcia (7th Cir. 2004) 376 F.3d 648, 650 ["police may make full custodial arrests for fine-only offenses"].
50. (2002) 27 Cal.4th 601.
51. People v. McKay (2002) 27 Cal.4th 601, 618.
52. Atwater v. City of Lago Vista (2001) 532 U.S. 318, 347.
53. See Shipley v. California (1969) 395 U.S. 818, 820 ["substantially contemporaneous"]; Vale v. Louisiana (1970) 399 U.S. 30, 33 ["substantially contemporaneous"]. ALSO SEE U.S. v. McLaughlin (9th Cir. 1999) 170 F.3d 889, 892 ["roughly contemporaneous"]; US v. Smith (9C 2004) 389 F3 944. 951 ["roughly contemporaneous"]; U.S. v. Fleming (7th Cir. 1982) 677 F.2d 602, 607 ["absolute" contemporaneousness is not required].
54. See Chimel v. California (1969) 395 U.S. 752, 763 ["And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."]; U.S. v. Tejada (7th Cir. 2008) 524 F.3d 809, 811 [officers can search "the area within grabbing distance"].
55. See U.S. v. Ingram (N.D.N.Y. 2001) 164 F.Supp.2d 310, 314 ["The scope of the search is not limited to the suspect's person, but extends to the suspect's 'wingspan,' or "the area from within which the arrestee might gain possession of a weapon or destructible evidence."].
56. See Thornton v. United States (2004) 541 U.S. 615, 621 ["nor is an arrestee less likely to attempt to lunge for a weapon"].
57. U.S. v. Abdul-Saboor (D.C. Cir. 1996) 85 F.3d 664, 670.
58. See Washington v. Chrisman (1982) 455 U.S. 1, 7 ["There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."]; U.S. v. McConney (9th Cir. 1984) 728 F.2d 1195, 1207 ["Chimel does not require the police to presume that an arrestee is wholly rational."]; ; U.S. v. Han (4th Cir. 1996) 74 F.3d 537, 542 ["Since Chimel, the Supreme Court has interpreted broadly both the area under "immediate control' and the likelihood of danger or destruction of evidence."]; US v. Palumbo (8C 1984) 735 F2 1095, 1097 ["[A]ccessibility, as a practical matter is not the benchmark. The question is whether the cocaine was in the area within the immediate control of the arrestee"]; State v. Murdock (Wis. 1990) 455 N.W.2d 618, 626 ["[W]e cannot require an officer to weigh the arrestee's probability of success in obtaining a weapon or destructible evidence hidden within his or her immediate control."].
59. U.S. v. Queen (7th Cir. 1988) 847 F.2d 346, 353.
60. See U.S. v. Lyons (D.C. Cir. 1983) 706 F.2d 321, 330.
61. (3rd Cir. 2010) F.3d [2010 WL 3122808].
62. See, for example, People v. Pressley (1966) 242 Cal.App.2d 555, 559-60 ["[T]he actual arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away. But we do not think that this is controlling. The process of arrest had begun at the door"]; People v. Williams (1967) 67 Cal.2d 226, 229 ["Of no legal significance is the fact that defendant, through his efforts to escape, succeeded in separating himself from the car by a distance of about one block."].
63. See U.S. v. Davis (8th Cir. 2009) 569 F.3d 813, 817 ["Although Davis had been detained, three unsecured and intoxicated passengers were standing around a vehicle redolent of recently smoked marijuana."]; U.S. v. Goodwin-Bey (8th Cir. 2009) 584 F.3d 1117 [officers had reasonable suspicion to believe that one of the occupants had recently displayed a firearm]; U.S. v. Shakir (3rd Cir. 2010) F3 [2010 WL 3122808] [court noted that the officers "had reason to believe that one or more of Shakir's accomplices was nearby"].

64. U.S. v. Sanders (5th Cir. 1993) 994 F.2d 200, 209. ALSO SEE U.S. v. Shakir (3d Cir. 2010) F.3d [2010 WL 3122808] ["handcuffs are not fail-safe"].
65. Gustafson v. Florida (1973) 414 U.S. 260, 264 [officers may "conduct a full search of the arrestee incident to a lawful custodial arrest"]; People v. Dennis (1985) 172 Cal.App.3d 287, 290 [a "full" search "is a greater intrusion than [a] pat-down"].
66. Terry v. Ohio (1968) 392 U.S. 1, 17, fn. 13.
67. United States v. Robinson (1973) 414 U.S. 218, 227. ALSO SEE Chimel v. California (1969) 395 U.S. 752, 763 ["it is reasonable for the arresting officer to search the person arrested" for weapons and evidence]; U.S. v. Brewer (8th Cir. 2010) F.3d [2010 WL 4117368] [search of pants pocket].
68. See People v. Cressy (1996) 47 Cal.App.4th 981, 988 ["Officers are sometimes required to do dangerous things. They should not, however, be required to do the foolhardy."].
69. See US v. Robinson (1973) 414 U.S. 218, 223 [cigarette package]; Gustafson v. Florida (1973) 414 U.S. 260, 262 [cigarette package]; People v. Limon (1993) 17 Cal.App.4th 524, 538 ["hide-a-key" box]; People v. Methey (1991) 227 Cal.App.3d 349, 358-59 [wallet]; People v. Loudermilk (1987) 195 Cal.App.3d 996, 1005-6 [wallet]; People v. Baker (1970) 12 Cal.App.3d 826, 841 [handbag]; People v. Ingham (1992) 5 Cal.App.4th 326, 331 [purse]; People v. Brocks (1981) 124 Cal.App.3d 959, 964 [change purse]; People v. Flores (1979) 100 Cal.App.3d 221, 230 [shoulder bag]; Northrop v. Trippett (6th Cir. 2001) 265 F.3d 372, 379 [duffle bag that the arrestee removed from his shoulder when officers approached]; In re Humberto O. (2000) 80 Cal.App.4th 237, 243-44 [backpack]; People v. Sims (1993) 5 Cal.4th 405, 451 [bank bag]; People v. Gutierrez (1984) 163 Cal.App.3d 332, 335 [small cardboard box]; People v. Gonzales (1989) 216 Cal.App.3d 1185 ["cylindrical rolled up clear plastic baggy"]; People v. Brown (1989) 213 Cal.App.3d 187, 192 [pill bottle]; U.S. v. Nohara (9th Cir. 1993) 3 F.3d 1239, 1243 [bag]; U.S. v. Holzman (9th Cir. 1989) 871 F.2d 1496, 1504 [address book]; U.S. v. Porter (4th Cir. 1983) 738 F.2d 622, 627 [carry-on bag]; U.S. v. Stephenson (8th Cir. 1986) 785 F.2d 214, 225 [briefcase].
70. United States v. Robinson (1973) 414 U.S. 218, 236. ALSO SEE People v. Laiwa (1983) 34 Cal.3d 711, 726 ["When, as often occurs, the arrest takes place on the street or in some other public setting, it is plainly wrong to say that a thorough search of the booking type performed at that location is not a grater invasion of personal privacy than the same search held in the relatively sequestered milieu of the property room of a police station."]; Schmidt v. City of Lockport (N.D. Ill. 1999) 67 F.Supp.2d 938, 944 [the search "went beyond the full search authorized by the Court in Robinson"]; U.S. v. Ford (E.D. Va. 2002) 232 F.Supp.2d 625, 631 [officer violated the Fourth Amendment when he "shoved his gloved hand into defendant's buttocks"].
71. See Illinois v. Lafayette (1983) 462 U.S. 640, 645 ["[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street"]; U.S. v. Williams (7th Cir. 2000) 209 F.3d 940, 944 ["Williams was never disrobed or exposed to the public. The search occurred at night, away from traffic and neither officer saw anyone in the vicinity."]; U.S. v. McKissick (10th Cir. 2000) 204 F.3d 1282, 1297, fn.6 ["Officer Patten testified he did not remove Mr. Zeigler's clothes during the search, but he might have unzipped Mr. Zeigler's pants after discovering a lump in Mr. Zeigler's crotch area that was inconsistent with his genitals."]; U.S. v. Dorlouis (4th Cir. 1997) 107 F.3d 248, 256 [the search "took place in the privacy of the police van"].
72. See Chimel v. California (1969) 395 U.S. 752, 763 [the dangerousness of an item does not depend on who owns it].
73. (3rd Cir. 2010) F.3d [2010 WL 3122808].
74. (1981) 453 U.S. 454, 462, fn.5 ["But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'"].
75. See United States v. Edwards (1974) 415 U.S. 800, 805; United States v. Chadwick (1977) 433 U.S. 1, 15; People v. Belvin (1969) 275 Cal.App.2d 955, 959.
76. See People v. Topp (1974) 40 Cal.App.3d 372, 378 [ok to search "the jacket that defendant indicated he wished to take with him to jail."]: U.S. v. Lyons (D.C. Cir. 1983) 706 F.2d 321, 331 [ok to search jacket "for weapons before giving it to him"].
77. See People v. Ingham (1992) 5 Cal.App.4th 326, 331-33.
78. See U.S. v. Quintana (M.D. Fla. 2009) 594 F.Supp.2d 1291, 1300 ["The search of the contents of Defendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest."]. BUT ALSO SEE U.S. v. Finley (5th Cir. 2007) 477 F.3d 250, 260 [officers were "therefore permitted to search Finley's cell phone pursuant to his arrest"]; U.S. v. Thomas (3d Cir. 1997) 114 F.3d 404, 404, fn.2 [search of pager in arrestee's possession "falls within an exception to the warrant requirement as a lawful search incident to arrest"]; U.S. v. Chan (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["[T]he general

requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest. The search conducted by activating the pager's memory is therefore valid."].

79. See United States v. Edwards (1974) 415 U.S. 800; U.S. v. Murphy (4th Cir. 2009) 552 F.3d 405, 412 [under Edwards, "once the cell phone was held for evidence, other officers and investigators were entitled to conduct a further review of its contents"].
80. (2011) Cal.4th [2011 WL 6158].
81. See People v. Bullock (1990) 226 Cal.App.3d 380, 388 ["danger existed that the incoming telephone numbers would be lost unless quickly retrieved by the officer"].
82. (2009) U.S. [129 S.Ct. 1710, 1719]. ALSO SEE U.S. v. Maddox (9th Cir. 2010) F.3d [2010 WL 3169397] [search of vial in arrestee's car was unlawful because the arrestee had been "handcuffed in the backseat of the patrol car"]; U.S. v. Gonzalez (9th Cir. 2009) 578 F.3d 1130, 1132 [search unlawful "because Gonzalez was handcuffed and secured in a patrol vehicle at the time of the search"]; U.S. v. Caseres (9th Cir. 2008) 533 F.3d 1064, 1072 [Caseres was handcuffed and arrested a full block and a half away from his car"]; U.S. v. Vinton (D.C. Cir. 2010) 594 F.3d 14, 25 [search unlawful "because Vinton was handcuffed at the time"]; U.S. v. McCane (10th Cir. 2009) 573 F.3d 1037 [search unlawful because arrestee was handcuffed and restrained in a patrol car].
83. See New York v. Belton (1981) 453 U.S. 454, 461.
84. See New York v. Belton (1981) 453 U.S. 454, 460, fn.4.
85. See New York v. Belton (1981) 453 U.S. 454, 460, fn.4.
86. See People v. King (1971) 5 Cal.3d 458, 463; People v. Spencer (1972) 22 Cal.App.3d 786, 797.
87. See People v. Arvizu (1970) 12 Cal.App.3d 726, 729.
88. U.S. v. McConney (9th Cir. 1984) 728 F.2d 1195, 1207.
89. See In re Sealed Case (D.C. Cir. 1998) 153 F.3d 759, 767 ["critical time for analysis is the time of the arrest and not the time of the search"].
90. See People v. Leal (2009) 178 Cal.App.4th 1051, 1061-62 [search under clothing near place of arrest was unlawful because the arrestee had been handcuffed and removed from the premises].
91. See Shipley v. California (1969) 395 U.S. 818, 819 [search of home not justified by arrest that occurred as the arrestee was exiting his car]; People v. Baldwin (1976) 62 Cal.App.3d 727, 742 ["The search of the house cannot be justified as incident to the arrest of Martinez, as he was arrested outside the house."].
92. Vale v. Louisiana (1970) 399 U.S. 30, 33-34.
93. See Chimel v. California (1969) 395 U.S. 752, 763 ["There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs"]; Dillon v. Superior Court (1972) 7 Cal.3d 305, 314 [the "mere possibility of additional persons in the house" will not warrant a search of other rooms]; People v. Jordan (1976) 55 Cal.App.3d 965, 967 ["Routine searches cannot extend beyond the room in which the suspect is arrested, but the facts and circumstances of the case may nevertheless permit entry of other parts of the house."]; Guidi v. Superior Court (1973) 10 Cal.3d 1, 7 [kitchen was not within arrestee's immediate control when he was arrested in the living room]; People v. Block (1971) 6 Cal.3d 239, 243 [cannot search upstairs when arrest occurred downstairs].
94. Washington v. Chrisman (1982) 455 U.S. 1, 6. ALSO SEE: People v. Breault (1990) 223 Cal.App.3d 125, 133 ["Chrisman does not require a showing of exigent circumstances."]; Curry v. Superior Court (1970) 7 Cal.App.3d 836, 849 [search permitted because arrestee was given permission to enter the room to obtain a dress]; U.S. v. Nascimento (1st Cir. 2007) 491 F.3d 25, 50 ["[I]t was not inappropriate for the police to escort Nascimento to his bedroom in order that he might get dressed."]; U.S. v. Garcia (7th Cir. 2004) 376 F.3d 648, 651 ["It would have been folly for the police to let [the arrestee] enter the home and root about [for identification] unobserved."]. ALSO SEE: U.S. v. Scroggins (5th Cir. 2010) 599 F.3d 433, 442 ["it would be strange indeed to hold that the Constitution requires police to deny a citizen's reasonable request to enter her residence and put on less revealing clothing before being taken into custody"].
95. Mestas v. Superior Court (1972) 7 Cal.3d 537, 541, fn.2.
96. 96 See Shipley v. California (1969) 395 U.S. 818, 820 [the area that can be searched cannot be expanded "without reasonable justification."]; People v. Mendoza (1986) 176 Cal.App.3d 1127, 1132 ["Mendoza was taken from the bathroom into the presence of the shoulder bag. If the Chimel rule could be so easily satisfied, the officers would only have to force the defendant to accompany them while they proceeded to examine the entire contents of the premises."]; Eiseman v. Superior Court (1971) 21 Cal.App.3d 342, 350 ["The police should not be allowed to extend the scope of [the search] by having a person under arrest move around the room at their request."].

97. Maryland v. Buie (1990) 494 U.S. 325, 334.
98. See Maryland v. Buie (1990) 494 U.S. 325, 336 [“the justification for the search incident to arrest considered in Chimel was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house”].
99. See Maryland v. Buie (1990) 494 U.S. 325, 334 [as “an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion [conduct a vicinity sweep]”]; US v. Ford (D.C. Cir. 1995) 56 F.3d 265, 269 [“[The vicinity sweep] requires no probable cause or reasonable suspicion”]; U.S. v. Archibald (6th Cir. 2009) 589 F.3d 289 [sweep inside residence not permitted when arrest occurred at the threshold].
100. U.S. v. Gandia (2nd Cir. 2005) 424 F.3d 255, 262 [“[A] ‘protective sweep’ seems clearly to refer to a search that focuses not on the threat posed by the arrestee, but the safety threat posed by the house, or more properly by unseen third parties in the house.”]; U.S. v. Ford (D.C. Cir. 1995) 56 F.3d 265 [under a mattress and behind a window shade were not places in which a person might be hiding].
101. See U.S. v. Lemus (9th Cir. 2009) 582 F.3d 958, 963 [search of living room was lawful because the suspect “was only partially outside the living room when he was arrested”]; In re Sealed Case (D.C. Cir. 1998) 153 F.3d 759, 767 [“The defendant was arrested while standing next to a chair in the bedroom. The drugs were found on that chair, and the gun was found beside it.”].
102. (D.C. Cir. 2002) 239 F.Supp.2d 1.

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6.4: Schneckloth v. Bustamonte

PETITIONER	RESPONDENT
Merle R. Schneckloth	Robert Clyde Bustamonte

LOCATION

Location of Car Search

DOCKET NO.	DECIDED BY
71-732	Burger Court

LOWER COURT

United States Court of Appeals for the Ninth Circuit

CITATION

412 US 218 (1973)

ARGUED

Oct 10, 1972

DECIDED

May 29, 1973

GRANTED

Feb 28, 1972

ADVOCATES

Robert R. Granucci *for petitioner*

Stuart P. Tobisman *for the respondent, pro hac vice, by special leave of Court*

Facts of the case

A police officer stopped a car that had a burned out license plate light and headlight. There were six men in the car, including Robert Clyde Bustamonte. Only one passenger had a drivers license, and he claimed that his brother owned the car. The officer asked this man if he could search the car. The man said, " Sure, go ahead." Inside the car, the officer found stolen checks. Those checks were admitted into evidence at Bustamonte's trial for possessing checks with the intent to defraud. A jury convicted Bustamonte, and the California Court of Appeal for the First Appellate District affirmed. The court reasoned that consent to search the car was given voluntarily, so evidence obtained during the search was admissible. The California Supreme Court denied review. Bustamonte filed a petition for a writ of habeas corpus, which the district court denied. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that consent is not voluntary unless it is proven that the person who consented to th e search knew he had the right to refuse consent.

Question

1. Did the court of appeals err when it held that the search of the car was invalid because the state failed to show consent given with knowledge that it could be withheld?
2. Should claims relating to search and seizure be available to a prisoner filing a writ of habeus corpus?

Conclusion

6–3 Decision for Schneckloth Majority Opinion by Potter Stewart

FOR	AGAINST
Stewart White Powell Burger Blackmun Rehnquist	Douglas Brennan Marshall

Yes, No answer. Justice Potter Stewart, writing for a 6 -3 majority, reversed. The Supreme Court held that whether consent is voluntary can be determined from the totality of the circumstances. It is unnecessary to prove that the person who gave consent knew that h e had the right to refuse. The Fourth Amendment protection against unreasonable searches and seizures does not require a knowing and intelligent waiver of constitutional rights. Because the Fourth Amendment claims had no merit, the Court did not reach the second question. Justice Lewis F. Powell also concurred, stating that the main question should be whether Bustamonte had a fair opportunity to raise his Fourth Amendment claims. Chief Justice Warren E. Burger and Justice William H. Rehnquist joined in the concurrence. Justice Harry A. Blackmun concurred, agreeing with the majority and noting it was unnecessary to reach the issue discussed by Justice Powell.

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6.5: United States v. Drayton

PETITIONER	RESPONDENT
United States	Drayton
DOCKET NO.	**DECIDED BY**
01-631	Rehnquist Court

LOWER COURT

United States Court of Appeals for the Eleventh Circuit

CITATION

536 US 194 (2002)

ARGUED

Apr 16, 2002

DECIDED

Jun 17, 2002

ADVOCATES

Larry D. Thompson *Argued the cause for the petitioner*

Gwendolyn Spivey *Argued the cause for the respondents*

Daniel J. Pop eo et al. *for the Washington Legal Foundation et al. as amici curiae urging reversal*

Joshua L. Drat el et al. *for the National Association of Criminal Defense Lawyers as amicus curiae urging affirmance*

Richard Weintraub et al. *for Americans For Effective Law Enforcement, Inc., et al. as amici curiae*

Facts of the case

Christopher Drayton and Clifton Brown were traveling on a Greyhound bus. In Tallahassee, Florida, police officers boarded the bus as part of a routine interdiction effort. One of the officers worked his way from back to front, speaking with individual passengers as he went. The officer did not inform the passengers of their right to refuse to cooperate. As the officer approached Drayton and Brown, he identified himself, declared that the police were looking for drugs and weapons, and asked if the two had any bags. Subsequently, the officer asked Brown whether he minded if he checked his person. Brown agreed and a pat-down revealed hard objects similar to drug packages in both thigh areas. When Drayton agreed, a pat-down revealed similar objects. Both were arrested. A further search revealed that Drayton and Brown had taped cocaine to their legs. Charged with federal drug crimes, Drayton and Brown moved to suppress the cocaine on the ground that their consent to the pat-down searches was invalid. In denying the motions, the District Court determined that the police conduct was not coercive and Drayton and Brown's consent to the search was voluntary. In reversing, the Court of Appeals noted that bus passengers do not feel free to disregard officers' requests to search absent some positive indication that consent may be refused.

Question

Must police officers, while searching buses at random to ask questions and to request passengers' consent to searches, advise passengers of their right not to cooperate?

Conclusion

6–3 Decision for United States Majority Opinion by Anthony M. Kennedy

FOR	AGAINST
Breyer Kennedy Scalia Thomas O’Conner Rehnquist	Ginsburg Souter Stevens

No. In a 6-3 opinion delivered by Justice Anthony M. Kennedy, the Court held that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches. The Court reasoned that, although the officer did not inform the defendants of their right to refuse the search, he did request permission to search and gave no indication consent was required. Moreover, the Court noted, the totality of the circumstances indicated that the consent was voluntary. Justice David H. Souter, with whom Justices John Paul Stevens and Ruth Bader Ginsburg joined, dissented. "The issue we took to review is whether the police's examination of the bus passengers ... amounted to a suspicionless seizure under the Fourth Amendment. If it did, any consent to search was plainly invalid as a product of the illegal seizure," argued Justice Souter.

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6.6: Taking a "Second Look" at Prisoners' Property

"[T]he items in question have been exposed to police view under unobjectionable circumstances, so that no reasonable expectation of privacy is breached by an officer's taking a second look . . . " U.S. v. Grill [1]

When an arrestee is booked into jail, officers or jail staff will routinely examine and inventory most or all of his personal property. If they happen to find evidence in the process, it will ordinarily be given to investigators or stored in an evidence room.[2] The rest will be kept in a property room for safekeeping. It might sit there for days, often months or longer.

At some point, investigators might want to take a second look at it. In many cases, they will be looking for something specific, whether it pertains to the crime for which the prisoner was arrested or some other crime. Oftentimes they just want to see if there is anything with evidentiary value that was overlooked when the prisoner was booked. In either case, the question arises: Is a warrant required?

At first glance, it might seem that a warrant would never be necessary because the property is in the lawful possession of a law enforcement agency or detention facility. Thus, the prisoner cannot reasonably expect his property is protected. This may, in fact, be the view of the United States Supreme Court which made the following observation in

U.S. v. Edwards:

> [I]t is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.[3]

While this language seems to indicate that a warrant will never be required, elsewhere in Edwards the Court indicated that a warrant might be required in some situations, although it did not elaborate.[4]

So, what's the law? As we will now explain, an analysis of Edwards and other cases leads to the conclusion that a warrant is not required to search an item if there is probable cause to believe it is evidence of a crime. If probable cause does not exist, a warrant is unnecessary if, (1) the item was "subject to search" during booking, and (2) the search was conducted in a reasonable manner.

IF PROBABLE CAUSE EXISTS

If officers have probable cause to believe that an item taken from a prisoner for safekeeping is evidence of a crime, they may seize it without a warrant. This is essentially because a prisoner does not enjoy a reasonable expectation of privacy as to seizable evidence of a crime that is in the lawful possession of a law enforcement agency.

The controlling case on this issue is Edwards [5] which resulted from the defendant's arrest late one night as he was attempting to break into a post office in Ohio. When Edwards was booked, he was allowed to keep his clothing. Meanwhile, officers at the post office determined that the burglar had unfastened a window with a pry bar and, in the process, left "paint chips on the window sill and wire mesh screen." Figuring that some of the chips would probably have stuck to the perpetrator's clothing, they gave Edwards some jail garb and sent his clothes to the lab for analysis. As expected, the lab found bits of paint that matched the paint at the post office.

The Ohio Court of Appeals ruled the seizure of Edwards' clothing was unlawful because it occurred after he had been booked. The Ohio Court of Appeals ruled the seizure of Edwards' clothing was unlawful because it occurred without a warrant after the booking process had been completed. The United States Supreme Court disagreed, ruling the search was lawful regardless of when it occurred because the officers had probable cause. Said the Court:

> It must be remembered that . . . the police had lawful custody of Edwards and necessarily of the clothing he wore. When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence, just as they are normally permitted to seize evidence of crime when it is lawfully encountered.

Similarly, in *U.S. v. Oaxaca* [6] two men were arrested shortly after they robbed a bank in the City of Commerce. When booked into the Los Angeles County Jail, they were allowed to keep their shoes. About six weeks later, investigators took the shoes from them without a warrant in order to compare them with the perpetrators' shoes as shown in a surveillance video. They matched.

On appeal, the defendants argued the shoes should have been suppressed because the investigators did not have a warrant. The Ninth Circuit disagreed, saying:

Both the defendants and their shoes remained in lawful custody until the time when the shoes were taken for use as evidence. To require a warrant under these circumstances would be to require a useless and meaningless formality.

IF NO PROBABLE CAUSE

If investigators lack probable cause to conduct a warrantless search of a prisoner's stored property, they may search it nevertheless if both of the following requirements are met: (1) they searched only those items that were actually searched or "subject to search" during booking or arrest; and (2) the search was conducted in a reasonable manner.

THE "SUBJECT TO SEARCH" TEST

Under the "subject to search" test, a warrant is not required to take a second look at items that were actually observed during a search incident to arrest or during booking, or items that could have been lawfully observed at either time.[7] As the U.S. Supreme Court observed in Edwards:

> [M]ost cases in the courts of appeals . . . have long since concluded that once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.[8]

Three things should be noted about the "subject to search" test. First, a second look is permitted even though there was no "first look," so long as officers could have taken a first look when the suspect was booked or arrested.[9] Second, because officers can lawfully look at virtually everything in an arrestee's possession,[10] the "subject to search" requirement is seldom an obstacle.[11]

Third, the "subject to search" test is actually more protective of the prisoners' privacy than a rule permitting a second look only if officers did, in fact, see the item during booking or arrest. This is because such a rule would give the arresting officers and jail staff a perverse incentive to open every container and search everything they find to make sure that all of the prisoner's property would be subject to a second look. As the Ninth Circuit noted in *U.S. v. Burnette*.

> It is likely that, were we to require warrants for subsequent searches, police officers would routinely remove all items from containers seized at the time of the initial search and thereby insure that all items were discovered at that time. Thus, requiring a warrant for subsequent searches would be unlikely to provide any additional protection for individual privacy.[12]

Because the courts employ a "subject to search" test, the following items are subject to a second look without a warrant.

PROPERTY NOT INSIDE A CONTAINER

Articles that were not inside a container may be inspected because they were not only "subject to search," they were actually seen — at least briefly—when they were seized, inventoried, or stored; e.g., clothing, rings, watches, keys.[13] As the United States Supreme Court observed, "The seizure of an item whose identity is already known occasions no further invasion of privacy."[14]

PROPERTY INSIDE A CONTAINER

Items that were inside a container may be searched if, (1) officers actually opened the container during booking or arrest and saw the contents, or (2) the contents of the container were subject to search when the prisoner was booked.[15] As a practical matter, all property inside a container is subject to a second look because, as the United States Supreme Court observed, "[I]t is not unreasonable for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."[16]

MANNER OF SEARCHING

As noted, a "second look" search must be conducted in a reasonable manner. In determining whether such a search was reasonable, the courts look at, (1) whether the property was searched more than once and, if so, whether there was a good reason for conducting multiple searches; and (2) whether officers damaged or destroyed property in conducting the search.[17]

EXAMPLES

The following are examples of situations in which the courts ruled that a warrant was not required to take a second look at a prisoner's property:

ROBBER'S RING: After the defendant was arrested for robbing a cab driver, investigators learned from the victim that the perpetrator was wearing a certain kind of ring. A booking inventory showed that the defendant was wearing a ring when he was arrested. Investigators retrieved the ring from property and showed it to the victim, who identified it. The ring, said the court, "did not have, nor can it acquire after booking, a vestige of privacy requiring a search warrant."[18]

ROBBER'S RING: A Sacramento bank teller noticed that the man who was robbing her was wearing a "gold nugget ring." When Davis was arrested for the robbery a few days later, he had two rings in his possession. During booking, the rings were put in a nylon bag. When an FBI agent learned that the teller had noticed that the robber was wearing a gold ring, he asked a police detective to see if there were any rings in Davis's property. Checking the inventory sheet, the detective saw that the bag contained two rings, so he opened it and seized the rings—one of which was identified by the teller. The court ruled the warrantless seizure was lawful because the detective "did not conduct a search but merely retrieved items, lawfully obtained, that law enforcement knew were in its possession."[19]

RAPIST'S SHOES: After Cheatham was arrested for rape, his clothes and shoes were "inventoried and stored in the jail's property room." Cheatham was also a suspect in another rape case in which the perpetrator left shoe prints at the scene. When investigators learned Cheatham was in custody, they obtained the shoes from the property room without a warrant, examined the tread, and determined they matched. In rejecting Cheatham's argument that the shoes should have been suppressed because the officer did not obtain a warrant, the Washington Supreme Court said, "[O]nce an inmate's personal effects have been exposed to police view in a lawful inventory search and stored in the continuous custody of the police, the inmate no longer has a legitimate expectation of privacy in the items free of further government intrusion."[20]

KEYS: Thompson was arrested in Texas on drug charges. During booking, officers seized some keys, among other things. Several days later, an FBI agent went to the jail and arrested Thompson for stealing dynamite. The agent was aware that some keys had been booked into property, so he inspected them and, as the result, determined they opened a storage unit in which the dynamite had been found. The court ruled the agent did not need a warrant to inspect the keys, noting, "[The FBI agent was] not searching personal effects based on mere hunches that something of evidentiary value might be found. The police officer who had arrested Thompson had already informed the federal agent about the keys. The agent's particularized search for the keys did not require a warrant."[21]

KEYS: Two Symbionese Liberation Army members, Little and Remiro were arrested by Concord police for the murder of Oakland Schools Superintendent Marcus Foster. During booking, officers removed a set of keys from each of them. Later that day, the keys were turned over to an Oakland police officer who determined they opened the locks on some buildings connected to the SLA. In ruling the keys were seized lawfully, the Court of Appeal noted that an arrestee's personal effects "like his person itself, are subject to reasonable inspection, examination, and test."[22]

BAIT MONEY: After arresting Westover, detectives in Kansas City searched him and found $621 which was later put into an envelope and stored in the police property room. Because Westover was also a suspect in two Sacramento bank robberies, officers later examined the money without a warrant and determined that some of the bills had been taken in the Sacramento holdup. In ruling a warrant was not required, the Ninth Circuit observed, "In taking the money, no one would suggest that at that instant a search warrant would be required to list the numbers on the bills. Thus, a search warrant to again look at the money already in police custody does not make sense."[23]

ROBBER'S CLOTHES: Earls was arrested on an unspecified Vehicle Code violation and booked into jail. During booking, his clothing "was confiscated." Several days later, FBI agents determined that Earls was a suspect in a Sacramento bank robbery. An agent obtained Earls' clothing and sent it to the FBI lab for analysis. The lab found fibers that linked Earls to the robbery. Court: "During their period of police custody an arrested person's personal effects, like the person itself, are subject to reasonable inspection, examination, and test."[24]

MURDERER'S RING: LAPD detectives had probable cause to arrest Phillip Gunn for murder. When they learned that a man named Phillip Gunn was in jail on a cocaine possession charge they went there to see if the prisoner was the Gunn they were looking for. Gunn's property had been stored in a transparent plastic bag. Inside the bag, they could see a ring which they apparently realized was similar to the ring worn by the murder victim. Before confirming that the prisoner was the murder suspect, they opened the bag and seized the ring. Later, they showed it to the victim's wife who positively identified it. Said the court: "What the homicide investigators did in this case cannot be classified as either a search or a seizure within the meaning of the

Fourth Amendment. The ring was lawfully in the custody of the police. Its storage in the plastic property bag was purely for convenience and safekeeping. No expectation of privacy was involved. The ring was no more in a place of privacy than if the booking officer had left it on the counter of the booking desk."[25]

ADDRESS BOOK: A Scottsdale police officer arrested Holzman for using a stolen credit card in a department store. During a search incident to the arrest, the officer found an address book. He opened the book and noted it contained "a bunch of names and numbers," but he did not read any of the entries. The address book was subsequently placed with Holzman's other property in the jail property room. As the investigation continued, the officer developed probable cause to believe that Holzman was involved in widespread credit card scam. Consequently, he went back to the jail and took a closer look at the entries in the address book and discovered incriminating evidence. Said the court, "[T]he arresting officer legitimately examined the address book during the valid arrest of Holzman, and determined that it contained 'a bunch of names and numbers.' At that point appellant's expectation of privacy in the contents of the book was significantly diminished."[26]

References

1. (5th Cir. 1973) 484 F.2d 990, 991
2. See United States v. Edwards (1974) 415 U.S. 800, 804-5 ["The police were also entitled to take from Edwards any evidence of the crime in his immediate possession, including his clothing."].
3. (1974) 415 U.S. 800, 806.
4. See United States v. Edwards (1974) 415 U.S. 800, 808 ["In upholding this search and seizure, we do not conclude that the Warrant Clause of the Fourth Amendment is never applicable to post arrest seizures of the effects of the arrestee."].
5. (1974) 415 U.S. 800.
6. (9th Cir. 1978) 569 F.2d 518. ALSO SEE Jackson v. State (Del. Supreme 1994) 643 A.2d 1360, 1364-5 ["When the evidentiary value of the sneakers was realized, they were properly seized as evidence."].
7. See United States v. Edwards (1974) 415 U.S. 800, 807 ["Caruso [U.S. v. Caruso (2nd Cir. 1966) 358 F.2d 184] is typical of most cases in the courts of appeals that have long since concluded that once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant . . . " Emphasis added. Citations omitted.]; Illinois v. Andreas (1983) 463 U.S. 765, 771 ["[O]nce police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost . . . " Emphasis added.]; U.S. v. Grill (5th Cir. 1973) 484 F.2d 990, 991 ["[T]he items in question have been exposed to police view under unobjectionable circumstances, so that no reasonable expectation of privacy is breached by an officer's taking a second look . . . "]; U.S. v. Johnson (9th Cir. 1987) 820 F.2d 1065, 1072 ["Even though the officer did not in fact at first record the serial numbers of the bills, he could have done so legitimately without a warrant. Accordingly, we find that appellant's expectation of privacy was significantly reduced, and that the information obtained during the second search was admissible."]; U.S. v. Burnette (9th Cir. 1983) 698 F.2d 1038, 1049 ["The contents of the purse had been fully exposed to the police and, consequently, her expectation of privacy in the purse was necessarily reduced by a significant degree. . . . [so that] the subsequent warrantless search at the police station was valid."]; Lockhart v. McCotter (5th Cir. 1986) 782 F.2d 1275, 1280 ["The police had earlier, at the time of inventory, lawfully viewed the wallet contained in Lockhart's envelope. Because of this earlier police inspection of his personal property, Lockhart had only a diminished expectation of privacy with respect to the items contained in the envelope. By taking a 'second look' at the wallet without first obtaining a search warrant, the police did not unduly intrude upon whatever remaining expectation of privacy Lockhart had."]; State v. Williams (Kan. 1991) 807 P.2d 1292, 1315 ["[The issue is] whether the law enforcement officers can go through the personal possessions of the accused that were being held for safekeeping and seize evidence without a warrant under circumstances in which the officers could have and should have examined the item seized when the defendant was first booked into jail."]. NOTE: There is language in Edwards indicating a warrantless search is permitted regardless of whether there was probable cause. The Court noted that the prisoner's clothes could have been searched without a warrant after booking, "particularly in view of [not because of] the existence of probable cause linking the clothes to the crime." At p. 806. Emphasis added.
8. (1974) 415 U.S. 800, 807. Emphasis added. Citations omitted.]. NOTE: Elsewhere in Edwards, the Court applied the "subject to search" principle when it noted, "Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." At p. 805. Emphasis added.

9. See State v. William (Kan. Supreme 1991) 807 P.2d 1292, 1318 [although there was no "first look" of documents, a "second look" was permitted because they could have been read when they were booked into a property locker].
10. See Illinois v. Lafayette (1983) 462 U.S. 640, 648 ["[I]t is not unreasonable for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."] People v. Panfili (1983) 145 Cal.App.3d 387, 393 ["Police have not merely a right but an affirmative duty, statutorily defined, to safeguard the property of a prisoner." Citing Penal Code § 1412.].
11. NOTE: Defense attorneys sometimes cite two cases which they contend prohibit a warrantless second look unless officers took a first look. One of the cases, U.S. v. Brett (5th Cir. 1969) 412 F.2d 401, 405-6 can be disposed of quickly—it is a pre-Edwards case that is contrary to Edwards. The other case is People v. Smith (1980) 103 Cal.App.3d 840. Although Smith is still occasionally cited by defendants, we are not aware of any case in which it was followed. There are two good reasons for this. First, the court did not engage in any meaningful analysis of the central issue; i.e., whether prisoners enjoy a reasonable expectation of privacy as to items that have been taken from them and stored in a property room for safekeeping. Second, if Smith were the law, officers could comply with it by simply making it a practice to conduct highly intensive booking searches of all property—looking at everything. This would not only result in a waste of police resources, it would, as noted, result in less privacy for the prisoners. Consequently, Smith is usually either distinguished or ignored. See People v. Bradley (1981) 115 Cal.App.3d 744, 751; People v. Davis (2000) 84 Cal.App.4th 390, 394 ["Smith does not stand for the broad proposition that jail inmates retain a Fourth Amendment privacy interest in property seized upon arrest and stored in the jail property room. On the contrary, [Smith] was based on the fact that the officers searched through a purse and wallet in the defendant's mother's property for items which had not previously been noted or whose evidentiary value had not previously been appreciated."]; People v. Superior Court (Gunn)(1981) 112 Cal.App.3d 970, 978, fn.2 [court notes that Smith was inconsistent with Edwards]; People v. Panfili (1983) 145 Cal.App.3d 387, 383 [unlike Smith, officers isolated the defendant's property—they did not complete the booking process].
12. (9th Cir. 1983) 698 F.2d 1038, 1049, fn.25.
13. See United States v. Edwards (1974) 415 U.S. 800, 806 [clothing]; People v. Davis (2000) 84 Cal.App.4th 390 [ring]; People v. Bradley (1981) 115 Cal.App.3d 744, 750-1 [ring]; People v. Remiro (1979) 89 Cal.App.3d 809, 835 [keys]; People v. Superior Court (Gunn) (1980) 112 Cal.App.3d 970, 977-8 [ring]; U.S. v. Thompson (5th Cir. 1988) 837 F.2d 673, 675-6; U.S. v. Oaxaca (9th Cir. 1978) 569 F.2d 518, 524 ["Both the defendants and their shoes remained in lawful custody until the time when the shoes were taken for use as evidence. To require a warrant under these circumstances would be to require a useless and meaningless formality."]; U.S. v. Caruso (2nd Cir. 1966) 358 F.2d 184; U.S. v. Turner (9th Cir. 1994) 28 F.3d 981, 983 ["We have held that if an initial seizure of clothing of the defendant is incident to a lawful arrest and therefore proper, once the clothes were properly in the custody of the sheriff's office, the clothing could be removed or transferred without benefit of official process."]; U.S. v. Bomengo (5th Cir. 1978) 580 F.2d 173, 175 ["In United States v. Blanton (5 Cir. 1973, 479 F.2d 327) and recently in United States v. McDaniel (5 Cir. 1978) 574 F.2d 1224, 1226, we rejected the argument that for Fourth Amendment purposes a governmental view subsequent to a private search constituted a 'new search.'"]; United States v. Burnette (9th Cir. 1983) 698 F.2d 1038, 1049 ["[O]nce an item in an individual's possession has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate uninterrupted possession of the police, may be conducted without a warrant. . . . ¶ Requiring police to procure a warrant for subsequent searches of an item already lawfully searched would in no way provide additional protection for an individual's legitimate privacy interests. The contents of an item previously searched are simply no longer private."]; Hell's Angels Motorcycle Corp. v. McKinley (9th Cir. 2004) 360 F.3d 930, 933 ["[P]ersonal items seized and examined by police during searches incident to a lawful arrest are not protected from further warrantless searches by police." Emphasis added.]. ALSO SEE Arizona v. Hicks (1987) 480 U.S. 321, 325 ["Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest."].
14. Minnesota v. Dickerson (1993) 508 U.S. 366, 377.
15. See United States v. Edwards (1974) 415 U.S. 800, 807; Illinois v. Andreas (1983) 463 U.S. 765, 771 ["It is obvious that the privacy interest in the contents of a container diminishes with respect to a container that law enforcement authorities have already lawfully opened and found to contain illicit drugs."]; United States v. Burnette (9th Cir. 1983) 698 F.2d 1038, 1049 ["The contents of an item previously searched are simply no longer private."]. ALSO SEE the cases cited in section entitled "If no probable cause," supra.

16. Illinois v. Lafayette (1983) 462 U.S. 640, 648. ALSO SEE People v. Panfili (1983) 145 Cal.App.3d 387, 393 [“Police have not merely a right but an affirmative duty, statutorily defined, to safeguard the property of a prisoner.” Citing Penal Code § 1412.]; People v. Bradley (1981) 115 Cal.App.3d 744, 751 [“Whatever segregation the police make as a matter of internal police administration of articles taken from a prisoner at the time of his arrest and booking does not derogate the fact of their continued custody and possession of such articles.”].
17. See United States v. Edwards (1974) 415 U.S. 800, 808, fn.9 [Court notes that a second look searches might be deemed unreasonable “because of their number or their manner of perpetration.”].
18. People v. Bradley (1981) 115 Cal.App.3d 744, 751. ALSO SEE People v. Rivard (Mich.App. 1975) 230 N.W.2d 6, 8 [“Once the ring had been exposed to police view under unobjectionable circumstances and lawfully taken by the police for safekeeping, any expectation of privacy with respect to that item had at least partially dissipated so that no reasonable expectation of privacy was breached by Detective Van Alstine taking a ‘second look.’”].
19. People v. Davis (2000) 84 Cal.App.4th 390, 394-5.
20. State v. Cheatham (Wash. 2003) 81 P.3d 830, 836. ALSO SEE State v. Jellison (Mont. Supreme 1989) 769 P.2d 711 [robbery suspect’s shoes that were booked into property were taken to robbery scene and compared with a shoe print on the counter].
21. U.S. v. Thompson (5th Cir. 1988) 837 F.2d 673. ALSO SEE U.S. v. Grill (5th Cir. 1973) 484 F.2d 990.
22. People v. Remiro (1979) 89 Cal.App.3d 809, 835 [quoting from People v. Rogers (1966) 241 Cal.App.2d 384, 389-90.
23. U.S. v. Westover (9th Cir. 1968) 394 F.2d 164, 165. ALSO SEE U.S. v. Jenkins (2nd Cir. 1974) 496 F.2d 57, 73 [“[O]nce the money had been lawfully taken by the police for safekeeping Wilcox no longer could reasonably expect any privacy with respect to the serial numbers.”]; U.S. v. Johnson (9th Cir. 1987) 820 F.2d 1065, 1072 [bait money]; U.S. v. Burnette (9th Cir. 1983) 698 F.2d 1038, 1049 [bait money]; Evalt v. U.S. (9th Cir. 1967) 382 F.2d 424, 427 [bait money]; People v. Panfili (1983) 145 Cal.App.3d 387, 393-4 [bait money].
24. People v. Earls (1980) 109 Cal.App.3d 1009, 1012.
25. People v. Superior Court (Gunn)(1981) 112 Cal.App.3d 970, 977. ALSO SEE People v. Richards (Ill. Supreme 1983) 445 N.E.2d 319 [officers lawfully seized necklace, having probable cause to believe the defendant had taken it in a burglary].
26. U.S. v. Holzman (9th Cir. 1989) 871 F.2d 1496. ALSO SEE State v. William (Kan. 1991) 807 P.2d 1292, 425-6 [officers lawfully seized and read a document taken from the defendant and placed in storage even though the document was not read when the defendant was booked].

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6.7: Searches and Detentions on School Grounds

"[D]rug use and violent crime in the schools have become major social problems." 1

There are very few things that virtually everyone agrees on. But here's one: Schools are places in which the students must be safe.2 School safety is not only essential for the students' physical and emotional health, it is necessary in order to create an environment in which students can learn. As the California Supreme Court observed, "Teaching and learning cannot take place without the physical and mental well-being of the students."3 To put it another way, "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."4

An important part of this effort is eliminating drugs and weapons from school grounds. Another is keeping people off school property if they have no legitimate reason for being there. One of the difficulties in accomplishing these objectives is that they often require searches and detentions of students and others. And this can be dangerous.

As a result, many school districts now have their own police departments staffed by sworn officers.5 Another significant development is the school resource officer program in which law enforcement officers are assigned to work closely with school administrators. Over the years, these officers have become invaluable because they provide both an authoritative presence and a wealth of specialized knowledge on how to detect and combat crime on school grounds.

The courts have also assisted in this effort. As we will explain in this article, they have determined that it has become necessary to ease the restrictions on searches and detentions that occur on school grounds. As the court pointed out in *People v. Randy G.*:

> [School officials] must be permitted to exercise their broad supervisory and disciplinary powers, without worrying that every encounter with a student will be converted into an opportunity for constitutional review.6

Searches on school grounds

School officers may search students and their property on school grounds if they have reasonable suspicion that the search will turn up evidence of a crime or a violation of school rules.7 As the United States Supreme Court explained:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or the rules of the school.8

Because only reasonable suspicion is required, a search will be upheld even though the probability of finding evidence is "considerably less" than a preponderance of the evidence; i.e., considerably less than a 50% chance.9 On the other hand, a search would be unlawful if it was based on "mere curiosity, rumor, or hunch."10

Not surprisingly, searches for weapons are especially likely to be upheld because, as the Fourth Circuit observed, "Weapons are a matter with which schools can take no chances."11 For example, in *People v. Alexander B.* 12 the dean of students at a high school in Los Angeles and two officers with the school's police force were trying to defuse an encounter between the members of two gangs on the school grounds. As the tension mounted, one of the participants said, "Don't pick on us. One of those guys has a gun." As he said this, he gestured toward five or six students who had been standing around, "yelling and making gang signs." Upon hearing this, the dean told an officer to "check the group over there. One of them is supposed to have a weapon." When the officer ordered the students to sit on the curb, one of them, Alexander, started to walk off. The officer wrestled him to the ground and, in the process, spotted the handle of a machete under his clothing. After Alexander was handcuffed, the officer reached in and seized the weapon.

On appeal, Alexander contended that the officer did not have reasonable suspicion to search him because, (1) only one of the five or six students in the group was alleged to have a gun (so there was only about a 20% chance that he was the one), and (2) there was no reason for the officer to believe that the student who made the allegation was reliable. But the court rejected the argument, pointing out that one of the circumstances that can be properly considered is the potential for violence if officers neglected to act.

Said the court, "Here, suspicion was focused on a group of five or six students. Given the potential danger to students and staff which would have resulted from inaction, a weapons search of the several accused students was reasonable."

Similarly, in *People v. Joseph G.* 13 a high school vice-principal in Spring Valley, California received a phone call from a parent who said that her son had been attending a high school football game a few days earlier when saw another student, Joseph G.,

carrying a handgun. The next morning, the vice-principal and a campus security officer searched Joseph's locker and found a handgun in his backpack. In upholding the search, the court noted, “The fact the mother named a particular student, apparently identified herself, and was a citizen-informant are all factors which weigh in favor of investigating the truth of her accusation by the minimal intrusion on Joseph's privacy of opening his locker, particularly when weighed against the gravity of the danger posed by possession of a firearm or other weapon on campus.”

Furthermore, although the caller did not know where the gun was located, the court noted that the locker was a logical place to look for it because a student who carries a weapon to school will probably keep it there or on his person. Thus, the court ruled the vice-principal had sufficient grounds to believe that a gun was located in Joseph’s backpack.

As noted, a search is permitted even if its purpose was to investigate a violation of a school rule. For example, in *New Jersey v. T.L.O.*14 the United States Supreme Court ruled that a vice-principal’s search of a high school student’s purse for cigarettes was lawful because the student had been caught smoking in a lavatory in violation of school rules.

Detentions on school grounds

The requirements for detaining students on school grounds are even less demanding than those for searches. In fact, neither probable cause nor reasonable suspicion is required. Instead, the only requirement is that the detention must not have been conducted for some arbitrary or capricious reason, or for the purpose of harassment.15

The reason for such an undemanding requirement is that school officials must be able to address safety and misbehavior concerns on school grounds without undue delay. In addition, detentions of students on school grounds are relatively unintrusive because a student’s freedom of movement is necessarily restricted simply by virtue of being on school property. As the California Supreme Court observed:

> While at school, a student may be stopped, told to remain in or leave a classroom, directed to go to a particular classroom, given an errand, sent to study hall, called to the office, or held after school. Unlike a citizen on the street, a minor student is subject to the ordering and direction of teachers and administrators.16

Consequently, a student may be detained for merely violating a school rule. For example, in *People v. William V.*17 a school resource officer at Hayward High School saw that a student named William “had a neatly folded red bandanna hanging from the back pocket of his pants.” This caught the officer’s attention because, as he testified, colored bandannas “commonly indicate gang affiliation” and are therefore not permitted on campus.

Furthermore, he explained that the manner in which the bandanna was folded and hanging from the pocket indicated to him that “something was about to happen or that William was getting ready for a confrontation.” The officer’s suspicions were heightened when, as William made eye contact with him, he “became nervous and started pacing,” and he began “trembling quite heavily, his entire body, especially his hands, his lips, his jaw.” At that point, the officer detained William, seized the bandanna, and pat searched him. In the course of the search, he found a knife.

William contended the detention was unlawful because the officer did not have reasonable suspicion to believe he was committing a crime. It didn’t matter, said the court, because “William’s violation of the school rule prohibiting bandannas on school grounds justified the initial detention.”18

As for detaining non-students, it appears that reasonable suspicion is still required. Even so, a non-student can be detained during school hours to confirm he has registered with the office as required by law.19 He may also be detained after school hours to confirm he has a legitimate reason for being there. For example, in *People v. Joseph F.*20 an assistant principal and resource officer at a middle school in Fairfield saw Joseph, a high school student, on campus at about 3 P.M. At the request of the assistant principal, the officer tried to detain him to determine whether he should be arrested for being an unregistered visitor on campus during school hours in violation of Penal Code § 627.2. But Joseph refused to stop, and the officer had to forcibly detain him. As the result, Joseph was arrested for battery on a peace officer engaged in the performance of his duties.

On appeal, Joseph argued that the officer was not acting in the performance of his duties because school hours had ended an hour earlier. The court responded that the detention of a high school student on a middle school campus is plainly lawful, if only to ascertain whether he has a legitimate reason for being there. Said the court, “[S]chool officials, or their designees, responsible for the security and safety of campuses should reasonably be permitted to detain an outsider for the limited purpose of determining such person’s identity and purpose regardless of ‘school hours.’”

Searches and detentions by police officers

There had been some uncertainty as to whether the less-restrictive rules pertaining to school searches and detentions apply when they were conducted by, or "at the behest of," school resource officers or school district police officers, as opposed to unsworn school security officers.[21] This uncertainty was, however, eliminated by the Court of Appeal in *People v. William V.*[22] Said the court:

> We see no reason to distinguish for this purpose between a non-law enforcement security officer and a police officer on assignment to a school as a resource officer.

The court added that requiring sworn officers to work under different—more demanding—rules than unsworn security officers would make no sense because it would "focus on the insignificant factor of who pays the officer's salary, rather than on the officer's function at the school and the special nature of the public school."

Moreover, it is apparent that school resource officers and district police officers have been specially designated by school administrators to discharge certain duties that, while they could be undertaken by school administrators and teachers, are better suited for law enforcement officers with special training and experience.[23] Thus, in discussing this issue, the Wisconsin Supreme Court observed:

> Were we to conclude otherwise, our decision might serve to encourage teachers and school officials, who generally are untrained in proper pat down procedures or in neutralizing dangerous weapons, to conduct a search of a student suspected of carrying a dangerous weapon on school grounds without the assistance of a school liaison officer or other law enforcement official.[24]

It should be noted that school resource officers and district police officers, as well as school administrators, are "state actors" for purposes of determining the lawfulness of searches and seizures on public school grounds.[25] Thus, as we discussed in the accompanying article "Searches by Civilians and Police Agents," evidence and statements obtained by them in violation of the Fourth Amendment may be suppressed.

References

1. New Jersey v. T.L.O. (1985) 469 U.S. 325, 339.
2. See Cal. Const., art. I, § 28(c) ["All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure, and peaceful."].
3. People v. William G. (1985) 40 Cal.3d 550, 563.
4. People v. Randy G. (2001) 26 Cal.4th 556, 562.
5. See Ed. Code § 38001. ALSO SEE People v. Randy G. (2001) 26 Cal.4th 556, 562 ["California fulfills its obligations [for campus security] by requiring each school board to establish rules and regulations to govern student conduct and discipline (Ed. Code § 3529) and by permitting the local district to establish a police or security department to enforce those rules. (Ed. Code § 38000.)].
6. (2001) 26 Cal.4th 556, 566. ALSO SEE New Jersey v. T.L.O. (1985) 469 U.S. 325, 340 ["It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."]; Wofford v. Evans (4th Cir. 2004) 390 F.3d 318, 321 ["School officials must have the leeway to maintain order on school premises and secure a safe environment in which learning can flourish."].
7. See People v. William G. (1985) 40 Cal.3d 550, 562 ["[T]he unique characteristics of the school setting require that the applicable standard be reasonable suspicion."]; People v. Bobby B. (1985) 172 Cal.App.3d 377, 381 ["[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."]; People v. Lisa G. (2005) 125 Cal.App.4th 801, 806 ["Ordinarily, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting the search will disclose evidence the student has violated or is violating the law or school rules"; student's disruptive behavior did not provide grounds to search her purse]; People v. Cody S. (2004) 121 Cal.App.4th 86; People v. Joseph G.(1995) 32 Cal.App.4th 1735; People v. Guillermo M. (1982) 130 Cal.App.3d 642 [pat search for suspected knives].
8. New Jersey v. T.L.O. (1985) 469 U.S. 325, 341.
9. See United States v. Sokolow (1989) 490 U.S. 1, 7 ["That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence."]; Illinois v. Wardlow (2000) 528 U.S. 119, 123 ["'[R]easonable suspicion' is a less demanding

standard than probable cause and requires a showing considerably less than preponderance of the evidence."]; United States v. Arvizu (2002) 534 U.S. 266, 274; Richards v. Wisconsin (1997) 520 U.S. 385, 394 ["This showing [for reasonable suspicion] is not high"]; Alabama v. White (1990) 496 U.S. 325, 330 ["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 than that required to show probable cause."].

10. See People v. William G. (1985) 40 Cal.3d 550, 564 ["[A] search of a student by a public school official is unlawful if predicated on mere curiosity, rumor, or hunch."].
11. Wofford v. Evans (4th Cir. 2004) 390 F.3d 318, 328. ALSO SEE People v. Alexander B. (1990) 220 Cal.App.3d 1572, 1577 ["Of greater importance is the fact that the gravity of the danger posed by possession of a firearm or other weapon on campus was great"]; People v. Guillermo M. (1982) 130 Cal.App.3d 642 [pat search for suspected knives].
12. (1990) 220 Cal.App.3d 1572. ALSO SEE People v. Bobby B. (1985) 172 Cal.App.3d 377.
13. (1995) 32 Cal.App.4th 1735. COMPARE People v. Lisa G. (2005) 125 Cal.App.4th 801, 807 ["Mere disruptive behavior does not authorize a school official to rummage through his or her students' personal belongings."].
14. (1985) 469 U.S. 325.
15. See People v. Randy G. (2001) 26 Cal.4th 556, 567 ["[D]etentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment."]. NOTE: Although the officer who detained Randy was not a school resource officer or district police officer, and although the court stated it was not ruling on whether sworn officers could make suspicionless detentions (at fn.3), the court seemingly disposed of the issue when it observed that the "mere detention and questioning of a student constitutes a more limited intrusion than a search of his person and effects." Quoting from In re D.E.M. (1999) 727 A.2d 570, 577, fn.18]. ALSO SEE Wofford v. Evans (4th Cir. 2004) 390 F.3d 318, 326 ["The facts of T.L.O. involved only a search. But the policies underlying that decision easily supports its extension to seizures of students by school officials." Citations omitted.].
16. People v. Randy G. (2001) 26 Cal.4th 556, 563.
17. (2003) 111 Cal.App.4th 1464.
18. NOTE: The court summarily ruled the pat search was lawful, noting, "In light of William's bulky clothes, [the officer] reasonably lifted William's jacket to search his waistband."
19. See Penal Code § 627.2
20. (2000) 85 Cal.App.4th 975.
21. See New Jersey v. T.L.O. (1985) 469 U.S. 325, 341, fn.7 [Court expresses "no opinion" on "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies"]; People v. Alexander B. (1990) 220 Cal.App.3d 1572, 1577, fn.1 ["Since the search of appellant and his companions was undertaken by police at the request of a school official, we need not consider the appropriate standard for assessing the legality of searches undertaken by school officials at the behest of police."].
22. (2003) 111 Cal.App.4th 1464. ALSO SEE Wofford v. Evans (4th Cir. 2004) 390 F.3d 318, 327 ["But when a student is suspected of also breaching a criminal law, both school officials and law enforcement officers may proceed under the lesser standards"].
23. ALSO SEE Cal. Ed. Code §38000(a) ["It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers."]; People v. Randy G. (2001) 26 Cal.4th 556, 568 ["If we were to draw the distinction urged by the minor, the extent of a student's rights would depend not on the nature of the asserted infringement but on the happenstance of the status of the employee who observed and investigated the misconduct."]; Wofford v. Evans (4th Cir. 2004) 390 F.3d 318, 327 ["Law enforcement officers, not school administrators, have a particular expertise in safely retrieving hidden weapons."]; People v. Dilworth (1996) 169 Ill.2d 195; Hussan v. Lubbock Indep. School Dist. (5th Cir. 1995) 55 F.3d 1075, 1080 ["Nor do we perceive anything in [juvenile probation officer] Atkins' role as a Center employee, or his actions in this incident, that warrants the application of a different standard to his conduct. He acted at the behest of school officials and at all times his control over Hassan remained subject to the direction of Thomas and Williams."].
24. State v. Angelia D.B. (1997) 564 N.W. 682, 690.
25. See New Jersey v. T.L.O. (1985) 469 U.S. 325, 336-7 ["In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State [and cannot claim] immunity from the strictures of the Fourth

Amendment.”]; In re William G. (1985) 40 Cal.3d 550, 561 [“[P]ublic school officials are governmental agents within the purview of [the Fourth Amendment].”]; People v. Alexander B. (1990) 220 Cal.App.3d 1572, 1576 [“State and federal constitutional prohibitions against unreasonable searches and seizures apply to the actions of public school authorities as well as law enforcement officers.”].

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6.8: Workplace Searches

"Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police."

The United States Supreme Court(1)

Evidence of a crime will sometimes be located in a suspect's office, desk, file cabinet, computer, locker or other area at his or her workplace. In such cases, officers need to know how they can legally obtain the evidence. Do they need a warrant? Can the suspect's employer consent to the search? If so, what is the permissible scope of the search? Is the evidence admissible if the employer comes in on his own and turns it over to officers? These are some of the issues we will discuss in this article.

As we will explain, the rules regarding the admissibility of evidence obtained in the workplace depend mainly on who conducted the search. Was it a private employer, a governmental agency, or a law enforcement officer?

SEARCHES BY PRIVATE EMPLOYERS

In some cases an employer will discover evidence of a crime in an employee's desk, computer, or other location in the workplace. This may occur inadvertently or as the intentional result of a search. In any event, if the employer seizes the evidence and turns it over to police, the question arises: Is the evidence admissible in court?

The answer is as follows: The evidence will be admissible if, (1) the suspect's employer was a private company or individual, not a governmental agency; and (2) the employee who conducted the search did so on his own initiative with absolutely no police involvement. As the United States Supreme Court pointed out, the exclusionary rule Ais wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."(2)

On the other hand, the evidence will be suppressed if an officer or other government employee requested, planned, or facilitated the search.(3)

Re-opening closed containers

If a private employer discovers evidence and turns it over to police, another legal issue may arise: If the evidence is in a container or is otherwise not in plain view when it was handed to officers, is a warrant required before officers may open the container?

The answer is that a warrant is required if the officers' act of opening the container permits them to see something that had not been observed previously by the employer. But a warrant is not required if the evidence, although not in plain view when it was received by officers, had been observed previously by the employer.(4)

For example, in United States v. Jacobsen(5) a cardboard box that was being shipped by Federal Express was accidentally torn by a forklift. When workers opened the package to examine its contents to prepare an insurance report they found a "tube" about ten inches long covered by duct tape. The workers cut open the tape and found four zip-lock plastic bags containing white powder. Suspecting drugs, the workers notified the DEA. Before the agents arrived, however, the FedEx workers put the plastic bags back in the tube and re-packaged the tube in the cardboard box. When agents arrived, they opened the box and the tube, then extracted some of the powder to conduct a field test which came back positive for cocaine.

The United States Supreme Court ruled the agents acted lawfully when they re-opened the tube and examined the powder because it had already been observed by FedEx workers. Said the Court, "[T]he removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a >search' within the meaning of the Fourth Amendment."

The Court also ruled that agents did not need a warrant to conduct a field test of suspected drugs that are in their lawful possession because, "A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."

Later, the California Court of Appeal ruled that if the field test confirms the substance was an illegal drug, a warrant would not be required to test the substance in a laboratory.(6) If, however, the field test was negative or inconclusive, laboratory testing is permitted only if officers obtain a warrant.(7)

SEARCHES BY GOVERNMENT EMPLOYERS

Special rules apply to searches that were made by government employers, such as a city, county, or state. This is because the Fourth Amendment governs searches made by public employees.(8) Consequently, evidence obtained as the result of a warrantless search will usually be suppressed, except in three situations:

1. **No reasonable expectation of privacy**: The employee did not have a reasonable expectation of privacy in the place or thing that was searched.
2. **Reasonable suspicion**: There was reasonable suspicion that evidence of work-related misconduct would be found in the place or thing that was searched; the place or thing that was searched was part of the "workplace"; and the search was reasonable in scope.
3. **Consent**: The employee consented to the search. No reasonable expectation of privacy

Evidence discovered by a government employee will not be suppressed if the suspect-employee did not have a reasonable expectation of privacy in the place or thing that was searched.(9) In determining whether a reasonable expectation of privacy existed in the workplace, the following principles apply:

Personal items: Employees will generally have a reasonable expectation of privacy in their personal effects in the workplace, such as purses, luggage and briefcases.(10) As the United States Supreme Court observed, "Not everything that passes through the confines of the business address can be considered part of the workplace context. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the contents of the luggage is not affected in the same way."(11) Thus, evidence obtained as the result of a public employer's warrantless search of such items will almost always be suppressed.

Property owned by the employer: An employee may also have a reasonable expectation of privacy as to some non-personal effects in the workplace, such as the employee's office, file cabinet, desk, and computer. There are, however, circumstances in which an employee could not reasonably expect privacy in such an area or thing, in which case the evidence would be admissible. Those circumstances are as follows:

Usual practices and procedures: An employee's expectation that items in the workplace would not be searched or observed may be unreasonable as the result of office practices and procedures. As the United States Supreme Court observed, "The operational realities of the workplace may make some employees' expectations of privacy unreasonable . . . Public employees' expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures. . . ."(12) For example, if workers or supervisors regularly enter the employee's office to retrieve files from a file cabinet, it would probably be unreasonable for the employee to expect that items in the file cabinet would remain private.(13)

Plain view: It would usually be unreasonable for an employee to expect privacy as to items out in the open in his office, especially if such items were observed by a supervisor or fellow employee. This is because, as the United States Supreme Court noted, "An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits."(14)

Reasonable suspicion

A warrantless search of a public employee's workplace, including areas in which the employee had a reasonable expectation of privacy, is permitted if the following three requirements are met:

1. **Reasonable suspicion**: There was reasonable suspicion to believe the search would result in the discovery of evidence pertaining to work-related misconduct.(15) Under such circumstances, probable cause is not required because, as the United States Supreme Court explained, "Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related malfeasance of its employees."(16) Consequently, the court ruled that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness."

2. **Search of "workplace"**: A warrantless search based on reasonable suspicion is permitted only if the area or thing that was searched was located on the "workplace." Otherwise, a search warrant based on probable cause will be required. What does the term "workplace" mean in this context? According to the United States Supreme Court, the workplace "includes those areas and items that are related to work and are generally within the employer's control. At a hospital, for example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace."(17) On the other hand, an employee's personal effects, such as a purse, briefcase, or luggage, are not part of the workplace merely because they were on the premises when the search was conducted.(18)
3. **Search was reasonable in scope**: The search must not have been unduly intrusive.(19) Or, in the words of the U.S. Court of Appeals, "The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct."(20)

POLICE SEARCHES

Law enforcement officers may conduct a search of a suspect's workplace if the search was authorized by a warrant based on probable cause or the search was authorized by the terms of the employee's parole or probation.(21) As we will now discuss, a police search may also be based on two other legal theories:

1. The employee had no reasonable expectation that officers would not see or discover the evidence.
2. Officers obtained consent to search from the employee or the employer. No reasonable expectation of privacy

An employee cannot challenge the search of a place or thing in which he has no reasonable expectation that law enforcement officers would not see or discover the item seized.

Note, however, there is a significant difference between an employee's reasonable expectation that his employer would not invade a certain area versus the employee's reasonable expectation that the area would not be invaded by law enforcement officers.(22)Thus, while it might be unreasonable for an employee to expect that his employer would not look through his desk or files, it might be entirely reasonable for the employee to expect that such things would not be searched by law enforcement officers without a warrant.

Employee consents to search

The suspect may consent to a police search of those places and things in the workplace over which he has joint access or control. (23) The suspect may not, however, authorize a search of any other places or things in the workplace. Like any consent search, the following requirements must be met:

1. Express or implied consent: The employee expressly or impliedly consented to the search.(24)
2. Voluntary consent: The consent was voluntary, not the result of coercion.(25)
3. Search within scope of consent: Officers searched only those places and things they reasonably believed the employee authorized them to search.(26)

Employer consents to search

An employer may voluntarily give officers consent to search places and things in the workplace over which the employer has joint access or control for most purposes.(27) Areas and things over which such access and control usually exist include common areas that are generally used by, or accessible to, some or all employees. This would include conference rooms, file rooms, libraries, kitchens, and rest rooms.(28)

It would also include places and things that are used primarily by the employee if the employer, as a matter of actual practice, retained and exercised the right to access or control the place or thing.(29) In other words, joint access or control may exist when the employer has sufficient mutual use of the property for most purposes so that it reasonably appears the employer had the authority to permit the search in his own right.(30)

Note that an employer does not have "joint access or control" merely because he owns or is able to access the area or thing that was searched.(31) Nor does common authority exist merely because the employer has a key or master key that allows him access.(32)

Instead, what counts is whether the employee had exclusive access or control, or whether the employer regularly or at least occasionally used or accessed the place or thing so that it can be fairly said that the employee lacked exclusive control. For

example, an employer will probably not have joint access or control over a desk or file cabinet in the employee's office which is used exclusively by the employee.(33)

In some cases, officers have obtained consent to search from an employer who they believed could consent to the search, but they later learn that the employer did not, in fact, have joint access or control over the place or thing that was searched. Does this invalidate the search? It depends on whether the employer was a private employer or government agency.

Private employers

If the employer was a private individual or company, a consent search will be upheld if the officers reasonably believed the employer had joint access or control for most purposes (also known as "common authority") over the place or thing that was searched.(34) In other words, the issue here is not whether the employer actually had such authority but whether the officers reasonably believed he did.(35)

Governmental agencies

Because governmental agencies are subject to Fourth Amendment restraints, consent from a public employer will be valid only if the public employer did, in fact, have joint access and control over the area or thing searched.(36) In other words, an officer's reasonable but mistaken belief that the employer could consent to the search would be insufficient.

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6.9: Maryland v. Buie

PETITIONER

Maryland Jerome

RESPONDENT

Edward Buie

LOCATION

Buie Residence

DOCKET NO.

88-1369

DECIDED BY

Rehnquist Court

LOWER COURT

Maryland Court of Appeals

CITATION

494 US 325 (1990)

ARGUED

Dec 4, 1989

Decided

Feb 28, 1990

Granted

June 5, 1989

ADVOCATES

John L. Kopolow *on behalf of the Respondent*

Lawrence S. Robbins *on behalf of the United States as amicus curiae, supporting the Petitioner*

Facts of the case

On February 3, 1986, two men robbed a Godfather's Pizza in Prince George's County, Maryland. One of the men was wearing a red running suit. Later that day, the police obtained warrants for the arrest of Jerome Edward Buie and Lloyd Allen and put Buie's house under surveillance. On February 5, the police arrested Buie in his house. Police found him hiding in the basement. Once Buie emerged and was handcuffed, an officer went down to determine if there was anyone else hiding. While in the basement, the officer saw a red running suit in plain view and seized it as evidence. The trial court denied Buie's motion to suppress the running suit evidence, and he was convicted. The Court of Special Appeals of Maryland affirmed the trial court's denial of the motion. The Court of Appeals of Maryland reversed.

Question

Does the Fourth Amendment prevent police officers from making a "protective sweep" at the site of an in-home arrest if they do not believe themselves or others to be in immediate danger?

FOR	AGAINST
Stevens Kennedy Scalia Blackmun O'Conner Rehnquist White	Marshall Brennan

Conclusion

7–2 Decision for Maryland Majority Opinion by Byron R. White

No. Justice Byron R. White delivered the opinion of the 7-2 majority.

The Court held that the potential risk to police officers of another person on the arrest site must be weighed against the invasion of privacy. Because the arrest in this case happened in the suspect's home, the officer was put at even greater risk because of the possibility of an ambush. This risk justified the protective sweep. The Court also held that a protective sweep was meant to be a cursory one, and not an in-depth search of the premises that would require a specific warrant.

In his concurring opinion, Justice John Paul Stevens wrote that the state has the burden to prove that the search was protective in nature. He argued that the state must show that the officers had a "reasonable basis" for believing that there was a risk to themselves. In his concurring opinion, Justice Anthony M. Kennedy wrote that he disagreed with Justice John Paul Stevens. He argued that the protective sweep was an element of police safety procedure, so the state did not have as high of a burden as Justice Stevens' concurrence implied. Justice William J. Brennan, Jr. wrote a dissent where he argued that the protective sweep represented the type of intrusive unwarranted search that the Fourth Amendment was created to prevent.

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6.10: Chimel v. California

PETITIONER	RESPONDENT
Chimel	California

LOCATION

Chimel's Home

DOCKET NO.	DECIDED BY
770	Burger Court

CITATION

395 US 752 (1969)

ARGUED

Mar 27, 1969

DECIDED

Jun 23, 1969

Facts of the case

Local police officers went to Chimel's home with a warrant authorizing his arrest for burglary. Upon serving him with the arrest warrant, the officers conducted a comprehensive search of Chimel's residence. The search uncovered a number of items that were later used to convict Chimel. State courts upheld the conviction.

Question

Was the warrantless search of Chimel's home constitutionally justified under the Fourth Amendment as "incident to that arrest?"

FOR	AGAINST
Douglas Marshall Warren Stewart Harlan Brennan	White Black

Conclusion

6–2 Decision for Chimel Majority Opinion by Potter Stewart

In a 7-to-2 decision, the Court held that the search of Chimel's house was unreasonable under the Fourth and Fourteenth Amendments. The Court reasoned that searches "incident to arrest" are limited to the area within the immediate control of the suspect. While police could reasonably search and seize evidence on or around the arrestee's person, they were prohibited from rummaging through the entire house without a search warrant. The Court emphasized the importance of warrants and probable cause as necessary bulwarks against government abuse.

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CHAPTER OVERVIEW

7: The Exclusionary Rule

7.1: Weeks v. United States

7.2: Wong Sun v. United States

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7.1: Weeks v. United States

PETITIONER	RESPONDENT
Freemont Weeks	United States
DOCKET NO.	**DECIDED BY**
461	White Court
LOWER COURT	
Federal District Court	
CITATION	
232 US 383 (1914)	
ARGUED	
Dec 1-2, 1914	
DECIDED	
Feb 24, 1914	

ADVOCATES

Martin J. O'Donnell *for Weeks*

John W . Davis *Solicitor General, Department of Justice, for the United States*

Winfred T. Denis *on Assistant Attorney General, Department of Justice, for the United States*

Facts of the case

Police entered the home of Fremont Weeks and seized papers which were used to convict him of transporting lottery tickets through the mail. This was done without a search warrant. Weeks took action against the police and petitioned for the return of his private possessions.

Question

Did the search and seizure of Weeks' home violate the Fourth Amendment?

Conclusion

Decision for Weeks by William R. Day

UNANIMOUS

Day

White

McKenna

Holmes

Lurton

Hughes

Van Devanter

Lamar

Pitney

The Fourth Amendment prohibition against unlawful searches and seizures applies to Weeks and the evidence thus seized must be excluded from prosecuting him. In a unanimous decision, the Court held that the seizure of items from Weeks' residence directly

violated his constitutional rights. The Court also held that the government's refusal to return Weeks' possessions violated the Fourth Amendment. To allow private documents to be seized and then held as evidence against citizens would have meant that the protection of the Fourth Amendment declaring the right to be secure against such searches and seizures would be of no value whatsoever. This was the first application of what eventually became known as the "exclusionary rule."

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7.2: Wong Sun v. United States

PETITIONER	RESPONDENT
Wong Sun and James Wah Toy	United States

LOCATION

James Wah Toy's Laundry

DOCKET NO.	DECIDED BY
36	Warren Court

LOWER COURT

United States Court of Appeals for the Ninth Circuit

CITATION

371 US 471 (1963)

ARGUED

Mar 28, 1962 / Apr 01, 1962

REARGUED

Oct 8, 1962

DECIDED

Jan 14, 1963

GRANTED

Oct 9, 1961

ADVOCATES

Edward Bennett Williams *acting under appointment by the Court, for the petitioners*

Archibald Cox *Solicitor General, Department of Justice, for the United States*

Facts of the case

Police arrested Hom Way for possession of heroin. While under arrest, Way told police that a man named "Blackie Toy" once sold him an ounce of heroin at his laundry on Leavenworth St. Later that day, police found a laundry run by James Wah Toy. Nothing on the record identified Toy as "Blackie Toy", but police arrested him anyway. Police then went to Toy's house where they arrested Johnny Yee and found several tubes containing less than one ounce of heroin. Police also arrested Wong Sun. Police interrogated the men and wrote statements in English for them to sign. Both men refused, citing errors in the statements. At trial in U.S. District Court, Toy and Sun were convicted on federal narcotics charges. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed.

Question

1. Were the petitioners' arrests lawful?
2. Were the petitioners' unsigned statements admissible as evidence?

Conclusion

5–4 DECISION FOR WONG SUN MAJORITY OPINION BY WILLIAM J. BRENNAN, JR.

FOR	AGAINST
Douglas Black Goldberg Warren Brennan	White Clark Harlan Stewart

Prejudicial error at trial may have considered each petitioner's statement as corroboration of the other petitioner's guilt No, No. In a 5-4 decision, Justice William J. Brennan wrote the majority opinion reversing the lower court and remanding for a new trial. The Supreme Court held that the police did not have probable cause to justify the arrests. With regard to Toy, the court should exclude all evidence found during the search because they are the “fruits” of an unlawful search. The unsigned statement was not corroborated, so it gave no basis for conviction. Sun’s unsigned confession and evidence against him were admissible. Justice Tom C. Clark wrote a dissent, stating that the arrests were lawful and there was no reason to grant Sun a new trial. Justices James M. Harlan, Potter Stewart, and Byron R. White joined in the dissent.

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CHAPTER OVERVIEW

8: The Plain View Doctrine

8.1: Plain View Doctrine

8.2: Arizona v. Hicks

8.3: Police Trespassing

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8.1: Plain View Doctrine

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant." 1

here is general agreement that the plain view rule is fairly simple to understand and apply. Even the words "plain view" seem to to saying,

"If it's visible, it's seizable!" Of course, it is not that simple, but it's not very complicated either. Specifically, evidence is deemed in plain view—and can therefore be seized without a warrant—if the following circumstances existed:

1. Lawful vantage point: The officers' initial viewing of the evidence must have been "lawful."
2. Probable cause: Before seizing the evidence, officers must have had probable cause to believe it was, in fact, evidence of a crime
3. Lawful access: Officers must have had a legal right to enter the place in which the evidence was located.

If these circumstances exist, the officers' act of observing the evidence does not constitute a "search" because no one can reasonably expect privacy in something that is so readily exposed; and their act of seizing the evidence is lawful because the plain view rule constitutes an exception to the warrant requirement.2 As the United States Supreme Court explained, "The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable."3

Lawful Vantage Point

The requirement that the officers' initial observation of the evidence must have been "lawful" is satisfied if the officers did not violate the suspect's Fourth Amendment rights by getting into the position from which they saw it.4 "The plain view doctrine," said the Supreme Court, "is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost."5

Before we discuss the types of places from which an observation is apt to be legal, it should be noted an observation does not become an unlawful search merely because officers had to make some effort to see the evidence, so long as the effort was reasonably foreseeable. Thus, it is unimportant that officers could not initially see the evidence without using a common visual aid (such as a flashlight or binoculars),6 or without bending down or elevating themselves somewhat. Thus, the D.C. Circuit explained, "That a policeman may have to crane his neck, or bend over, or squat, does not render the [plain view] doctrine inapplicable, so long as what he saw would have been visible to any curious passerby."7 Similarly, the Court of Appeal ruled that merely looking over the five-foot fence from a neighbor's yard "disclosed no more than what was in plain view."8

In contrast, the courts have ruled that officers "searched" a high-rise apartment when they could only see the evidence inside by using high-power binoculars from a hilltop about 250 yards away,9 or when officers "had to squeeze into a narrow area between the neighbor's garage and defendant's fence" and that area was almost blocked by foliage.10

OBSERVATION FROM PUBLIC PLACE

The most obvious example of a lawful vantage point is a place that is accessible to the general public.11 Thus, the Supreme Court pointed out that "the police may see what may be seen from a public vantage point where they have a right to be,"12 and that officers "cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."13

OBSERVATION DURING DETENTION OR ARREST

An observation that occurred in the course of a detention is lawful if officers had sufficient grounds for the detention or arrest and it was reasonable in its scope and intensity.14 For example, in *People v. Sandoval* 15 the Court of Appeal ruled that an officer, having made a lawful car stop, lawfully observed drugs and paraphernalia in the passenger compartment because "the officer clearly had a right to be in the position to have that view."

OBSERVATION DURING PAT SEARCH

In a variation of the plain view rule (i.e., the "plain feel" rule), officers who feel evidence while conducting a pat search are deemed to be in a lawful vantage point if they had grounds for the search.16 In such cases, said the Third Circuit, the "proper question" is whether the officer detected the evidence "in a manner consistent with a routine frisk."17 Or, in the words of the Supreme Court, a

lawful pat search must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[18]

OBSERVATION WHILE EXECUTING A SEARCH WARRANT

Officers who are executing search warrants often find evidence that was not listed in the warrant. When this happens, the discovery will be deemed lawful under the plain view rule if they found the evidence while looking in places or things in which any of the listed evidence might have been found. For example, in *Skelton v. Superior Court* [19] officers in La Palma were searching for a wedding ring and carving set which were taken in a burglary. While searching for these items, they also found some watches and rings that matched the descriptions of items taken in related burglaries. On appeal, the California Supreme Court ruled the unlisted evidence was lawfully discovered because "the warrant mandated a search for and seizure of several small and easily secreted items" and therefore "the officers had the authority to conduct an intensive search of the entire house."

Similarly, in *U.S. v. Smith*,[20] officers in Tampa obtained a warrant to search the home of Smith's mother for drugs and indicia. In the course of the search, they opened Smith's lockbox and found child pornography. In ruling that the pornography was discovered lawfully, the court said, "It was through the lawful execution of the warrant that the officers came across the photographs at issue here."

In contrast, in *People v. Albritton* [21] narcotics officers in Bakersfield obtained a warrant to search the defendant's home for drugs and indicia. A detective assigned to the auto theft detail learned about the warrant and decided to "go along for the ride" because the defendant was also a suspected car thief. When the officers arrived, the detective "immediately separated himself from the others and went to the garage" where he checked the VIN numbers on several cars and learned that four were stolen. On appeal, prosecutors argued that the detective's initial viewing of the VIN numbers was lawful, and therefore the plain view rule applied. But the court disagreed, ruling the detective's observation of the VIN numbers was unlawful because none of the evidence listed in the search warrant could reasonably have been found in the areas in which the VIN numbers were located.

OBSERVATION DURING WARRANTLESS ENTRY

In a similar vein, officers may seize evidence inside a residence if (1) they were lawfully on the premises (e.g., exigent circumstances, consentual entry, execution of an arrest warrant), and (2) they discovered the evidence while they were carrying out their lawful duties. For example, if the officers' entry into a living room was consensual (e.g., a knock and talk), and if they saw drugs in the room, their observation would be deemed lawful because they had been invited into that room. But if they saw the evidence by opening a container in the living room or while wandering into another room, the observations would be unlawful.

A good example of such an unlawful observation is found in *Arizona v. Hicks* [22] in which officers had entered Hicks' apartment without a warrant because someone in his apartment had fired a shot through the floor, injuring an occupant in the apartment below. While looking around, one of the officers noticed an expensive audio system which he thought might have been stolen because the apartment was otherwise "squalid." The officer then confirmed his suspicion by picking up a component, writing down the serial number, and running it through a police database. Although the U.S. Supreme Court ruled that the entry into the apartment was lawful, it ruled that the serial number was not in plain view because the officer could not have seen it without doing something (picking up the component) that went beyond the objective of the entry, which was to apprehend the shooter and look for any other injured people.

OBSERVATION DURING ENTRY INTO YARDS

As with warrantless entries into residences, warrantless entries into a suspect's front, back, or side yards may fall within an exception to the warrant requirement (e.g., exigent circumstances, consent), in which case their observations would be lawful. In the absence of a warrant, officers may still walk to the front door via normal access routes, then knock or otherwise announce their presence. But if no one answers the door within a reasonable time, any observations they make may be illegal if they loitered on the property or explored the grounds. As the Supreme Court explained, officers are impliedly authorized "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."[23]

For example, in *People v. Edelbacher* [24] the defendant shot and killed his estranged wife in Fresno County, then drove to his home in Madera County. A sheriff's deputy who was investigating the murder drove to Madera and, while standing on Edelbacher's driveway, saw shoe prints that looked just like the shoe prints that had been found at the murder scene. Consequently, officers took photos of the shoe prints and prosecutors used them against Edelbacher at his trial. On appeal, he argued that the discovery was

unlawful because the deputy had been standing on his private property. It didn't matter, said the California Supreme Court, because the prints "were apparently visible on the normal route used by visitors approaching the front doors of the residences and there is no indication of solid fencing or visible efforts to establish a zone of privacy."

OBSERVATION FROM ADJACENT PROPERTY

An observation of evidence in a suspect's yard or other private property is not unlawful if it was made from a neighbor's property, even if the officers were technically trespassing.25 This is because it was the neighbor who was intruded upon—not the suspect. As the Court of Appeal observed, "[A] search does not violate the Fourth Amendment simply because police officers trespassed onto a neighbor's property when making their observations."26

OBSERVATION DURING COMPUTER SEARCH

Officers who are executing a warrant to search a computer will often discover unlisted data or evidence of some other crime. When this happens the discovery will be deemed lawful under the plain view rule if the file in which the evidence was found could have contained any of the data or graphics listed in the warrant. In most cases, that means every file must be read because, as the Ninth Circuit pointed out in *U.S. v. Comprehensive Drug Testing, Inc.*, unless officers read every file they would have "no way of knowing which or how many illicit files there might be or where they might be stored."27

Probable Cause

The second requirement for a plain view seizure is that the officers—at or before the moment they seized the evidence—must have had probable cause to believe the item was, in fact, evidence of a crime.28 And like the other forms of proof, probable cause to seize an item in plain view may be based on direct or circumstantial proof. Examples of direct proof would include an officer's observation of a weapon that is illegal to possess,29 a weapon used in a crime,30 readily-identifiable drugs or drug paraphernalia,31 readily-identifiable child pornography,32 or property that had been reported stolen.33

As we will now discuss, circumstantial proof typically consists of an officer's observation of something that, based on his training and experience, appears to be seizable evidence.

INSTRUMENTALITIES OF A CRIME

Probable cause is often based on an officer's knowledge of a link between the item and a certain crime or a type of crime. The following are examples of such a link:

- A man suspected of having just robbed a bank had a large amount of cash protruding from his wallet.34
- A suspect in an armed robbery or shooting possessed firearms, ammunition, shell casings;35 clothing that matched those of the perpetrator;36 a mask (the perpetrator wore one);37 a handcuff key (the victim had been handcuffed).38
- A murder suspect possessed bailing wire (bailing wire had been used to bind the victims).39
- A murder suspect possessed "cut-off panty hose" (the officer knew that the murderers had worn masks and that cut-off panty hose are used as masks).40
- A man who had solicited the murder of his estranged wife possessed a hand-drawn diagram of his wife's home and lighting system.41
- A burglary suspect possessed pillow cases filled with "large, bulky" items 42 or burglary tools.43
- A suspected drug dealer possessed "a bundle of small, plastic baggies";44 a "big stack or wad of bills";45 firearms.46

STOLEN PROPERTY

Circumstantial evidence that property was stolen may consist of the condition of the property, such as obliterated serial numbers, clipped wires, and pry marks. For example, in *People v. Gorak* 47 the court ruled that officers had probable cause to seize an air compressor in plain view in the back seat of the defendant's car mainly because "the electrical lines and air lines appeared to have been broken off" and water was leaking out of a broken line. Similarly, in *People v. Stokes* 48 two Hayward police officers in an unmarked car were driving through a mobile home park that was occupied mainly by senior citizens. As they turned a corner, they saw Stokes standing in the middle of the street, holding a video recorder. The officers recognized Stokes as a local burglar, they noticed that he kept looking around and appeared to be nervous, that he was carrying a screwdriver, and that several homes in the park had recently been burglarized. Although the officers had no direct evidence that the recorder had been stolen, the court ruled that the circumstantial evidence was quite sufficient.

Other circumstantial evidence that may suffice include the presence of store merchandise tags or anti-shoplifting devices that are usually removed when retail goods are sold; or the presence of an inordinate amount of property, especially the type of property that is frequently stolen, such as TVs, cell phones, tablets, firearms, and jewelry.[49]

POSSESSION OF DRUGS, PARAPHERNALIA

Officers frequently develop probable cause to seize a container in the possession of a drug user or trafficker based entirely on circumstantial evidence that it contained drugs, paraphernalia, or evidence of sales.[50] As the court observed in *People v. Holt*, "Courts have recognized certain containers as distinctive drug carrying devices which may be seized upon observation: heroin balloons, paper bindles and marijuana smelling brick-shaped packages."[51]

Probable cause may also be based on how the object felt; i.e., "plain feel."[52] For example, in *People v. Lee* [53] an Oakland police officer was pat searching a suspected drug dealer when he felt "a clump of small resilient objects" which he believed (correctly) were heroin-filled balloons. In ruling that the officer's seizure of the balloons was lawful under the "plain feel" rule, the court noted that he "recognized the feel of such balloons from at least 100 other occasions on which he had pat-searched people and felt what were later determined to be heroin-filled balloons. As he described it, the feel is unmistakable."

Lawful Access

Finally, even if officers could see the evidence and had probable cause to believe it was seizable, they may not enter the suspect's home or other place in which he had a reasonable expectation of privacy unless they had a legal right to enter; e.g., a vehicle in which the evidence was located.[54] Thus, in discussing the plain view rule, the Supreme Court explained that "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself."[55] Or, as Justice Grodin observed in *People v. Superior Court (Spielman)*, "Seeing something in plain view does not, of course, dispose, ipso facto, of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly overapply the plain view doctrine to every situation where there is a visual open view have not yet learned the simple lesson long since mastered by old hands at the burlesque houses, 'You can't touch everything you can see.'"[56] Note that officers will always have lawful access to evidence located in a public place or a vehicle located in a public place.[57] In addition, they may enter a residence and seize evidence observed from the outside if they were aware that a resident was subject to a parole or probation search or if they reasonably believed the evidence would be destroyed if they delayed seizing it.

For example, in *People v. Ortiz* [58] an officer happened to be walking by the open door of a hotel room when he saw a woman inside, and she was "counting out tinfoil bindles and placing them on a table." Having probable cause to believe the bindles contained heroin, the officer went inside, seized the bindles, and arrested the woman and the other occupants. In ruling that the officer had lawful access to the evidence, the court pointed out that, because he was initially only three to six feet away from the woman, he reasonably believed that she had seen him and it is "common knowledge that those who possess drugs often attempt to destroy the evidence when they are observed by law enforcement officers." Consequently, the court ruled that the officer had a legal right to enter because "it was reasonable for [him] to believe the contraband he saw in front of defendant and the woman was in imminent danger of being destroyed.

References

1. Coolidge v. New Hampshire (1971) 403 U.S. 443, 465.
2. See People v. Kilpatrick (1980) 105 Cal.App.3d 401, 408; People v. Albritton (1982) 138 Cal.App.3d 79, 85, fn.1.
3. Payton v. New York (1980) 445 U.S. 573, 587.
4. See Minnesota v. Dickerson (1993) 508 U.S. 366, 375 ["The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no 'search'"]; Washington v. Chrisman (1982) 455 U.S. 1, 5-6 ["The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be."]; People v. Bradford (1997) 15 Cal.4th 1229, 1295.
5. Illinois v. Andreas (1983) 463 U.S. 765, 771.
6. See On Lee v. United States (1952) 343 U.S. 747, 754; Texas v. Brown (1983) 460 U.S. 730, 740; People v. Superior Court (Mata) (1970) 3 Cal.App.3d 636, 639; People v. St. Amour (1980) 104 Cal.App.3d 886, 893 ["So long as the object which is

viewed is perceptible to the naked eye … the government may use technological aid of whatever type without infringing on the person's Fourth Amendment rights."].

7. James v. U.S. (D.C. Cir. 1969) 418 F.2d 1150, 1151.
8. People v. Superior Court (Stroud) (1974) 37 Cal.App.3d 836, 839.
9. People v. Arno (1979) 90 Cal.App.3d 505. Also see People v. Henderson (1990) 220 Cal.App.3d 1632, 1649.
10. People v. Fly (1973) 34 Cal.App.3d 665, 667. Also see Pate v. Municipal Court (1970) 11 Cal.App.3d 721, 724 [officer climbed over a fence onto a trellis, then walked along the trellis for a considerable distance]; Jacobs v. Superior Court (1973) 36 Cal.App.3d 489 [the officer had to step onto a small planter area between the building and the parking lot]; Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 636 [officer had to traverse some bushes that constituted a "significant hindrance"].
11. See Katz v. United States (1967) 389 U.S. 347, 351 ["What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."]; Florida v. Riley (1989) 488 U.S. 445, 449-50 ["Thus the police, like the public, would have been free to inspect the backyard garden from the street if their view had been unobstructed."]; People v. Deutsch (1996) 44 Cal.App.4th 1224, 1229 ["Information or activities which are exposed to public view cannot be characterized as something in which a person has a subjective expectation of privacy."].
12. Florida v. Riley (1989) 488 U.S. 445, 449.
13. California v. Greenwood (1988) 486 U.S. 35, 41.
14. See United States v. Hensley (1985) 469 U.S. 221, 235; Texas v. Brown (1983) 460 U.S. 730, 737, 739; People v. DeCosse (1986) 183 Cal.App.3d 404, 410 ["Standing where he had a right to be, the officer was lawfully entitled to observe, in plain sight, the opened alcoholic beverage container."].
15. (1985) 164 Cal.App.3d 958.
16. See People v. Avila (1997) 58 Cal.App.4th 1069, 1075 ["However, if contraband is found while performing a permissible Terry search, the officer cannot be expected to ignore that contraband."]; People v. Armenta (1968) 268 Cal.App.2d 248, 253 ["The officer was not required to blind himself to the heroin simply because it was disconnected from the initial purpose of the search."]; People v. Garcia (1969) 274 Cal.App.2d 100, 106-7 ["[T]he manner of conducting an otherwise justified precautionary search is of vital importance."].
17. U.S. v. Yamba (3rd Cir. 2007) 506 F.3d 251, 259.
18. Terry v. Ohio (1968) 392 U.S. 1 29.
19. (1969) 1 Cal.3d 144. Also see Horton v. California (1990) 496 U.S. 128, 142.
20. (11th Cir. 2006) 459 F.3d 1276.
21. (1982) 138 Cal.App.3d 79.
22. (1987) 480 U.S. 321.
23. Florida v. Jardines (2013) U.S. [133 S.Ct. 1409, 1415].
24. (1989) 47 Cal.3d 983.
25. See Dillon v. Superior Court (1972) 7 Cal.3d 305, 311 [officer's observation of a marijuana garden in a fenced-in backyard was lawful where the officer viewed the garden from the second floor of the house next door whose owner had consented to the entry]; People v. Shaw (2002) 97 Cal.App.4th 833 [with permission of a neighbor, officers standing behind a fence looked into the common area of defendant's apartment]; People v. Smith (1986) 180 Cal.App.3d 72, 83-84 ["The fence surrounding Smith's (marijuana) garden was only five feet high and allowed people outside to see the activities occurring inside the garden."].
26. People v. Claeys (2002) 97 Cal.App.4th 55, 59.
27. (9th Cir. 2010) 621 F.3d 1162, 1171. Also see U.S. v. Schesso (9th Cir. 2013) 730 F.3d 1040, 1046.
28. (7th Cir. 2010) 592 F.3d 779, 785. Also see U.S. v. Stabile (3rd Cir. 2011) 633 F.3d 219, 239 ["Detective Vanadia's decision to highlight and view the contents of the Kazvid folder was objectively reasonable because criminals can easily alter file names and file extensions to conceal contraband."].
29. See Arizona v. Hicks (1987) 480 U.S. 321, 326; People v. Stokes (1990) 224 Cal.App.3d 715, 719. NOTE: In Coolidge v. New Hampshire (1971) 403 U.S. 443, 466 a plurality of the Supreme Court said that officers may not seize evidence in plain view unless it was "immediately apparent" that the item was evidence of a crime. Subsequently, the Court observed that the term "immediately apparent" was "very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." Texas v. Brown (1983) 460 U.S. 730, 741. The Court then ruled that only probable cause is required. At p. 742. Also see Minnesota v. Dickerson (1993) 508 U.S. 366, 375; People v. Clark (1989) 212 Cal.App.3d 1233, 1238.

30. Texas v. Brown (1983) 460 U.S. 730, 742. Also see People v. Stokes (1990) 224 Cal.App.3d 715, 719.
31. See People v. McNeal (1979) 90 CA3 830, 841 [nunchucks].
32. Horton v. California (1990) 496 U.S. 128, 131 [stun gun used in robbery]; People v. Bradford (1997) 15 Cal.4th 1229, 1296.
33. See People v. Nickles (1970) 9 Cal.App.3d 986, 994; People v. LeBlank (1997) 60 Cal.App.4th 157, 165.
34. See U.S. v. Benoit (10th Cir.2013) 713 F.3d 1, 11.
35. See Colorado v. Bannister (1980) 449 U.S. 1, 2; Christians v. Chester (1990) 218 Cal.App.3d 273, 275.
36. U.S. v. Muhammad (8th Cir. 2010) 604 F.3d 1022, 1027-28.
37. See People v. Rico (1979) 97 Cal.App.3d 124, 133; People v. Superior Court (Orozco) (1981) 121 CA3 395, 404,
38. Warden v. Hayden (1967) 387 U.S. 294.
39. People v. Jardine (1981) 116 Cal.App.3d 907, 913.
40. Horton v. California (1990) 496 U.S. 128, 130-1, 142.
41. People v. Easley (1983) 34 Cal.3d 858, 872.
42. People v. Hill (1974) 12 Cal.3d 731, 763.
43. People v. Miley (1984) 158 Cal.App.3d 25, 35-36.
44. People v. Vasquez (1983) 138 Cal.App.3d 995, 999-1000.
45. People v. Koelzer (1963) 222 Cal.App.3d 20, 25; People v. Mack (1977) 66 Cal.App.3d 839, 859.
46. People v. Taylor (1975) 46 Cal.App.3d 513, 518.
47. (1987) 196 Cal.App.3d 1032.
48. (1990) 224 Cal.App.3d 715.
49. See In re Donald L. (1978) 81 Cal.App.3d 770, 775 [the officer "could have reasonably believed that the assorted objects of jewelry, including women's jewelry, were probably stolen"]; In re Curtis T. (1989) 214 Cal.App.3d 1391, 1398; People v. Sedillo (1982) 135 Cal.App.3d 616, 623; People v. Williams (1988) 198 Cal.App.3d 873, 890; People v. McGraw (1981) 119 Cal.App.3d 582, 603; People v. Atkins (1982) 128 Cal.App.3d 564, 570; People v. Garcia (1981) 121 Cal.App.3d 239, 246; People v. Superior Court (Thomas) (1970) 9 Cal.App.3d 203, 210; People v. Jennings (1965) 231 Cal.App.2d 744.
50. See Texas v. Brown (1983) 460 U.S. 730, 743 ["[T]he distinctive character of the balloon itself spoke volumes as to its contents — particularly to the trained eye of the officer."]; United States v. Jacobsen (1984) 466 U.S. 109, 121 ["it was just like a balloon the distinctive character of which spoke volumes as to its contents"]; People v. Nonnette (1990) 221 Cal.App3d 659, 666 [bundle of tiny baggies of the type used for drugs]; People v. Chapman (1990) 224 Cal.App.3d 253, 257 ["Probable cause to believe a container holds contraband may be adequately afforded by its shape, design, and the manner in which it is carried.
51. 212 Cal.App.3d 1200, 1205.
52. See People v. Dibb (1995) 37 Cal.App.4th 832, 836-37 ["The critical question is not whether [the officer] could identify the object as contraband based on only the 'plain feel' of the object, but whether the totality of circumstances made it immediately apparent to [the officer] when he first felt the lump that the object was contraband."]; People v. Chavers (1983) 33 Cal.3d 462, 471 ["[T]he knowledge [gained by the officer through sense of touch] was as meaningful and accurate as if the container had been transparent and he had seen the gun within the container."].
53. (1987) 194 Cal.App.3d 975.
54. See Texas v. Brown (1983) 460 U.S. 730, 738 ["[P]lain view provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment."]; United States v. Ross (1982) 456 U.S. 798, 809; People v. Ortiz (1995) 32 Cal.App.4th 286, 291 ["Before Officer Forsythe could enter the hotel room to arrest defendant and seize the tinfoil bindles containing heroin, he needed to have a lawful right of access to defendant and the heroin."]; U.S. v. Davis (4th Cir. 2012) 690 F.3d 226, 234 ["the lawful access requirement is intended to clarify that police may not enter a premises to make a warrantless seizure, even if they could otherwise see (from a lawful vantage point) that there was contraband in plain sight"].
55. Horton v. California (1990) 496 U.S. 128, 137.
56. (1980) 102 Cal.App.3d 342, 348, fn.1 (conc. opn. Grodin, J.).
57. See United States v. Ross (1982) 456 U.S. 798, 809; People v. Superior Court (Nasmeh) (2007) 151 Cal.App.4th 85, 100.
58. (1995) 32 Cal.App.4th 286.

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8.2: Arizona v. Hicks

PETITIONER	RESPONDENT
Arizona	Hicks

LOCATION

Apartment of Hicks

DOCKET NO.	DECIDED BY
85-1027	Rehnquist Court

LOWER COURT

Sate Appellate Court

CITATION

480 US 321 (1987)

ARGUED

Dec 8, 1986

DECIDED

Mar 3, 1987

ADVOCATES

John W. Rood, III *By appointment of the Court, argued the cause for the respondent*

Linda A. Akers *Argued the cause for the petitioner*

John William Rood *for respondent*

Facts of the case

A bullet was fired through the floor of Hicks's apartment which injured a man in the apartment below. To investigate the shooting, police officers entered Hicks's apartment and found three weapons along with a stocking mask. During the search, which was done without a warrant, an officer noticed some expensive stereo equipment which he suspected had been stolen. The officer moved some of the components, recorded their serial numbers, and seized them upon learning from police headquarters that his suspicions were correct.

Question

Was the search of the stereo equipment (a search beyond the exigencies of the original entry) reasonable under the Fourth and Fourteenth Amendments?

Conclusion

6–3 Decision

Majority Opinion by Antonin Scalia

FOR	AGAINST
Blackmun White Scalia Stevens Brennan Marshall	Powell Rehnquist O’Connor

No. The Court found, that the search and seizure of the stereo equipment violated the Fourth and Fourteenth Amendments. Citing the Court's holding in *Coolidge v. New Hampshire (1971)*, Justice Scalia upheld the "plain view" doctrine which allows police officers under some circumstances to seize evidence in plain view without a warrant. However, critical to this doctrine, argued Scalia, is the requirement that warrantless seizures which rely on no "special operational necessities" be done with probable cause. Since the officer who seized the stereo equipment had only a "reasonable suspicion" and not a "probable cause" to believe that the equipment was stolen, the officer's actions were not reconcilable with the Constitution.

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8.3: Police Trespassing

"The Fourth Amendment prohibits unreasonable searches and seizures, not trespasses." 1

Law enforcement officers regularly walk and drive onto private property. It happens so often it's hardly noteworthy. Although some might call it "trespassing," to most people it's insignificant, a nonevent.

Sometimes, however, it turns into a big deal—like when officers see something that results in a search or an arrest. Maybe they'll trip over a marijuana plant, or happen to see the residents sitting around the kitchen table packaging heroin or cleaning their rocket launchers. In any event, evidence discovered as the result of an entry onto private property will be suppressed if the officers' entry constituted an illegal "search."

It might seem crazy to think of walking or driving onto private property as a "search." But it is—at least under certain circumstances. What are those circumstances? And when is such a search lawful? These are the questions we will answer in this article.

Before we start, it should be noted that there are two kinds of trespassing: criminal and "technical." The criminal variety is trespassing that is unlawful, such as occupying real property, or refusing to leave after being requested to do so by the owner.2 This is not the type of trespassing that officers are likely to do. Even when they refuse an owner's request to leave, their continued presence is hardly ever a criminal trespass because it's usually justified under some exception to the warrant requirement.

On the other hand, officers routinely commit technical or "common law" trespassing, which is simply walking or driving onto private property without the owner's permission.3 Although technical trespassing is not unlawful,4 it's the type of trespassing that is most likely to constitute a "search."

Finally, in this article the word "curtilage" in used in a few places. It's a word from the common law which, for our purposes, simply means the private property immediately surrounding a home; e.g., the front, back, and side yards.5

WHEN TRESPASSING IS A "SEARCH"

A trespass by officers is a "search" if it permitted them to see or hear something the occupants reasonably believed would be private.6 As the U.S. Court of Appeals put it:

> Whether a police officer has commenced a "search" turns not on his subjective intent to conduct a search and seizure, but rather whether he has in fact invaded an area which the defendant harbors a reasonable expectation of privacy.7

As we will now discuss, whether an expectation of privacy exists and is reasonable depends largely on two things: (1) the nature of the property officers entered; and (2) whether, or to what extent, the occupants took steps to prevent or discourage entry.

Front yards

The least private area surrounding most homes and other structures is almost always the front. This is because it is usually visible to the public and it's where visitors, tradespeople, and others must walk to reach the front door. Consequently, in determining whether an officer's entry into the front yard constituted a search, the courts focus mainly on the extent to which visitors and others might use it to contact the occupants.

ACCESS ROUTES

There can be no reasonable expectation that officers and others will not walk on walkways, pathways, porches, and other access routes to the front door.8

Accordingly, an officer's presence on an access route is not a "search."9 As the U.S. Court of Appeals put it, "[N]o Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors . . . ."10

In fact, the California Supreme Court has ruled that the occupants of a residence impliedly consent to entries on access routes. Said the court, "A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there."11

The question arises: Can officers depart somewhat from a pathway without converting their departure into a search? And if so, how far? It appears that officers, like other visitors, may stray somewhat from a path provided their detour was neither substantial nor unreasonable.12

DRIVEWAYS

Driveways are sometimes used as pathways—sometimes the only pathway—to the front of a house. If so, for the reasons discussed above, an officer's entry onto a driveway is not a search.

But even if the driveway was not a pathway to the front door, the occupants can seldom expect that officers and others will not walk on the driveway unless there were unusual circumstances that restricted such access.13 As the U.S. Court of Appeals pointed out:

> Whether a driveway is protected from entry by police officers depends on the circumstances. The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy."14

For example, the courts have ruled that officers did not need a warrant to walk onto a suspect's driveway to install a tracking device under his car or to record his car's license number.15 Another example is found in *U.S. v. Ventling* 16 where a forest service agent was investigating the construction of an illegal roadblock on a government road. The agent noticed tire tracks leading from the roadblock to the driveway of Ventling's house. So he followed the tracks down the driveway where the took photos of them. The photos were later used in Ventling's trial on a charge of blocking a Forest Service road. In ruling that the agent was not conducting a "search" when he drove down the driveway, the court said:

> [A] driveway and portion of the yard immediately adjacent to the front door of the residence can hardly be considered out of public view. The extension of Ventling's expectations of privacy to the driveway and that portion of the yard in front of the house do not, under these circumstances, appear reasonable.

Side yards

Like the driveway, the unfenced side areas of a home are usually visible to the public and are readily accessible. Still, unless there is a normal access route or walkway along the side of the house, the courts view unfenced side yards as somewhat more private than the front. And it becomes more private as the entry becomes more unusual or unexpected; e.g., entry late at night, officers had to climb over bushes to get into yard, officers traversed almost the entire side of the house. For example, in *People v. Camacho* 17 officers in Ventura County were dispatched to investigate a complaint of a "loud party disturbance" at Camacho's home. The call came in at about 11 P.M. When the officers arrived they heard no loud noise and saw no sign of a party. Still, they decided to investigate. But instead of knocking on Camacho's front door, one of the officers walked into the side yard which the court described as follows:

> "[A]n open area covered in grass. No fence, gate or shrubbery suggested entrance was forbidden. Neither, however, did anything indicate the public was invited to enter; there was neither a path nor a walkway, nor was there an entrance to the house accessible from the side yard.

While in the side yard, the officer noticed a window that was open a few inches and was not covered by curtains. Looking through the window, he saw Camacho packaging cocaine. The officers then entered the house through the window and arrested him.

In ruling the officers' entry into the side yard was an unlawful "search," the court observed "Most persons, we believe, would be surprised, indeed startled, to look out their bedroom window at such an hour to find police officers standing in their yard looking back at them." Similarly, in *Lorenzana v. Superior Court* 18 officers went to Lorenzana's apartment at about 10 P.M. to investigate a tip that heroin was being sold there. Although there were no doors or pathways along the east side of the apartment, an officer walked there and, through a partially open window, was able to hear Lorenzana talking on the phone about a heroin sale he was about to make. This ultimately led to Lorenzana's arrest.

The California Supreme Court ruled, however, the officer was conducting an illegal "search" when he heard the incriminating conversation. This was essentially because, (1) there were no pathways or doors at this side of the apartment, and (2) the area along the east side was not a common area for other apartment residents—it was solely for Lorenzana's use.

Backyards

Privacy expectations in backyards (including fenced side yards) are almost always higher—usually much higher—than those in the front. There may be several reasons for this, such as, (1) most backyards are not readily visible to the public, (2) normal access routes seldom go through backyards, (3) backyards are usually surrounded by fences, and (4) the family activities that commonly occur in backyards more closely resemble the so-called "intimate" household activities that are afforded greater protection under the Fourth Amendment. As the court observed in *People v. Winters*,19 "A person who surrounds his backyard with a fence and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy."

To the extent that one or more of these circumstances do not exist, however, privacy expectations may be reduced, maybe even eliminated. For example, if access to the house is normally made from both the front and back, an officer's entry into the backyard would not constitute a search. As the court observed in *U.S. v. Garcia*,20 "If the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling."

Similarly, if the front door is inaccessible, and if officers have a legitimate reason for contacting an occupant, it may be reasonable for them to go to the back to find another door. This occurred in *U.S. v. Daoust* 21 where officers, having received a tip that Daoust might have some information about illegal drug activities, went to his house to speak with him. Upon arrival, they discovered that the stairs leading up to the front door were missing. And because the front door was five feet above the ground, the door was essentially "inaccessible." So the officers walked into the unfenced backyard, looking for another door. While there, they saw a gun inside the house, which led to Daoust's arrest for being a felon in possession of a firearm. In ruling the officers' entry into the backyard was lawful, the court said:

> A policeman may lawfully go to a person's home to interview him. In doing so, he obviously can go to up the front door, and, it seems to us, if that door is inaccessible there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person.

"Open fields"

There can be no reasonable expectation of privacy in a so-called "open field," even if the property was obviously private. What is an "open field?" It is essentially any unoccupied and undeveloped private residential property that is outside the curtilage of a home, almost always in rural areas.22 It is also possible that unoccupied or undeveloped commercial property may constitute an "open field."23

If property is deemed an "open field," any evidence observed by officers while they are walking or driving on it cannot be suppressed.24 As the Court of Appeal observed, "A warrantless observation made by law enforcement from an open field enjoys the same constitutional protection as one made from a public place."25 This is true even if the area is surrounded by a fences and NO TRESPASSING signs.26 For example, in *United States v. Dunn* 27 DEA agents entered a 198-acre "open field" that was "completely encircled by a perimeter fence" and "several interior fences, constructed mainly of posts and multiple strands of barbed wire." In order to get close to two barns on the land, the agents had to climb over two barbed-wire fences and a wooden fence. As they approached one of the barns, they observed a PCP laboratory. Based on this observation, they obtained a warrant to search the barn.

In ruling the agents' presence on the property did not constitute a "search," the U.S. Supreme Court noted that it has "expressly rejected the argument that the erection of fences on an open field—at least of the variety involved in those cases and in the present case—creates a constitutionally protected privacy interest." Thus, said the Court:

> It follows that no constitutional violation occurred here when the officers crossed over respondent's ranch-style perimeter fence, and over several similarly constructed interior fences, prior to stopping at the locked front gate of the barn.

Adjoining property

Private property adjacent to the suspect's property is, by its very nature, not within the curtilage of the suspect's house. It is, therefore, essentially an "open field" as to searches on the suspect's property. For example, if the suspect's neighbor permitted officers to use his property to watch the suspect's activities, the officers would be, as far as the law is concerned, in an "open field" because it is outside the curtilage of the suspect's house.28

Even if officers entered the neighbor's property without the neighbor's consent, the suspect would not have standing to challenge the legality of the entry. As the court observed in *People v. Claeys*,"[D]efendant's Fourth Amendment rights stopped at his

backyard fence because the [marijuana] plants were readily visible from his neighbor's property and he had no reasonable expectation of privacy in what could be seen from there."[29]

Multiple-occupant buildings

In multiple-occupant buildings, such as apartments and hotels, the occupants do not have a reasonable expectation of privacy in areas that are for the use of the tenants in general such as hallways, walkways, recreation facilities, parking lots, and enclosed garages.[30] Consequently, an officer's act of entering such a common area is not a "search." As the court noted in *People v. Seals*:

> [P]olice officers in performance of their duty may, without doing violence to the Constitution, enter upon the common hallway of an apartment building without warrant or express permission to do so.[31]

Note that an entry into such a common area is not a search even if officers entered through a locked door.[32]

Officers may also walk on areas outside the structure that are accessible to the tenants. For example, in *U.S. v. Fields* [33] narcotics officers in New Haven, Connecticut received reliable information that Fields was presently bagging crack cocaine in the rear of a certain apartment, and that his activities were visible through an open window. They arrived at the apartment at 8:25 P.M.; it was dark. Because the windows out front were covered, the officers walked into the "fenced-in side yard." There they saw Fields bagging crack cocaine. On appeal, the court ruled that Fields could not reasonably expect that people would not be in his side yard because the area was readily accessible to the other residents of the building. Said the court, "[D]efendants here could have no such legitimate [privacy] expectations because the building in which they conducted their operations contained other apartments whose tenants were entitled to use the side yard without giving notice or having the defendant's permission."

Businesses

A search does not result from an officer's entering a parking lot, business, or other commercial establishment to which the public was expressly or impliedly given access.[34] As the U.S. Supreme Court observed in *Maryland v. Macon*,[35] "The officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment."

Signs and fences

The posting of NO TRESPASSING signs may be relevant in determining whether the occupants reasonably expected privacy. It is not, however, nearly as significant as erecting fences that are constructed to keep people out.

"NO TRESPASSING" SIGNS

NO TRESPASSING signs are like blaring car alarms: they're so common, they're usually ignored.[36] This is especially true if the sign is posted in a place where people can be expected to walk or drive. For example, it is unlikely that signs posted on a pathway leading to a home or apartment building would ever create a reasonable expectation that people would not walk to the front door.[37] Similarly, NO TRESPASSING signs around an "open field" would not create a reasonable expectation of privacy because open fields are simply not private places.[38]

On the other hand, NO TRESPASSING signs at the entry to a backyard would be a more significant circumstance because backyards—especially fenced backyards—are traditionally much more private than front yards.

FENCES

Whether a fence creates or helps establish a reasonable expectation of privacy depends largely on the nature of the fence and the normal privacy expectations of the area it surrounds.[39] For example, a fence surrounding an apartment house or other multiple-occupant building will seldom establish a reasonable expectation of privacy because the fence is obviously not intended to prevent entry by the residents, their visitors, and tradespeople. Similarly, as noted earlier, a fence surrounding an "open field" will not create or even contribute to the owner's privacy expectations.

On the other hand, a fence surrounding the backyard of a single-family residence is much more likely to demonstrate a reasonable expectation of privacy because backyards are fairly private to the extent they're not readily visible to the public and are not places where normal access routes are ordinarily found. As the Court of Appeal observed, "A person who surrounds his backyard with a fence and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy."[40]

The manner in which a fence or barrier is constructed may also be relevant in determining privacy expectations.41 A homeowner who surrounds his home with an electrified chain link fence topped with razor wire could make a good case that he reasonably expected privacy. On the other hand, a white picket fence or a chain hanging between two posts would not be viewed as a serious effort to prevent entry. For example, in *U.S. v. Reyes* 42 a probation officer went to Reyes' house to investigate a report from the DEA that Reyes, a probationer, might be growing large quantities of marijuana. When no one answered the front door, the probation officer walked down a gravel driveway along the side of the house to see if Reyes was in the backyard. There was a "chain hanging from two posts across a portion of the driveway" but it "did not extend the full width of the driveway." While walking along the driveway, the probation officer spotted marijuana plants on Reyes' property.

In ruling that Reyes could not reasonably expect that visitors would not walk along his driveway, the trial court said, "Although there was a chain to prevent vehicles from entering the driveway, there were no signs forbidding pedestrian access. [Furthermore] the driveway was not secluded in any manner. The driveway led to the street and could be viewed in its entirety from the street." Thus, the court ruled, "In these circumstances, there was nothing inappropriate, much less unconstitutional, about the probation officers' entry onto the driveway . . . "

Finally, although the absence of a "serious" fence might suggest that no reasonable expectation of privacy exists, the courts have rejected the idea that people must construct fences in order to claim privacy. As the California Supreme Court stated in *People v. Camacho*,43 "[W]e cannot accept the proposition that defendant forfeited the expectation his property would remain private simply because he did not erect an impregnable barrier to access."

LEGAL TRESPASS-SEARCHES

Even if an officer's entry onto private property is a "search," it's not an unlawful search unless the intrusiveness of the trespass outweighed the law enforcement interest in being on the property. Consequently, to determine whether a trespass-search is lawful, the courts balance the justification for the trespass against its intrusiveness.44 If the justification outweighs the intrusiveness, the search is lawful. Otherwise. it's unlawful.

Justification

Because the intrusiveness of most technical trespasses falls somewhere between nonexistent and trivial, not much justification is ordinarily required. Even so, officers must be able to articulate some legitimate law enforcement interest for entering the property —as opposed to "simply snooping."45 The following are commonly cited:

> **To INVESTIGATE**: Officers reasonably believed the entry was necessary to investigate a crime or suspicious circumstance.46
>
> **TO DETAIN OR ARREST**: Officers had legal grounds to detain or arrest a person on the property.47
>
> **TO INSPECT STOLEN PROPERTY OR CONTRABAND**: Officers entered the property to inspect property that they reasonably believed was stolen.48
>
> **TO SPEAK WITH OCCUPANTS**: Officers had a duty to attempt to speak with the occupants.49

For example, in *People v. Camacho*,50 discussed earlier, officers received a complaint of a "loud party disturbance" at Camacho's home at about 11 P.M. When they arrived, however, they heard no loud noise and found no sign of a party. Nevertheless, they walked into the side yard where they happened to see Camacho in a bedroom bagging cocaine. The court ruled the officers' technical trespass was not justified because there was no disturbance and, therefore, no need to take any action. Said the court:

> Indeed, had the officers on their arrival at defendant's house heard a raucous party, confirming the anonymous complaint that brought them there in the first place, and had they then banged on the front door to no avail, their entry into the side yard in an attempt to seek the source of the noise would likely have been justified. [But here] the officers arrived at defendant's home late in the evening and heard no such noise. Without bothering to knock on defendant's front door, they proceeded directly into his darkened side yard.

Another example—this one demonstrating sufficient justification—is found in In *re Gregory S.*51 which involved a "malicious mischief" call at about 1:45 P.M. The Contra Costa County sheriff's deputy who was dispatched to the call saw the suspect standing in the front yard of his home. But when the deputy stopped to talk with him, the suspect started to walk around the side of his house. The deputy called out twice, "Hey you. Come here," but the suspect kept walking. As the officer was walking down the

driveway toward the suspect, the suspect told him to get off his property. The deputy told the suspect that he was investigating a complaint by a neighbor and that he had a legal right to be there. The suspect then started to leave and a struggle ensued. The suspect was charged with interfering with an officer in the performance of his duties.52

In ruling the deputy had a right to be on the suspect's property, the court said: Appellant argues that privacy was invoked when he ordered the officer off the property. But the officer had a right and commensurate duty to deal with the problem at hand. He did not enter the property arbitrarily. Appellant had ignored the officer's earlier order to come to the street. If, despite the lack of indicia of privacy, the entry be deemed an intrusion, the entry and detention were authorized by the public concern to maintain peace in the neighborhood.

Keep in mind that if the trespass is more than minimally intrusive, the courts will require more justification.

Intrusiveness

Assuming that officers are able to articulate some justification for entering the property, the issue becomes whether that justification outweighed the intrusiveness of the officers' entry. As a practical matter, most technical trespassing by officers involves nothing more than walking or driving onto private property which is seldom considered a significant intrusion. Sometimes, however, there are circumstances that increase the intrusiveness of the trespass, requiring additional justification. The following are circumstances that might be relevant:

> **TIME OF NIGHT**: Privacy expectations may be affected by the time of day or night in which the entry occurred. Although there is little law on this subject, the court in *People v. Camacho* 53 cited the "lateness of the hour" (11 P.M.) as a circumstance indicating the defendant reasonably expected that officers and other people would not be walking along the side of his home.
>
> **LOOKING THROUGH WINDOWS**: An entry may be deemed more intrusive if it enabled officers to see through a window that would otherwise not have afforded a view inside.54
>
> **CLIMBING LEDGE OR FIRE ESCAPE**: An officer's act of looking through the window of a home from a ledge, trellis, or fire escape may be deemed more intrusive because most people do not expect intruders on such places.55 However, an expectation of privacy would likely be unreasonable if the fire escape or ledge was routinely used by others.56
>
> **LENGTH OF TRESPASS**: Sometimes cited but only marginally important; most are very brief.57
>
> **OFFICERS ORDERED OFF**: The fact that officers remained on the property after being ordered to leave by a resident might make the entry more intrusive, but an order to leave does not make their presence unlawful if there was sufficient justification.58

References

1. Cohen v. Superior Court (1970) 5 Cal.App.3d 429, 434.
2. See Penal Code §§602(l), 602(n).
3. See Oliver v. United States (1984) 466 US 170, 183; People v. Manderscheid (2002) 99 Cal.App.4th 355, 361; People v. Zichwic (2001) 94 Cal.App.4th 944, 953; People v. Macioce (1987) 197 Cal.App.3d 262, 271.
4. See People v. Camacho (2000) 23 Cal.4th 824, 836 ["Since Katz, [the U.S. Supreme Court has] consistently held that the presence or absence of physical trespass by police is constitutionally irrelevant to the question whether society is prepared to recognize an asserted privacy interest as reasonable." Quoting from California v. Ciraolo (1986) 476 US 207, 223 [dis.opn. of Powell, J.]; Oliver v. United States (1984) 466 US 170, 183, fn.15; United States v. Karo (1984) 468 US 705, 712-3 ["The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated."]; People v. Edelbacher (1989) 47 Cal.3d 983, 1015; People v. Zichwic (2001) 94 Cal.App.4th 944, 953-6; People v. Manderscheid (2002) 99 Cal.App.4th 355, 361. NOTE: Many people believe that entering property without the owner's consent is a criminal trespass but it isn't unless the person enters with intent to dispossess the rightful owner. See People v. Wilkinson (1967) 248 Cal.App.2nd Supp. 906, 910 ["It is not a violation of Penal Code section 602, subdivision (l) to enter private property without consent unless such entry is followed by occupation thereof without consent."].
5. See Oliver v. United States (1984) 466 US 170, 180 ["At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes."]; California v. Ciraolo (1986) 476 US 207, 212-3 ["The protection afforded the

curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."]; U.S. v. Johnson (9th Cir. 2001) 256 F.3d 895. NOTE: Although it is now seldom necessary to determine whether a section of private property is within the curtilage, the U.S. Supreme Court has identified four circumstances that are relevant in making this determination: (1) the proximity of the section to the residence, (2) whether the section is included with an enclosure surrounding the home, (3) the nature of the uses to which the section is put, and (4) the steps taken by the occupant to protect the section from observation by passersby. See United States v. Dunn (1987) 480 US 294, 301.

6. See Oliver v. United States (1984) 466 US 170, 183, fn.15 ["(I)t does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment."]; Maryland v. Macon (1985) 472 US 463, 469 ["A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."]; People v. Manderscheid (2002) 99 Cal.App.4th 355, 361; People v. Arango (1993) 12 Cal.App.4th 450, 455 ["But even if climbing over the fence was a simple trespass it would not invalidate [the officers'] subsequent observations."]; People v. Camacho (2000) 23 Cal.4th 824, 836, fn.3 ["We emphasize our decision today is not based on the simplistic notion that police violate a defendant's constitutional rights whenever they commit a technical trespass."]; Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 638; Cohen v. Superior Court (1970) 5 Cal.App.3d 429, 434 ["The test to be applied in determining whether observation into a residence violates the Fourth Amendment is whether there has been an unreasonable invasion of the privacy of the occupants, not the extent of the trespass which was necessary to reach the observation point."]; Dean v. Superior Court (1973) 35 Cal.App.3d 112, 118 ["The reach of the Fourth Amendment no longer turns upon a physical intrusion into any given enclosure; hence, that a trespass was later revealed is not controlling."]; People v. Willard (1965) 238 Cal.App.2d 292, 299 ["It is worthy of note that while a few California cases seem to have given some consideration to the factor of trespass in determining the reasonableness of a search, by and large many of the case dealing with the question of a search arising from 'looking through a window' seem to have proceeded on the assumption that a minor or technical trespass not involving physical entry into a building does not derogate from the otherwise reasonable nature of the search."]; U.S. v. Ventling (8th Cir. 1982) 678 F.2d 63, 66 [The standard for determining when the search of an area surrounding a residence violates Fourth Amendment guarantees no longer depends on outmoded property concepts, but whether the defendant has a legitimate expectation of privacy in the area."].
7. U.S. v. Reed (8th Cir. 1984) 733 F.2d 492, 501.
8. See U.S. v. Reyes (2nd Cir. 2002) F.3d ["the route which any visitor to a residence would use is not private in the Fourth Amendment sense, when police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open."]; U.S. v. James (7th Cir. 1994) 40 F.3d 850, 862 ["Both the paved walkway and the rear side door were accessible to the general public and the rear side door was commonly used for entering the duplex from the nearby alley."].
9. See People v. Superior Court (Stroud) (1974) 37 Cal.App.3d 836, 840 ["It is common knowledge that a front yard is likely to be crossed at any time by door-to-door solicitors, delivery men and others unknown to the owner of the premises."]; People v. Thompson (1990) 221 Cal.App.3d 923, 943 ["An officer is permitted the same license to intrude as a reasonably respectful citizen."]; People v. Bradley (1969) 1 Cal.3d 80, 85; U.S. v. Taylor (4th Cir. 1996) 90 F.3d 903, 909 ["(T)he Taylors' front entrance was as open to the law enforcement officers as to any delivery person, guest, or other member of the public."]; Davis v. U.S. (9th Cir. 1964) 327 F.2d 301, 304 ["Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law."]; U.S. v. Hammett (9th Cir. 2001) 236 F.3d 1054, 1059 ["Law enforcement officers may encroach upon the curtilage of a home for the purpose of asking questions of the occupants."]; U.S. v. Smith (6th Cir. 1986) 783 F.2d 648, 651 ["The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy."]; U.S. v. Reyes (2nd Cir. 2002) 283 F.3d 446, 465 ["Since the route which any visitor to a residence would use is not private in the Fourth Amendment sense, when police take that route for the purpose of making a general inquiry or for some other legitimate reason, they are free to keep their eyes open." Quoting from 1 LaFave, Search and Seizure (3rd Ed. 1996) § 2.3(e) at p. 499].
10. U.S. v. Reed (8th Cir. 1984) 733 F.2d 492, 501.
11. Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 629. ALSO SEE People v. Camacho (2000) 23 Cal.4th 824, 832 ["A resident of a house may rely justifiably upon the privacy of the surrounding areas as a protection from the peering of the officer unless

such residence is “exposed” to that intrusion by the existence of public pathways or other invitations to the public to enter upon the property.”].

12. See People v. Thompson (1990) 221 Cal.App.3d 923, 943 [“(A) substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.” Quoting from State v. Seagull (1981) 95 Wn.2d 898]; U.S. v. Hammett (9th Cir. 2001) 236 F.3d 1054, 1060 [“(A)n officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence.”]; U.S. v. James (7th Cir. 1994) 40 F.3d 850; U.S. v. Taylor (4th Cir. 1996) 90 F.3d 903.
13. See U.S. v. Humphries 13 (9th Cir. 1980) 636 F.2d 1172, 1179 [“It does not appear from the record that the driveway was enclosed by a fence, shrubbery or other barrier. [The officer] did not move bushes or other objects in order to make his observations.”]; In re Gregory S. (1980) 112 Cal.App.3d 764 [officer walked 20 feet down a driveway to speak with a suspect; court ruled the entry was lawful, noting, “The criterion to be applied is whether entry is made into an area where the public has been implicitly invited, such as the area furnishing normal access to the house. A reasonable expectation of privacy does not exist in such areas.”]; U.S. v. Magana (9th Cir. 1975) 512 F.2d 1169, 1170-1 [“The proper inquiry is whether the officers’ intrusion into the residential driveway constituted an invasion into what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public.”]; People v. Zichwic (2001) 94 Cal.App.4th 944, 953 [“Just like any other visitor to a residence, a police officer is entitled to walk onto parts of the curtilage that are not fenced off.”]; U.S. v. Reyes (2nd Cir. 2002) 283 F.3d 446, 465 [“(W)e have found no Fourth Amendment violation based on a law enforcement officer’s presence on an individual’s driveway when that officer was in pursuit of legitimate law enforcement business.”]; U.S. v. Evans (7th Cir. 1994) 27 F.3d 1219, 1229 [“There was no evidence that the public had limited access to Glenn’s driveway, hence Evans had no reasonable expectation that members of the public or FBI agents would refrain from entering it.”]; U.S. v. Ventling (8th Cir. 1982) 678 F.2d 63, 66 [“(A) driveway and portion of the yard immediately adjacent to the front door of the residence can hardly be considered out of public view.”]; U.S. v. Rogers (1st Cir. 2001) 264 F.3d 1, 5 [“(A) person does not have a reasonable expectation of privacy in a driveway that was visible to the occasional passerby.”]; U.S. v. McIver (9th Cir. 1999) 186 F.3d 1119, 1126 [“Assuming arguendo that the officers committed a trespass in walking into McIver’s open driveway, he has failed to demonstrate that he had a legitimate expectation of privacy cognizable under the Fourth Amendment in this portion of his property.”]; U.S. v. Pretzinger (9th Cir. 1976) 542 F.2d 517, 520.
14. U.S. v. Smith (6th Cir. 1986) 783 F.2d 648, 651.
15. See People v. Zichwic (2001) 94 Cal.App.4th 944, 953; U.S. v. Humphries (9th Cir. 1980) 636 F.2d 1172, 1179.
16. (8th Cir. 1982) 678 F.2d 63. ALSO SEE U.S. v. Magana (9th Cir. 1975) 512 F.2d 1169 [officers lawfully drove onto driveway to make an arrest]; U.S. v. Roccio (1st Cir. 1992) 981 F.2d 587, 591 [“It is undisputed that appellant’s Mercedes was clearly visible from the street on an obstructed driveway. As such, the IRS agents needed no warrant to seize the automobile, and appellant suffered no Fourth Amendment violation due to the warrantless seizure.”]; U.S. v. Rogers (1st Cir. 2001) 264 F.3d 1, 5 [IRS legally seized car on driveway].
17. (2000) 23 Cal.4th 824.
18. (1973) 9 Cal.3d 626. COMPARE U.S. v. James (7th Cir. 1994) 40 F.3d 850 [officers walked on “a paved walkway along the side of the duplex leading to the rear side door. The passage to the rear side door was not impeded by a gate or fence. Both the paved walkway and the rear side door were accessible to the general public and the rear side door was commonly used for entering the duplex from the nearby alley.”].
19. (1983) 149 Cal.App.3d 705, 707. ALSO SEE People v. Cagle (1971) 21 Cal.App.3d 57, 65 [“The bathroom was at the rear of the house, situated far from all normal access routes.”].
20. (9th Cir. 1993) 997 F.2d 1273, 1279-80.
21. (1st Cir. 1990) 916 F.2d 757.
22. See Oliver v. United States (1984) 466 US 170, 177, 178 [“(A)n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”]; Dow Chemical v. United States (1986) 476 US 227, 235 [“(O)pen fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference or surveillance.”]; People v. Channing (2000) 81 Cal.App.4th 985, 990; People v. Freeman (1990) 219 Cal.App.3d 894, 901-3; People v. Channing (2000) 81 Cal.App.4th 985, 990. NOTE: Property may be an “open field” even though it is neither “open” nor a “field,” if it was thickly wooded, or if it was marked with NO TRESPASSING signs. See Oliver v. United States (1984) 466 US 170, 177, 182; People v. Freeman (1990) 219 Cal.App.3d 894, 901 [“An open field need be neither ‘open’ nor a ‘field’ as those terms are used in common speech.”]; People v. Channing

(2000) 81 Cal.App.4th 985, 990-1. It is also possible that unoccupied or undeveloped commercial property may constitute an "open field." 22 See Dow Chemical v. United States (1986) 476 US 227, 236-8.

23. See Dow Chemical v. United States (1986) 476 US 227, 236-8.
24. See Oliver v. United States (1984) 466 US 170, 183 ["Nor is the government's intrusion upon an open field a 'search' in the constitutional sense because that intrusion is a trespass at common law."]; United States v. Dunn (1987) 480 US 294, 304 ["Under Oliver and Hester, there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields."]; People v. Channing (2000) 81 Cal.App.4th 985, 990 ["A subjective expectation of privacy in an open fields area is not an expectation that society is willing to recognize as reasonable."]; People v. Scheib (1979) 98 Cal.App.3d 820, 825 ["As early as 1924, the United States Supreme Court held that the Fourth Amendment protection against unreasonable searches and seizures did not apply to 'open fields.'" Citing Hester v. United States (1924) 265 US 57].
25. People v. Shaw (2002) 97 Cal.App.4th 833, 838.
26. See U.S. v. Lewis (10th Cir. 2001) 240 F.3d 866; U.S. v. Caldwell (6th Cir. 2000) 238 F.3d 424; U.S. v. Rapanos (6th Cir. 1997) 115 F.3d 367, 372 ["The rather typical presence of fences, closed or locked gates, and 'no trespassing' signs on an otherwise open field therefore has no constitutional import.]; U.S. v. Burton (6th Cir. 1990) 894 F.2d 188; U.S. v. Roberts (9th Cir. 1984) 747 F.2d 537, 541.
27. (1987) 480 US 294.
28. See People v. Shaw (2002) 97 Cal.App.4th 833, 838 [officer's observation from defendant's neighbor's property was essentially an observation from an "open field" because a neighbor's property is necessarily outside the curtilage of the defendant's property]; People v. Claeys (2002) 97 Cal.App.4th 55, 59 ["We can find no California cases, nor does defendant cite any, where a search has been held invalid under the federal constitution because the police trespassed onto property adjoining a defendant's property."]; People v. Superior Court (Stroud) (1974) 37 Cal.App.3d 836, 839-40.
29. (2002) 97 Cal.App.4th 55, 59.
30. See People v. Shaw (2002) 97 Cal.App.4th 833, 840 [in ruling that Shaw did not have a reasonable expectation of privacy in the back area of the apartment building in which he lived, the court noted that Shaw "introduced no evidence of any right to exclude others from the common area of the apartment complex."]; People v. Robinson (1986) 185 Cal.App.3d 528, 531; People v. Superior Court (Reilly) (1975) 53 Cal.App.3d 40, 45 [officer standing outside motel room]; People v. Petersen (1972) 23 Cal.App.3d 883, 894 ["the dynamite was apparently in plain sight in a garage used in common by all the apartment tenants, so that any expectation of privacy on the part of appellant in placing it there, would have been unreasonable."]; People v. Campobasso (1989) 211 Cal.App.3d 1480, 1482-3 [officer looked into the hallway of a storage facility containing "dozens of rental lockers"]; People v. Galan (1985) 163 Cal.App.3d 786, 792-3; People v. Ortiz (1995) 32 Cal.App.4th 286, 290-1 [hotel hallway]; People v. Kilpatrick (1980) 105 Cal.App.3d 401, 409 ["The open carport area was used commonly by all motel tenants and thus was not a private, constitutionally protected space."]; People v. Szabo (1980) 107 Cal.App.3d 419, 428 [underground garage for apartment residents]; People v. Terry (1969) 70 Cal.2d 410, 425-8 [garage under an apartment building]; People v. Berutko (1969) 71 Cal.2d 84, 91; People v. Willard (1965) 238 Cal.App.2d 292, 307 ["The structure was a duplex and although the record does not spell it out, it is a reasonable inference that other occupants of the building had use of the area around it."]; People v. Arango (1993) 12 Cal.App.4th 450, 455 [officers climbed over a wrought iron fence surrounding an apartment complex].
31. (1968) 263 Cal.App.2d 575, 577.
32. See People v. Howard (1976) 63 Cal.App.3d 249, 254 ["(W)e do not believe that the locked outside door [to an apartment building] established the same sanctity for the hallways and common areas as is established for individual apartments by the door to those apartments."]; People v. Shaw (2002) 97 Cal.App.4th 833 [officers entered through a "break in the fencing"]; People v. Seals (1968) 263 Cal.App.2d 575, 577; People v. Arango (1993) 12 Cal.App.4th 450, 455.
33. (2nd Cir. 1997) 113 F.3d 313. ALSO SEE People v. Willard (1965) 238 Cal.App.2d 292, 307 ["We can find nothing unreasonable in [the officers'] proceeding to the rear door which appears to have been a normal means of access to and egress from that part of the house. The gate was open and the rear door, actually on the side of the house, would probably be more public than a door at the back of the structure."].
34. See U.S. v. Reed (8th Cir. 1984) 733 F.2d 492, 501 ["(T)here was no indication that the back parking lot was 'private' to the owners or to those specifically authorized to use it. . . [It] served as a common loading area for C.D.Y. and a carpet business located to the immediate west of C.D.Y."].
35. (1985) 472 US 463, 469.

36. See Oliver v. United States (1984) 466 US 170, 182, fn.13 ["Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No Trespassing' signs."]; U.S. v. Raines (8th Cir. 2001) 243 F.3d 419, 421 [no Fourth Amendment violation when officers, while walking down the driveway of the defendant's home, walked through a ten-foot wide opening in a "makeshift fence of debris that encircled [the defendant's] property."]; U.S. v. Ventling (8th Cir. 1982) 678 F.2d 63, 66 [trial court stated, "The presence of 'no trespassing' signs in this country without a locked or closed gate make the entry along the driveway for the purposes above described not a trespass and therefore does not constitute an intrusion prohibited by the Fourth Amendment."].
37. See U.S. v. Reyes (2nd Cir. 2002) 283 F.3d 446 [no reasonable expectation of privacy on a gravel driveway with "a chain hanging from two posts across a portion of the driveway; it did not extend the full width of the driveway . . . [T]he District Court found that the chain and posts 'did not block off ingress and egress for pedestrians but appeared to be something that would be put in place to keep vehicles either in or out of that area."]; U.S. v. Ventling (8th Cir. 1982) 678 F.2d 63, 65-6.
38. See U.S. v. Lewis (10th Cir. 2001) 240 F.3d 866; U.S. v. Caldwell (6th Cir. 2000) 238 F.3d 424; U.S. v. Rapanos (6th Cir. 1997) 115 F.3d 367, 372 ["The rather typical presence of fences, closed or locked gates, and 'no trespassing' signs on an otherwise open field therefore has no constitutional import.]; U.S. v. Burton (6th Cir. 1990) 894 F.2d 188; U.S. v. Roberts (9th Cir. 1984) 747 F.2d 537, 541.
39. See Oliver v. United States (1984) 466 US 170, 182, fn.13; People v. Winters (1983) 149 Cal.App.3d 705, 707 [reasonable expectation of privacy when gate enclosed the back yard and was posted with a sign reading, "Private Property/no trespassing/no soliciting"].
40. People v. Winters (1983) 149 Cal.App.3d 705, 707. ALSO SEE Vidaurri v. Superior Court (1970) 13 Cal.App.3d 550, 553; Burkholder v. Superior Court (1979) 96 Cal.App.3d 421, 424 ["search" occurred when an officer ignored NO TRESPASSING signs and "used a master key to unlock a gate across the dirt access road leading to the [petitioner's] property; encountering a second padlocked gate about three-fourths of a mile farther on, the party simply skirted the unfenced gate and entered upon petitioner's property without permission."].
41. See U.S. v. Raines (8th Cir. 2001) 243 F.3d 419, 421 [no Fourth Amendment violation when officers, while walking down the driveway of the defendant's home, walked through a ten-foot wide opening in a "makeshift fence of debris that encircled [the defendant's] property."].
42. (2nd Cir. 2002) 283 F.3d 446.
43. (2000) 23 Cal.4th 824, 835.
44. See In re Gregory S. (1980) 112 Cal.App.3d 764, 776 ["The constitutionality of police intrusions is determined by weighing the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Quoting from Brown v. Texas (1979) 443 US 47, 51.]; People v. Thompson (1990) 221 Cal.App.3d 923, 944; U.S. v. Anderson (8th Cir. 1977) 552 F.2d 1296, 1299-1300; U.S. v. Daoust (1st Cir. 1990) 916 F.2d 757 [court asked whether the officers have a legitimate need to be there, or were they "simply snooping?"].
45. U.S. v. Daoust (1st Cir. 1990) 916 F.2d 757.
46. See People v. Superior Court (Stroud) (1974) 37 Cal.App.3d 836, 841 [officers reasonably believed there were stolen car parts in the backyard]; U.S. v. James (7th Cir. 1994) 40 F.3d 850;]; U.S. v. Hammett (9th Cir. 2001) 236 F.3d 1054, 1060 [officers circled the house to speak with the residents about marijuana growing on their property].
47. See People v. Thompson (1990) 221 Cal.App.3d 923, 945 ["The police would have an unreasonably difficult time protecting citizens and the property from the criminal actions of third parties if police were restricted to walkways, driveways, and other normal access routes when the third parties whom the officers seek to detain do not restrict themselves to such areas."]; People v. Manderscheid (2002) 99 Cal.App.4th 355, 363-4 [entry into backyard lawful in connection with the arrest of a "potentially armed parolee" who was "hiding in a residential neighborhood; i.e., near families and children."]; People v. Arango (1993) 12 Cal.App.4th 450, 455 ["To detain appellants and investigate the suspicious narcotics trafficking circumstances, the officers were entitled to climb the wrought iron fence and enter an open carport area where the Buick was parked."]. ALSO SEE U.S. v. Reyes (2nd Cir. 2002) 283 F.3d 446, 467 [probation officer entered driveway to conduct court-imposed home visit].
48. See People v. Superior Court (Stroud) (1974) 37 Cal.App.3d 836, 841 [officers reasonably believed there were stolen car parts in the backyard]; U.S. v. Hammett (9th Cir. 2001) 236 F.3d 1054, 1060 [officers circled the house to speak with the residents about marijuana growing on their property].
49. See People v. Camacho (2000) 23 Cal.4th 824, 836 ["Indeed, had the officers on their arrival at defendant's house heard a raucous party, confirming the anonymous complaint that brought them there in the first place, and had they then banged on the

front door to no avail, their entry into the side yard in an attempt to seek the source of the noise would likely have been justified."]; U.S. v. Reyes (2nd Cir. 2002) 283 F.3d 446, 467 [probation officer entered driveway to conduct court-imposed home visit]; U.S. v. Hammett (9th Cir. 2001) 236 F.3d 1054, 1060; U.S. v. Anderson (8th Cir. 1977) 552 F.2d 1296, 1300 ["We cannot say that the agents' action in proceeding to the rear after receiving no answer at the front door was not incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded. . . ."]. COMPARE People v. Winters (1983) 149 Cal.App.3d 705, 708 ["The officers [who, according to the court, were only conducting a "routine investigation"] could have determined at the front door no one was at home. . . . By trespassing into the back yard, they surpassed what was reasonable under the circumstances."].

50. (2000) 23 Cal.4th 824. ALSO SEE People v. Winters (1983) 149 Cal.App.3d 705, 708 ["The officers [who, according to the court, were only conducting a "routine investigation"] could have determined at the front door no one was at home. . . . By trespassing into the back yard, they surpassed what was reasonable under the circumstances."]; U.S. v. Anderson (8th Cir. 1977) 552 F.2d 1296, 1300 ["We cannot say that the agents' action in proceeding to the rear after receiving no answer at the front door was no incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded. . . ."]; U.S. v. Raines (8th Cir. 2001) 243 F.3d 419 [officer walked to the back of a house to serve a civil complaint].
51. (1980) 112 Cal.App.3d 764.
52. See Penal Code § 148.
53. (2000) 23 Cal.4th 824, 838.
54. See Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 636; Pate v. Municipal Court (1970) 11 Cal.App.3d 721, 724.
55. See Pate v. Municipal Court (1970) 11 Cal.App.3d 721, 724 ["Thus, the trespass [Officer] Sweeney committed when he climbed upon the ornamental trellis to look into appellant's room through the accidental aperture was an unreasonable governmental intrusion."].
56. See Cohen v. Superior Court (1970) 5 Cal.App.3d 429, 435 ["Whether or not the occupants of apartment 402 could reasonably assume that they were free from uninvited inspection through the window opening onto the fire escape was a question of fact, turning (inter alia) on the customary use or nonuse of the fire escape platforms for purposes other than emergency escape . . . "].
57. See People v. Camacho (2000) 23 Cal.4th 824, 834 ["It is the nature, not the duration, of the intrusion that controls in this case."].
58. See In re Gregory S. (1980) 112 Cal.App.3d 764, 776 ["Appellant argues that privacy was invoked when he ordered the officer off the property. But the officer had a right and commensurate duty to deal with the problem at hand. He did not enter the property arbitrarily. Appellant had ignored the officer's earlier order to come to the street. If, despite the lack of indicia of privacy, the entry be deemed an intrusion, the entry and detention were authorized by the public concern to maintain peace in the neighborhood."].

Contributors and Attributions

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CHAPTER OVERVIEW

9: Abondonment, Open Fields, and Border Searches

9.1: Oliver v. United States

9.2: United States v. Martinez - Fuerte

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9.1: Oliver v. United States

PETITIONER	RESPONDENT
Oliver	United States

LOCATION

Sugar Camp Road

DOCKET NO.	DECIDED BY
82-15	Burger Court

LOWER COURT

United States Court of Appeals for the Sixth Circuit

CITATION

466 US 170 (1984)

ARGUED

Nov 9, 1983

DECIDED

Apr 17, 1984

ADVOCATES

Donna L. Zeegers *on behalf of the Respondent*

Thornton Wayne S. Moss *on behalf of the Petitioner Maine*

Frank E. Haddad, Jr. *on behalf of the Petitioner*

Oliver Alan I. Horowitz *on behalf of the Respondent United States*

Facts of the case

These are two consolidated cases involving the discovery of open marijuana fields as the result of unwarranted searches of privately owned land.

In the first case, Kentucky State police searched Ray E. Oliver's farm, acting on reports that marijuana was grown there. A gate marked with a "No Trespassing" sign surrounded the field.

Police found marijuana in the field about a mile from Oliver's home. Before trial, the United States District Court for the Western District of Kentucky suppressed evidence found in the search on the ground that Oliver had a reasonable expectation that his field would remain private. This expectation triggered the Fourth Amendment's protection against unreasonable searches and seizures. The Court of Appeals for the Sixth Circuit reversed under the open field doctrine. The open field doctrine states that a citizen's protection from unwarranted search does not extend to open fields.

In the second case, police searched the woods behind Richard Thornton's property after an anonymous tip. Police found two marijuana patches on Thornton's land. The Main Superior Court granted Thornton's motion to suppress evidence found in the search for the same reasons as the Oliver case. On appeal, the Supreme Judicial Court of Main affirmed.

Question

Does the open field doctrine apply when police officers knowingly enter privately owned fields without a warrant?

Conclusion

6–3 Decision

FOR	AGAINST
Blackmun White Powell Burger O’Conner Rehnquist	Marshall Brennan Stevens

Yes. In a 6-3 vote, Justice Lewis F. Powell, Jr. wrote for the majority, stating that the open field doctrine applies to both cases. Individuals cannot legitimately expect privacy for activities conducted out in the open except in the area immediately surrounding their house. Also, the act of police officers entering a privately owned field is not automatically a search for Fourth Amendment purposes even if it is a common law trespass. Oliver's case was affirmed, and Thornton's was reversed and remanded.

Justice Byron White wrote a special concurrence, saying that there was no need for the majority to deal with the expectation of privacy issue because a field is clearly not a "house" or an "effect" under the Fourth Amendment. Justice Thurgood Marshall wrote a dissent, contending that the law should protect private land that is marked as such against unreasonable searches and seizures. Justice William J. Brennan and Justice John P. Stevens joined Justice Marshall's dissent.

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9.2: United States v. Martinez - Fuerte

PETITIONER	RESPONDENT
United States	Martinez-Fuerte
DOCKET NO.	**DECIDED BY**
74 1560	Burger Court

LOWER COURT

United States Court of Appeals for the Ninth Circuit

CITATION

428 US 543 (1976)

ARGUED

Apr 26, 1976

DECIDED

Jul 6, 1976

ADVOCATES

Ballard Bennett *for petitioner in No. 75-5387, by Mark L*

Mark L. Evans

Charles M. Sevilla *for respondent in No. 75-1560*

Facts of the case

Martinez-Fuerte and others were charged with transporting illegal Mexican aliens. They were stopped at a routine fixed checkpoint for brief questioning of the vehicle's occupants on a major highway not far from the Mexican border.

Question

Do such stops violate the Fourth Amendment's proscription against unreasonable searches and seizures?

Conclusion

7 -2 Decision Majority Opinion By Lewis F. Powell, Jr.

FOR	AGAINST
Stevens Ginsburg Souter Scalia Thomas	Breyer Kennedy Roberts Alito

No, because if there is a reasonable collective suspicion, then individuals can be searched in the interest of public safety. Justice Lewis F. Powell, Jr., writing for the 7-to-2 majority, said: "The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.... But the Fourth Amendment imposes no irreducible requirement of such suspicion."

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9.3: California v. Greenwood

PETITIONER

California

RESPONDENT

Greenwood

DOCKET NO.

86 684

DECIDED BY

Rehnquist Court

LOWER COURT

State appellate court

CITATION

486 US 35 (1988)

ARGUED

Jan 11, 1988

DECIDED

May 16, 1988

ADVOCATES

Michael J. Pear *Argued the cause for the petitioner*

Michael Ian Garey *By appointment of the Court, argued the cause for the respondents*

Facts of the case

Local police suspected Billy Greenwood was dealing drugs from his residence. Because the police did not have enough evidence for a warrant to search his home, they searched the garbage bags Greenwood had left at the curb for pickup. The police uncovered evidence of drug use, which was then used to obtain a warrant to search the house. That search turned up illegal substances, and Greenwood was arrested on felony charges.

Question

Did the warrantless search and seizure of Greenwood's garbage violate the Fourth Amendment's search and seizure guarantee?

Conclusion

7 -2 Decision for CA Majority Opinion By Byron R. White

FOR	AGAINST
Blackmun Stevens White O'Connor Rehnquist	Brennan Marshall

Voting 6 to 2, the Court held that garbage placed at the curbside is unprotected by the Fourth Amendment. The Court argued that there was no reasonable expectation of privacy for trash on public streets "readily accessible to animals, children, scavengers, snoops, and other members of the public." The Court also noted that the police cannot be expected to ignore criminal activity that can be observed by "any member of the public."

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CHAPTER OVERVIEW

10: Vehicle Searches

10.1: Vehicle Searches
10.2: Arizona v. Gant

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10.1: Vehicle Searches

A group of friends and I are going on a road trip in a month and I was wondering what are some of the best methods you have come across to secure our drugs? Posted on Reddit.com.

Most bigand small-time criminals have learned that the safest and most convenient place to hide their drugs, guns and

other incriminating evidence is often inside their cars and trucks. This is mainly because motor vehicles are relatively secure, highly mobile and, as an added bonus, they are fully protected by the Fourth Amendment. As one website advised its criminal readership: "Forget your house—your car is your most private place."[1]

In the past, vehicles were even more attractive to criminals because the courts were suppressing a lot of evidence discovered inside them. This was because the rules pertaining to vehicle searches had become so "intolerably confusing"[2] that officers often had to guess at whether they could search a vehicle, and could only speculate as to the permissible scope and intensity of these searches.

Who caused this important area of the law to fall into disorder? The prime suspects were members of the United States Supreme Court who had consistently failed to resolve the recurring conflict between the privacy rights of vehicle occupants and the needs of law enforcement.

But then one day in 1981, the Court issued an opinion named *New York v. Belton* in which it announced—or so we thought—that it was going to fix these problems.[3] After acknowledging that officers needed vehicle search rules that were "straightforward," "easily applied," and "predictably enforced," it announced just such a rule: Whenever officers make a custodial arrest of the driver or any occupant of a vehicle, they may, as a matter of routine, conduct a full search of the passenger compartment and its contents.

Many criminals and their attorneys were, of course, disappointed that the Court would choose such a coherent rule when it could have devised one that kept everyone guessing. But Belton became the law, and suddenly the subject of vehicle searches was much easier to understand and apply in the field.

But then in 2009, the Court—for reasons that are still bewildering—overturned Belton and replaced it with precisely the type of rule that Belton was designed to eliminate: one that was "highly sophisticated," "qualified by all sorts of ifs, ands, and buts," and "literally impossible of application by the officer in the field."[4] The case was *Arizona v. Gant*,[5] and it was such a shifty opinion that the five justices who signed it claimed they had not actually overturned Belton when, in fact, that was exactly what they had done, and it was exactly what they had intended to do. As Justice Alioto said in his dissenting opinion, "Although the Court refuses to acknowledge that it is overruling Belton there can be no doubt that it does so."

Although Gant was a regrettable opinion, it was not as devastating as first predicted. While probable cause to arrest an occupant of a vehicle would no longer justify a warrantless search of it, prosecutors discovered that in many cases in which officers had probable cause to arrest an occupant, they also had probable cause to search the vehicle for evidence of the crime. And because the Supreme Court has consistently upheld the rule that probable cause to search a vehicle will, in and of itself, justify a warrantless search of it, the rules pertaining to vehicle searches has remained fairly stable.

In this article, we will discuss the various types of vehicle searches, starting with the one we have just been discussing. Although it is sometimes called "The Automobile Exception," it is more commonly known simply as a "probable cause search."

Probable Cause Searches

The rule pertaining to probable cause searches is as straightforward as they come: Officers may search a vehicle without a warrant if they have probable cause to search it. Or, in the words of the Supreme Court, a warrantless vehicle search is legal if it was "based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."[6]

Significantly, these searches are permitted even if officers had plenty of time to obtain a warrant,[7] or if there were no exigent circumstances that required an immediate search,[8] or even if the vehicle had already been towed and was sitting securely in a police garage or impound yard.[9] As the Supreme Court observed in *Michigan v. Thomas*, "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized."[10]

Although the existence of probable cause is the main requirement, as we will now explain, there are actually four of them:

1. “VEHICLE”: The thing that was searched must fall within the definition of a “vehicle” which, in the context of probable cause searches, includes cars, SUVs, vans, motorcycles, bicycles, and boats.[11] It also includes RVs and other motor homes except those that were being used solely as residences; e.g., on blocks.[12] Furthermore, a vehicle may be searched even though it was immobile as the result of a traffic accident, a mechanical failure, a fire or, as noted earlier, because the vehicle was in police custody.[13]
2. PUBLIC PLACE: A probable cause search of a vehicle is permitted only if the vehicle was located in a public place or on private property over which the suspect could not reasonably expect privacy. For example, a car parked in the suspect’s garage could not be searched without a warrant or consent. What about cars parked on private driveways? In the past, they could be searched because it was generally agreed that people could not reasonably expect privacy in a driveway which is, by necessity, readily accessible from the street. In 2013, however, the Supreme Court rejected this reasoning and ruled that any nonconsensual entry onto a private driveway would require a warrant or consent if the officers’ objective was to obtain information.[14] And because that is precisely the objective of conducting a vehicle search, an officer’s warrantless entry onto a driveway to search a car will ordinarily require a warrant.
3. PROBABLE CAUSE: See “Probable cause to search,” below.
4. SCOPE OF SEARCH: Officers must have restricted their search to places and things in which the evidence could reasonably be found. See “Scope and intensity of the search,” below.

Probable cause to search

In the context of vehicle searches, probable cause exists if officers were aware of facts that established a “fair probability” that contraband or other evidence of a crime was currently located inside the vehicle.[15] This can be established by direct evidence (e.g., officer sees the evidence inside) or circumstantial evidence, such as the following.

PC TO ARREST > PC TO SEARCH

As discussed earlier, officers are no longer permitted to search a vehicle merely because they have probable cause to arrest the driver or other occupant. However, if they have probable cause to arrest an occupant for a crime that occurred recently, they will often have probable cause to search the car for the fruits and instrumentalities of that crime. In the words of the Supreme Court, “[A]s will be true in many cases, the circumstances justifying the arrest are also those furnishing probable cause for the search.”[16] Here are two examples:

> GETAWAY CAR: Probable cause to arrest an occupant of a car for a crime that occurred recently will ordinarily establish probable cause to search the vehicle for the fruits and instrumentalities of the crime. This often occurs when officers stop a car that had recently been used in a robbery or burglary, in which case they may have probable cause to search for weapons or tools that were used in the commission of the crime, stolen property, and clothing similar to that used by the perpetrator.[17]
>
> DRUG SALES: Probable cause to arrest an occupant for drug sales will ordinarily provide probable cause to search for weapons and items that are commonly used to package and sell drugs.[18]
>
> THE VEHICLE IS AN “INSTRUMENTALITY”: If officers have probable cause to believe that a vehicle, itself, was the means by which a crime was committed (e.g., hit-and-run, vehicular manslaughter, kidnapping) they may search it under an exception to the warrant requirement known as the “instrumentality exception.”[19] As a practical matter, however, it is seldom necessary to rely on the instrumentality exception because, as discussed earlier, officers with probable cause to believe that a vehicle was an instrumentality of a crime will usually have probable cause to search it. Nevertheless, California courts continue to cite the instrumentality exception, especially in cases in which officers are looking for trace evidence such as DNA.[20]

INFERENCE BASED ON CLOSE ASSOCIATION

Probable cause to search for certain evidence in a vehicle may be based on the discovery of a thing or condition that is closely associated with such evidence. In other words, if items A and B are commonly found together, and if officers find A in the suspect’s possession, it may be reasonable to infer that he also possesses B. Thus, in discussing this principle, the court in *People v. Simpson* observed, “Illegal drugs and guns are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons.”[21] Some other examples:

DRUG CONTAINER > DRUGS

Seeing a distinctive container that is commonly used to store drugs will ordinarily warrant a search of it; e.g., bindles, tied balloons.[22] But containers that are commonly used for a legitimate purpose will not satisfy this requirement; e.g., film canisters.[23]

DRUG PARAPHERNALIA > DRUGS

The presence of drug use or sales paraphernalia in a vehicle may establish probable cause to search it for drugs.[24]

ODOR OF DRUGS > DRUGS

A distinctive odor of drugs from inside the vehicle may establish probable cause to search it for drugs.[25]

K-9 ALERT > DRUGS

A K-9's alert to the vehicle will ordinarily establish probable cause to search it for drugs.[26]

DUI DRUGS > DRUGS

If officers have probable cause to believe that the driver is under the influence of drugs, it is usually reasonable to infer he possesses drugs and paraphernalia.[27]

ALCOHOL ODOR > OPEN CONTAINER

Officers who smell fresh beer in a vehicle may infer there is an open container in the vehicle.[28]

AMMUNITION > FIREARMS

If officers see ammunition in the passenger compartment of a car, it is often reasonable to infer there is also a firearm inside.[29]

BURGLAR TOOLS > STOLEN PROPERTY

If officers saw burglar tools in a burglary suspect's vehicle shortly after a burglary occurred, it may be reasonable to infer that property stolen in the burglary will also be found in the vehicle.[30]

SUSPICIOUS CIRCUMSTANCES

Although probable cause to search a vehicle will seldom be based on a single suspicious circumstance, there are several circumstances that will ordinarily convert reasonable suspicion to detain into probable cause to search.[31] Some examples:

> SECRET COMPARTMENT: Officers who had stopped a suspected drug trafficker saw indications of a secret compartment in the vehicle.[32]
>
> SUSPICIOUS SPARE TIRE: In one case, a court ruled that grounds to search existed when, after officers stopped a car because they reasonably believed it was being used to transport drugs, they found an unusually heavy spare tire with a "flopping" sound coming from the inside.[33]
>
> MASKING ODOR: Another indication that a car is being used to transport drugs is the presence of multiple air fresheners.[34]
>
> STOLEN PROPERTY INDICATORS: In the vehicle of a suspected burglar, robber, or fence, officers saw property with obliterated serial numbers, store tags or anti-shoplifting devices, clipped wires, pry marks or other signs of forced removal.[35] Another indication that property in a vehicle was stolen is that there was an unusually high quantity of it. This is especially significant if the property was of a type that is commonly stolen; e.g., TVs, cell phones, jewelry.[36]
>
> STOLEN CAR INDICATIONS: Probable cause to believe that a car was stolen may be based in part— or sometimes entirely —on combinations of suspicious circumstances such as the following: failure to produce vehicle registration or driver's license; missing or improperly attached license plate, indications of VIN plate tampering, switched plates, side window broken out, evasive driving, failure to stop promptly when lit up, evidence of ignition tampering, use of makeshift ignition key, driver gave false or inconsistent statements about his ownership or possession of the car, driver did not know the name of the registered owner.[37]

WHERE THERE'S SOME, THERE'S PROBABLY MORE:

> When officers find contraband (e.g., stolen property, illegal weapons or drugs) in a vehicle, it is usually reasonable to believe there is more of it in the passenger compartment and the trunk. As the court said in People v. Stafford, "Being possessed of

probable cause that the automobile contained stolen property and dangerous weapons, the officers were reasonably justified in continuing their search for other property that might have been stolen or other dangerous instrumentalities."[38]

Scope and intensity of the search

If officers have probable cause to search a vehicle for evidence, they may search for it in the passenger compartment, the trunk, and all containers in which such evidence could reasonably be found.[39] As the Supreme Court explained, when officers are conducting a probable cause vehicle search, "nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages" must "give way to the interest in the prompt and efficient completion of the task at hand."[40] Thus, in upholding a search in *People v. Gallegos* the court observed, "The officers did not seek an elephant in a breadbox, but limited their search to areas that reasonably might have contained the [evidence]."[41] Officers are not, however, required to confine their search to places and things in which the listed evidence is usually or commonly found; what is required is a reasonable possibility.[42]

SEARCHING OCCUPANTS: Officers may not search the clothing worn by the occupants. Instead, a search is permitted only if officers had probable cause to believe that the evidence was located in the person's clothing.[43] Thus, in *U.S. v. Soyland* the Ninth Circuit said, "There was not a sufficient link between Soyland [a passenger] and the odor of methamphetamine or the marijuana cigarettes, and his mere presence did not give rise to probable cause to arrest and search him."[44]

SEARCHING CELL PHONES: As the result of California's Electronic Communications Privacy Act, a search warrant is required to search cell phones and other electronic communications devices that are located in a vehicle; i.e., merely having probable cause is no longer sufficient.[45] However, if officers believe they have probable cause to search the phone, they may seize it and seek a warrant.[46] Furthermore, because a weapon might be disguised as a cell phone, officers may conduct a physical examination of its exterior and case.[47]

PERMISSIBLE INTENSITY OF THE SEARCH: Officers may conduct a "probing" or reasonably thorough search.[48] Causing damage to the vehicle is permissible only if reasonably necessary and only if the damage was not excessive; e.g., OK to take paint samples from hit-and-run vehicle.[49] Suggestion: If it will be necessary to damage the vehicle, seek a warrant if there is time.

Reasonable Suspicion Searches

Although officers may no longer search a vehicle merely because they had probable cause to arrest an occupant, they may search it for evidence of that crime if, in addition to having probable cause to arrest, they reasonably believed that evidence pertaining to that crime was located inside the vehicle; i.e., probable cause to search is not required.[50] As the Supreme Court explained in *Arizona v. Gant*, "[C]ircumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[51] For example, in applying this rule, the courts have noted the following:

- "When a driver is arrested for being under the influence of a controlled substance, the officers could reasonably believe that evidence relevant to that offense might be found in the vehicle."[52]
- "Given the crime for which the officer had probable cause to arrest (illegal possession of a firearm), it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," such as ammunition or a holster.[53]
- "[T]he agents arrested Evans and Swanson for bank robbery and they had every reason to believe there was evidence of the offense in the green Cadillac."[54]

As for the scope of the search, officers may search the entire passenger compartment and all containers inside it; i.e., they need not restrict the search to places and things in which the evidence might be found.[55] It appears they may also search the trunk.[56] As noted earlier, however, pursuant to the California Electronic Communications Privacy Act, officers may not search cell phones or other communications devices without a warrant or consent.[57] Instead, as noted earlier, if they believe they have probable cause to search it, they may seize it and apply for a warrant.[58] They may also conduct a physical examination of the phone's exterior and its case.[59]

Vehicle Inventory Searches

Unlike "investigative" vehicle searches based on probable cause or reasonable suspicion, vehicle inventory searches are classified as "community caretaking" searches because their main purposes are to (1) provide a record of the property inside the vehicle so as to furnish the owner with an accounting; (2) protect officers and others from harm if the vehicle happened to contain a dangerous

device or substance; and (3) protect officers, their departments, and ultimately the taxpayers from false claims that property in the vehicle was lost, stolen, or damaged.[60]

Despite their obvious benefits, vehicle inventory searches are subject to certain restrictions that help ensure that they are not used as a pretext to conduct an investigative search for evidence.[61] Specifically, officers may conduct a search only if:

> (1) TOWING WAS REASONABLY NECESSARY: The officer's decision to impound or store the vehicle was reasonable under the circumstances.
>
> (2) STANDARD SEARCH PROCEDURES: The search was conducted in accordance with departmental policy or standard procedure.

Towing reasonably necessary

Because an inventory search can be conducted only if officers need to take temporary custody or control of the vehicle, the first requirement is that towing must have been reasonably necessary under the circumstances.[62] As the Court of Appeal explained, "[T]he ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances."[63] This does not mean that towing must have been imperative. Instead, as the First Circuit explained, it must have been reasonable:

> Framed precisely, the critical question is not whether the police needed to impound the vehicle in some absolute sense, but whether the decision to impound and the method chosen for implementing that decision were, under all the circumstances, within the realm of reason.[64]

NO LEAST INTRUSIVE MEANS TEST: In determining whether towing was reasonably necessary, it is immaterial that there might have been a less intrusive means of protecting the vehicle or its contents; e.g., by locking the vehicle and leaving it at the scene.[65] Instead, what matters is whether the decision was reasonable.[66] Furthermore, if towing was reasonably necessary, it is immaterial that the officers' decision to tow was based in part on their suspicion that the vehicle contained evidence.[67]

EXAMPLES OF REASONABLE NECESSITY: While it would be impractical to provide a comprehensive list of those situations in which the decision to tow a vehicle would be considered "reasonable," the following usually fall into that category:

> TRAFFIC HAZARD: The vehicle constituted a traffic hazard or obstruction.[69]
>
> ABANDONMENT: The vehicle had been abandoned.[69]
>
> DRIVER INCAPACITATED: The driver had become incapacitated by injuries or illness.[70]
>
> DRIVER ARRESTED + NECESSITY: While the Vehicle Code authorizes towing when officers have arrested the driver or other person in control of the vehicle,[71] the courts permit towing only if it was reasonably necessary.[72] For example, towing would ordinarily be permitted if the vehicle was away from the arrestee's home, especially if it was located in an area with a significant threat of theft or vandalism, or if the car was in an isolated area, or if the car could not be secured.[73] Towing would not ordinarily be reasonable if the vehicle could have been parked and secured in a safe place.[74] Similarly, there would ordinarily be no need to tow a vehicle if the arrestee wanted a friend at the scene to take possession, and the friend was licensed and insured.[75]
>
> UNOCCUPIED CAR NEEDING PROTECTION: Even if the Vehicle Code did not expressly authorize towing, officers may do so if towing was reasonably necessary to protect the vehicle or its contents from theft or damage.[76] If towing was necessary, it is immaterial that the vehicle was located on private property.[77]
>
> TOWING FORFEITED VEHICLE: Officers may tow a vehicle that was subject to forfeiture.[78]
>
> EXPIRED REGISTRATION: The Vehicle Code authorizes towing if (1) the vehicle was on the street or a public parking facility; and (2) the registration expired over six months earlier, or the registration sticker or license plate was issued for another vehicle or was forged.[79]
>
> SUSPENDED OR REVOKED DRIVER'S LICENSE: The Vehicle Code states that officers may impound a vehicle if the driver was given a notice to appear for violating Vehicle Code sections 14601 or 12500.[80] But if the driver was cited for driving on a suspended or a revoked license there is some uncertainty as to whether officers may tow the vehicle if there was a licensed and insured passenger on the scene who was willing to drive. As noted earlier, if the driver had been arrested,

officers must ordinarily permit such a passenger to take the vehicle because there is no apparent justification for towing when the driver is going to jail and cannot drive off after officers have left. The situation might be viewed differently, however, if the driver was going to be cited and released. This is because it is possible, (maybe even probable considering his demonstrated contempt for California's licensing statutes) that the driver will drive anyway after officers depart. Thus, in *People v. Burch* 81 the court upheld towing in such a situation because the officer testified he usually did so "to prevent the cited driver from simply getting back into the vehicle and driving away."

Search procedures are reasonable

In addition to proving that the decision to tow was reasonable, officers must prove that the search was conducted in accordance with "standardized criteria or established routine."82 The purpose of this requirement is to help ensure that inventory searches are not conducted for the purpose of "general rummaging in order to discover incriminating evidence."83 As the Second Circuit observed in *U.S. v. Lopez*:

> [W]hen a police department adopts a standardized policy governing the search of the contents of impounded vehicles, the owners and occupants of those vehicles are protected against the risk that officers will use selective discretion, searching only when they suspect criminal activity and then seeking to justify the searches as conducted for inventory purposes.84

This does not mean the criteria and routine must be set forth in elaborate specificity. As the First Circuit pointed out, this would be impractical:

> Virtually by definition, the need for police to function as community caretakers arises fortuitously, when unexpected circumstances present some transient hazard which must be dealt with on the spot. The police cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities. Rather, they must be free to follow sound police procedure, that is, to choose freely among the available options, so long as the option chosen is within the universe of reasonable choices.85

Keep in mind that officers are not required to prove that, under the circumstances in each case, it was reasonable to conduct an inventory search of the vehicle. This is because, as discussed earlier, it is settled that inventory searches are always reasonable whenever a vehicle will be towed.86 As the Ninth Circuit observed, "[I]t is undisputed that once a vehicle has been impounded, the police may conduct an inventory search."87

As we will now explain, there are two ways in which officers and prosecutors can prove that a search was conducted in accordance with standardized policy.

WRITTEN DEPARTMENTAL POLICY: If a department has a written policy in which it defines the permissible scope and intensity of its inventory searches, prosecutors can satisfy the standardization requirement by introducing a copy of the policy into evidence after laying the necessary foundation by, for example, having the searching officer identify it. What should be included in such a policy? In most cases, the following will suffice:

> GENERAL SCOPE AND INTENSITY: The policy need only specify the general areas and things in the vehicle that should be searched in order to locate and identify items that need to be included in the inventory,88 such as the following: the passenger compartment, including the glove box, console, under the seats;89 the trunk,90 including under the spare tire;91 all open and closed containers including containers that did not belong to the driver or owner of the vehicle;92 and the engine compartment.93 The policy may also authorize a search of motorcycles,94 rental cars,95 and any property that officers turn over to a third party, such as the driver's friend.96 If the vehicle contains so much property that a listing of each item would take an excessive amount of time, the policy may permit officers to photograph the property instead.97 The policy need not require a listing of every object in the vehicle.98
>
> OFFICER DISCRETION IS PERMITTED: The policy may permit officers to exercise discretion in determining what to search, but officers must exercise their discretion based on community caretaking objectives—not investigative interests.99 As the Supreme Court explained, "A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself."100
>
> READING DOCUMENTS: The policy may require or permit officers to read documents in the vehicle,101 and to look through notebooks and other multipage documents to "ensure that there was nothing of value hidden between the pages."102

NO DAMAGE: The policy must not authorize officers to damage or destroy parts of the vehicle.[103] CHP 180 FORMS: In lieu of a written policy as to the scope and intensity of the search, law enforcement agencies may satisfy the "standardization" requirement by mandating that their officers complete a CHP 180 form.[104] This form requires, among other things, that officers list all "property" in the vehicle, including radios, tape decks, firearms, tools, and ignition keys. It also requires a description of all damage to the vehicle.

UNWRITTEN DEPARTMENTAL POLICY: Although it is usually better to have a written policy, a department may verbally disseminate a policy that will meet the above requirements. As the court explained in *U.S. v. Tackett*, "Whether a police department maintains a written policy is not determinative, where testimony establishes the existence and contours of the policy."[105] Similarly, the California Supreme Court pointed out that the Fourth Amendment "does not require a written policy governing closed containers but the record must at least indicate that police were following some 'standardized criteria' or 'established routine.'"[106]

For example, in *People v. Green* [107] the Court of Appeal ruled that proof of a standardized policy was sufficient when the officer testified that she "considered the inventory search to be a natural consequence following the decision to impound defendant's automobile. Although she did not use the magic words 'standard procedure,' her matterof-fact response indicates that an inventory search following impound of the vehicle is standard department procedure."

Here's another example of an officer's testimony that satisfied the standardization requirement:

DA: What was your purpose of doing the inventory search; why did you do it?

Ofc: Policy of Moss Point Police Department, when you arrest someone out of their vehicle, you tow it and do an inventory search of their personal belongings and items left in the vehicle for the protection of the city.

DA: Is that standard operating procedures?

Ofc: Yes, ma'am.

DA: And is the policy, whether written or unwritten, of the police department to do that in every case?

Ofc: Yes, ma'am.

DA: And you said it was to protect the City of Moss Point or the police department. What do you mean by that?

Ofc: Well, so the person that's arrested doesn't come back and say, well, I had a five thousand dollar stereo, or five hundred dollars and now it's missing."

In contrast, in *People v. Aguilar* [108] the Court of Appeal ruled that an inventory search was unlawful because the officer testified that "he impounded 90 percent of the time; he had not seen the [departmental] policy; and one of the reasons he impounded Aguilar's car was to look in the trunk." Said the court, "It is clear from [the officer's] testimony that the arrest and the impound were for "an investigatory police motive."

Protective Vehicle Searches

When officers have detained or arrested an occupant of a vehicle, a weapon in the passenger compartment can be almost as dangerous to them as a weapon in his waistband. For this reason, officers may conduct a protective search of the vehicle if both of the following circumstances existed:

(1) Officers reasonably believed there was a "weapon" inside the vehicle.

(2) The detainee or arrestee had potential access to the passenger compartment.

If these circumstances existed, officers may seize any weapons in plain view,[109] and may also search the passenger compartment for additional weapons.[110] They may not, however, search the trunk unless they develop grounds to conduct a probable cause search of it.[111]

Keep in mind that, if these circumstances existed, officers will not be required to prove that the detainee also presented a danger to them. For example, in *People v. Lafitte* [112] sheriff 's deputies in Orange County made a traffic stop on Lafitte at about 10:15 P.M. because one of his headlights was not working. While one of the deputies was explaining the situation to Lafitte, the other shined a flashlight inside the car and saw a knife on the open door of the glove box. The deputy seized the knife, then conducted a protective

search of the passenger compartment for additional weapons. During the search, he found a handgun. Although it was not illegal to have such a knife in a vehicle, and although Lafitte had been cooperative throughout the detention, the court ruled that the search was justified because "the discovery of the weapon" provided "a reasonable basis for the officer's suspicion."

Officers are not, however, required to prove that, in addition to the presence of a weapon, the detainee appeared to present a danger to them. Still, it is a circumstance that should be cited because it would help prove that a protective vehicle search was necessary, just as it is a relevant circumstance in determining whether a pat search was necessary;113 e.g., the detainee had a history of violence against officers, or he was hostile, or his behavior was unpredictable because it appeared he was under the influence of drugs or alcohol.114

"Weapon" defined

There are two types of weapons that will justify a protective search: (1) a conventional weapon; and (2) an object that, based on circumstantial evidence, is being used as a weapon. In some cases, the presence of a weapon may also be inferred based on the suspect's behavior.

CONVENTIONAL WEAPONS: An officer's observation of any type of conventional weapon in plain view (such as a firearm, knife, brass knuckles, nunchakus) will, of course, justify a protective vehicle search. This is true even if the weapon was possessed lawfully; e.g., a "legal" knife.115

VIRTUAL WEAPONS: A virtual weapon is essentially any object that reasonably appeared as if it was being used as a weapon, even though it was manufactured for another purpose. Examples include baseball bats, hammers, crow bars screwdrivers, and box cutters. How can the courts determine the intended use of an object? Like most things, it is based on the totality of circumstances, especially the location of object, its proximity to the suspect, and especially the ease with which it can cause physical harm to people.116

BEHAVIOR INDICATING PRESENCE OF WEAPON: Based on the law pertaining to pat searches, an officer's belief that there was a weapon in the passenger compartment may be based on the suspect's behavior and other circumstantial evidence.117

For example, in *People v. King* 118 two San Diego police officers stopped King for driving with expired registration. As one of them was walking up to the driver's window, he saw King "reach under the driver's seat," at which point he heard the sound of "metal on metal." In court, the officer testified that, based on these circumstances, he "feared for the safety of his partner and himself," especially because "there was increased gang activity in the area." After ordering King to exit, the officer looked under the front seat and found a .25-caliber semiautomatic handgun. In ruling that the officer reasonably believed there was a weapon under the seat, the court said, "[I]n addition to King's movement, we have the contemporaneous sound of metal on metal and the officer's fear created by the increased level of gang activity in the area."

Potential access

If officers reasonably believed that a weapon was inside the vehicle, a protective search will be permitted only if the detainee or arrestee had not yet been subjected to a "full custodial arrest" and was therefore able to "gain immediate control" of the weapon. When that happens, said the Supreme Court, a protective vehicle search is permitted because "the officer remains particularly vulnerable" and the officer "must make a quick decision as to how to protect himself and others from possible danger."119 It should be noted that defense attorneys have sometimes cited *Arizona v. Gant* 120 as authority for prohibiting protective vehicle searches unless the detainee or arrestee had actual access to the passenger compartment at the time the search occurred. But Gant's requirement of actual access pertained to searches incident to arrest, and there is no logical reason that this requirement should be imported into the field of protective searches because officers do not ordinarily have as much control over detainees or those arrestees who not been subjected to a full custodial arrest.

Searches for ID

There is a type of warrantless vehicle search that is similar to, but distinct from, probable cause searches: searches for identification and related documentation. It is, of course, settled that officers who have stopped a vehicle for a traffic violation may inspect the driver's license, vehicle registration, rental forms, and proof of insurance.121 Because they also have probable cause to believe that such documents will be found in the vehicle, it has been argued that officers who have made a traffic stop should themselves be able to conduct a search for the documents. The courts have, however, consistently rejected these arguments mainly because there will usually be no reason to prohibit the driver from doing so.

Officers may, however, search for such documentation if they reasonably believed it would have been impractical or dangerous for them to permit the driver or another occupant to conduct the search, or if officers reasonably believed the vehicle had been stolen or abandoned.122 For example, the courts have upheld warrantless searches for documentation under the following circumstances:

- The driver was unable to produce a driver's license and said he did not know where the registration certificate was located because he did not own the vehicle.123
- The driver abandoned the car and the passenger (a parolee) said he didn't know the owner.124
- The driver said the car belonged to one of his passengers, but the passengers claimed they were hitchhikers."125
- An armed and dangerous driver fled from officers and they reasonably believed the vehicle contained evidence that would help them locate him.126
- The driver was stopped at 2 A.M. for driving erratically; there were two other men in the vehicle, one of whom had been hanging out a window and waving a whiskey bottle.127

Two other things should be noted. First, before beginning the search, officers may order the occupants to exit.128 Second, the search must be limited to places and things in which such documents may reasonably be found; e.g., the glove box, above the visor, under the seats.129 But the search need not be limited to places in which such documents are "usually" or "traditionally" found.130 Finally, in the absence of probable cause, officers may not search the trunk for ID.131

Other Vehicle Searches

There are five other types of warrantless vehicle searches that, although they do not require much discussion, should be noted.

CONSENT SEARCHES: The owner of a vehicle, or a person who has the owner's permission to drive it, may ordinarily consent to a search of both the vehicle and its contents.132 There is, however, an exception: Officers may not search a container in the vehicle if it reasonably appeared that someone other than the consenting person had exclusive control or access to it.133

PROBATION AND PAROLE SEARCHES: Officers may ordinarily search the vehicle pursuant to the terms of probation or parole if they were aware that the owner or the driver was on parole or was on probation which contained a search clause authorizing vehicle searches or searches of property under the probationer's control. In addition to searching property under the control of the probationer or parolee, officers may search property belonging to a passenger if they reasonably believed the parolee could have stowed his belongings in the property when he became aware of "police activity."134

EXIGENT CIRCUMSTANCES: Under the exigent circumstances exception to the warrant requirement, officers may forcibly enter a vehicle if it was reasonably necessary to protect a person from imminent harm, or protect property from imminent damage; e.g., child locked in vehicle, an occupant was sick or injured, gun or dangerous chemical was inside. It may also be necessary to enter a vehicle that has been burglarized or is otherwise insecure for the purpose of locking it or searching for registration that will enable officers to notify the owner.

SEARCHES BY VEHICLE THEFT INVESTIGATORS: Officers whose primary responsibility is to investigate vehicle theft may search unoccupied vehicles to determine the lawful owner if the vehicle was located "on a highway or in any public garage, repair shop, terminal, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment."135

VIN SEARCHES: Regardless of whether there are grounds to do so, officers may look through the windshield of a vehicle to inspect the VIN plate located on the dash if the car is located in a public place. If the vehicle was stopped for a traffic violation, and if the VIN plate was covered, officers may enter the vehicle and remove the covering in order to record the VIN number.136

References

1. http://jalopnik.com. April 17, 2013.
2. See Robbins v. California (1981) 453 U.S. 420, 430 [conc. opn. of Powell, J.].
3. (1981) 453 U.S. 454.
4. New York v. Belton (1981) 453 U.S. 454, 458 [quoting from LaFave, "Case-By-Case Adjudication versus Standardized Procedures: The Robinson Dilemma," (1974) S.Ct.Rev. 127, 141].
5. (2009) 556 U.S. 332.
6. United States v. Ross (1982) 456 U.S. 798, 809. Also see People v. Carpenter (1997) 15 Cal.4th 312, 365.
7. See People v. Superior Court (Valdez) (1983) 35 Cal.3d 11, 16.

8. See Maryland v. Dyson (1999) 527 U.S. 465, 467 [“the automobile exception does not have a separate exigency requirement”]; Pennsylvania v. Labron (1996) 518 U.S. 938, 940 [“unforeseen circumstances” are not required].
9. See California v. Acevedo (1991) 500 U.S. 565, 570; United States Johns (1985) 469 U.S. 478, 486; People v. Panah (2005) 35 Cal.4th 395, 469.
10. (1982) 458 U.S. 259, 261.
11. See California v. Carney (1985) 471 U.S. 386, 392-93 [the “automobile exception” applies only “[w]hen a vehicle is being used on the highways, or if it is readily capable of such use”]; People v. Needham (2000) 79 Cal.App.4th 260, 267; People v. Allen (2000) 78 Cal.App.4th 445 [bicycle].
12. See California v. Carney (1985) 471 U.S. 386, 394, fn.3; People v. Black (1985) 173 Cal.App.3d 506, 510 [Winnebago]; U.S. v. Navas (2nd Cir. 2010) 597 F.3d 492, 499 [trailer “with its legs dropped” was sufficiently mobile].
13. See California v. Carney (1985) 471 U.S. 386, 391; People v. Overland (1988) 203 Cal.App.3d 1114, 1118.
14. See Florida v. Jardines (2013) US [133 S.Ct. 1409, 1414].
15. See Illinois v. Gates (1983) 462 U.S. 213, 238.
16. Chambers v. Maroney (1970) 399 U.S. 42, 47-48, fn.6. Also see People v. Senkir (1972) 26 Cal.App.3d 411, 421 [“reasonable inferences may be indulged as to the presence of articles known to be usually accessory to or employed in the commission of a specific crime”].
17. See Chambers v. Maroney (1970) 399 U.S. 42, 47-48 [“there was probable cause to search the car for guns and stolen money”]; People v. Chavers (1983) 33 Cal.3d 462, 467; People v. Varela (1985) 172 Cal.App.3d 757, 762; People v. Le (1985) 169 Cal.App.3d 186, 190-91; People v. Weston (1981) 114 Cal.App.3d 764, 774-75.
18. See People v. Glaser (1995) 11 Cal.4th 354, 367 [“In the narcotics business, firearms are as much ‘tools of the trade’ as are most commonly recognized articles of narcotics paraphernalia.” Quoting Ybarra v. Illinois (1979) 444 U.S. 86, 106 (dis. opn. of Rehnquist, J)]; People v. Lee (1987) 194 Cal.App.3d 975, 983 [“persons engaged in selling narcotics frequently carry firearms to protect themselves against would-be robbers”].
19. See, for example, People v. Teale (1969) 70 Cal.2d 497,511; People v. Griffin (1988) 46 Cal.3d 1011, 1024-25; North v. Superior Court (1972) 8 Cal.3d 301; People v. Braun (1973) 29 Cal.App.3d 949, 970; People v. Bittaker (1989) 48 Cal.3d 1046, 1076; People v. Wolf (1978) 78 Cal.App.3d 735, 741; People v. Rice (1981) 126 Cal.App.3d 477.
20. See, for example, People v. Bittaker (1989) 48 Cal.3d 1046; People v. Diaz (2013) 213 Cal.App.4th 743.
21. (1998) 65 Cal.App.4th 854, 862.
22. See Texas v. Brown (1983) 460 U.S. 730, 743; People v. Parra (1973) 30 Cal.App.3d 729, 735.
23. See People v. Holt (1989) 212 Cal.App.3d 1200, 1205; People v. Valdez (1987) 196 Cal.App.3d 799, 806-7 [film canister
24. 24 See Wyoming v. Houghton (1999) 526 U.S. 295, 300 [because officers saw a hypodermic syringe in the driver’s shirt pocket, they reasonably believed there were drugs in the vehicle].
25. 25 See United States Johns (1985) 469 U.S. 478, 482; Robey v. Superior Court (2013) 56 Cal.4th 1218, 1240 [plain smell “is well established by cases that have found the smell of contraband sufficient to establish probable cause necessary for police to obtain a search warrant”]; People v. Waxler (2014) 224 Cal.App.4th 712, 719.
26. See Illinois v. Caballes (2005) 543 U.S. 405, 410; Indianapolis v. Edmond (2000) 531 U.S. 32, 40; Florida v. Royer (1983) 460 U.S. 491, 505-6 [“The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage”]; People v. Stillwell (2011) 197 Cal.App.4th 996, 1005-1006; Estes v. Rowland (1993) 14 Cal.App.4th 508, 529 [“[O]nce a dog alerts to the presence of narcotics the search [becomes] a probable cause search”].
27. See People v. Guy (1980) 107 Cal.App.3d 593, 598; People v. Gonzales (1989) 216 Cal.App.3d 1185, 1189, 1191; People v. Decker (1986) 176 Cal.App.3d 1247, 1250.
28. See People v. Molina (1994) 25 Cal.App.4th 1038, 1042; People v. Evans (1973) 34 Cal.App.3d 175; Veh. Code §§ 23222-23226.
29. See People v. DeCosse (1986) 183 Cal.App.3d 404, 411; U.S. v. Doward (1st Cir. 1994) 41 F.3d 789, 793 [gun cleaning kit].
30. See People v. Suennen (1980) 114 Cal.App.3d 192, 203.
31. See United States Sokolow (1989) 490 U.S. 1, 9; Safford Unified School District v. Redding (2009) 557 U.S. 364, 371.
32. See People v. Crenshaw (1992) 9 Cal.App.4th 1402, 1415; U.S. v. Ewing (9th Cir. 2011) 638 F.3d 1226, 1233, fn.6.
33. See U.S. v. Strickland (11th Cir. 1990) 902 F.2d 937.
34. See People v. Russell (2000) 81 Cal.App.4th 96, 103; U.S. v. Anderson (9th Cir. 1997) 114 F.3d 1059, 1066-67; U.S. v. Leos-Quijada (10th Cir. 1997) 107 F.3d 786.

35. See People v. Gorak (1987) 196 Cal.App.3d 1032, 1039; In re Curtis T. (1989) 214 Cal.App.3d 1391, 1398.
36. See People v. Martin (1973) 9 Cal.3d 687, 696; People v. Williams (1988) 198 Cal.App.3d 873, 890; In re Curtis T. (1989) 214 Cal.App.3d 1391 [large quantity of car stereo equipment on floor].
37. See People v. James (1969) 1 Cal.App.3d 645, 648-49; People v. Webster (1991) 54 Cal.3d 411, 430-1; People v. Windham (1987) 194 Cal.App.3d 1580, 1590; In re Jonathan M. (1981) 117 Cal.App.3d 530, 534.
38. 29 Cal.App.3d 940, 948. Also see People v. Hunt (1990) 225 Cal.App.3d 498, 509; People v. Evans (1973) 34 Cal.App.3d 175, 180.
39. See Florida v. Jimeno (1991) 500 U.S. 248, 251 ["The scope of a search is generally defined by its expressed object."]; United States Ross (1982) 456 U.S. 798, 821; California v. Acevedo (1991) 500 U.S. 565, 570 [officers may search the "compartments and containers within the automobile [if] supported by probable cause"]; Maryland v. Garrison (1987) 480 U.S. 79, 84-85 ["[P]robable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."]; Wyoming v. Houghton (1999) 526 U.S. 295, 302; People v. Chavers (1983) 33 Cal.3d 462, 470 [glove box]; People v. Hunter (2005) 133 Cal.App.4th 371 [trunk].
40. United States Ross (1982) 456 U.S. 798, 821-22.
41. (2002) 96 Cal.App.4th 612, 626.
42. See People v. Kraft (2000) 23 Cal.4th 978, 1043 [the officers "merely looked in a spot where the specified evidence of crime plausibly could be found, even if it was not a place where photographs normally are stored"]; People v. Smith (1994) 21 Cal.App.4th 942, 950 [drug dealers "usually attempt to secrete contraband where the police cannot find it"]; In re Arturo D. (2002) 27 Cal.4th 60, 78 ["an officer is entitled to conduct a nonpretextual warrantless search for such documents in those locations where such documentation reasonably may be expected to be found"].
43. See People v. Valdez (1987) 196 Cal.App.3d 799, 806 ["the officer's entry into the individual's pocket can only be justified if the officer's sensorial perception, coupled with the other circumstances, was sufficient to establish probable cause to arrest the defendant for possession of narcotics before the entry into the pocket"]; People v. Temple (1995) 36 Cal.App.4th 1219, 1227.
44. (9th Cir. 1993) 3 F.3d 1312, 1314.
45. Pen. Code § 1546 et seq.
46. See Riley v. California (2014) U.S. [134 S.Ct. 2473, 2486].
47. See Riley v. California (2014) U.S. [134 S.Ct. 2473, 2485].
48. See California v. Acevedo (1991) 500 U.S. 565, 570; United States Ross (1982) 456 U.S. 798, 820.
49. See United States Ramirez (1998) 523 U.S. 65, 71; People v. Robinson (1989) 209 Cal.App.3d 1047, 1055.
50. See U.S. v. Edwards (7th Cir. 2014) 769 F.3d 509, 514; U.S. v. Vinton (D.C. Cir. 2010) 594 F.3d 14, 25.
51. (2009) 556 U.S. 332, 335.
52. See People v. Nottoli (2011) 199 Cal.App.4th 532, 554.
53. People v. Osborne (2009) 175 Cal.App.4th 1052, 1065. Also see U.S. v. Johnson (6th Cir. 2010) 627 F.3d 578, 584.
54. U.S. v. Smith (7th Cir. 2012) 697 F.3d 625, 630.
55. See People v. Nottoli (2011) 199 Cal.App.4th 531, 556.
56. NOTE: The reason we think a search of the trunk is permitted is that a search based on reasonable suspicion is more akin to a probable cause search than a limited search incident to arrest. Therefore, the scope of the search should be substantially the same as the scope of probable cause searches which includes the trunk. See United States v. Ross (1982) 456 U.S. 798, 821["nice distinctions . . . between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand"].
57. See Pen. Code § 1546 et seq.
58. See: Riley v. California (2014) U.S. [134 S.Ct. 2473, 2486].
59. See Riley v. California (2014) U.S. [134 S.Ct. 2473, 2485].
60. See Whren v. United States (1996) 517 U.S. 806, 811, fn.1; Colorado v. Bertine (1987) 479 U.S. 367, 373; People v. Steeley (1989) 210 Cal.App.3d 887, 892.
61. See U.S. v. Duguay (7th Cir. 1996) 93 F.3d 346, 351 ["the decision to impound (the 'seizure') is properly analyzed as distinct from the decision to inventory (the 'search')"].
62. See People v. Andrews (1970) 6 Cal.App.3d 428, 433 ["[U]pon police impoundment of an automobile, the police undoubtedly become an involuntary bailee of the property and responsible for the vehicle and its contents."]; U.S. v. Smith (6th Cir. 2007)

510 F.3d 641, 651 [“A warrantless inventory search may only be conducted if police have lawfully taken custody of the vehicle.”].

63. People v. Shafrir (2010) 183 Cal.App.4th 1238, 1247.
64. U.S. v. Rodriguez-Morales (1st Cir. 1991) 929 F.2d 780, 786. Edited.
65. See City of Ontario v. Quon (2010) 560 U.S. 746, 763; Atwater v. City of Lago Vista (2001) 532 U.S. 318, 350; People v. Williams (2006) 145 Cal.App.4th 756, 761.
66. See People v. Bell (1996) 43 Cal.App.4th 754, 761, fn.1; Gallegos v. City of Los Angeles (9th Cir. 2002) 308 F.3d 987, 992.
67. See Colorado v. Bertine (1987) 479 U.S. 367, 372 [“[T]here was no showing that the police, who were following standard procedures, acted in bad faith or for the sole purpose of investigation.” Emphasis added]; People v. Torres (2010) 188 Cal.App.4th 775, 792 [pretext tow was unreasonable because “the record shows a concededly investigatory motive and no community caretaking function”]; U.S. v. Harris (8th Cir. 2015) 795 F.3d 820, 822 [officers “may keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime”]; U.S. v. Lopez (2nd Cir. 2008) 547 F.3d 364, 372 [“officers will inevitably be motivated in part by criminal investigative objectives. Such motivation, however, cannot reasonably disqualify an inventory search that is performed under standardized procedures for legitimate custodial purposes.”]; U.S. v. Coccia (1st Cir. 2006) 446 F.3d 233, 240-41 [“A search or seizure undertaken pursuant to the community caretaking exception is not infirm merely because it may also have been motivated by a desire to investigate crime.”].
68. See Cady v. Dombrowski (1973) 413 U.S. 433, 443 [the “vehicle was disabled as a result of the accident, and constituted a nuisance along the highway”]; Veh. Code §§ 22651(a)-(b); Miranda v. City of Cornelius (9th Cir. 2005) 429 F.3d 858, 864.
69. Veh. Code § 22669.
70. Veh. Code § 22651(g).
71. Veh. Code § 22651(h)(1).
72. See U.S. v. Ruckes (9th Cir. 2009) 586 F.3d 713.
73. See People v. Shafrir (2010) 183 Cal.App.4th 1238, 1248; People v. Scigliano (1987) 196 Cal.App.3d 26, 30; People v. Benites (1992) 9 Cal.App.4th 309, 326; Miranda v. City of Cornelius (9th Cir. 2005) 429 F.3d 858, 864.
74. See People v. Williams (2006) 145 Cal.App.4th 756, 762; Miranda v. City of Cornelius (9th Cir. 2005) 429 F.3d 858, 864 [“But no such public safety concern is implicated by the facts of this case involving a vehicle parked in the driveway of an owner who has a valid license”].
75. See U.S. v. Maddox (9th Cir. 2010) 614 F.3d 1046, 1050; U.S. v. Duguay (7th Cir. 1996) 93 F.3d 346, 353.
76. See People v. Scigliano (1987) 196 Cal.App.3d26, 29.
77. See Halajian v. D&B Towing (2012) 209 Cal.App.4th 1, 15; People v. Scigliano (1987) 196 Cal.App.3d 26, 29; People v. Auer (1991) 1 Cal.App.4th 1664, 1669.
78. See Florida v. White (1999) 526 U.S. 559, 566; Cooper v. California (1967) 386 U.S. 58.
79. Veh. Code § 22651(o)(1)(A); People v. Suff (2014) 58 Cal.4th 1013, 1056.
80. Veh. Code § 22651(p).
81. (1986) 188 Cal.App.3d 172, 180.
82. Florida v. Wells (1990) 495 U.S. 1, 4. Also see Colorado v. Bertine (1987) 479 U.S. 367, 374, fn.6 [“Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.”]; People v. Nottoli (2011) 199 Cal.App.4th 531, 546 [“But there was no evidence that [turning on a cell phone] was taken in accordance with any standardized policy or practice”]; People v. Williams (1999) 20 Cal.4th 119, 127 [“[T]he record must at least indicate that police were following some ‘standardized criteria’ or ‘established routine’ when they elected to open the containers”]; People v. Green (1996) 46 Cal.App.4th 367, 374 [“The search should be carried out pursuant to standardized procedures, as this would tend to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function.”].
83. Florida v. Wells (1990) 495 U.S. 1, 4.
84. (2nd Cir. 2008) 547 F.3d 364, 371. Also see U.S. v. Marshall (8th Cir. 1993) 986 F.2d 1171, 1176 [“When the police follow standardized inventory procedures that impact all impounded vehicles in a similar manner and sufficiently regulate the discretion of the officers conducting the search, the reasonableness requirement of the Fourth Amendment is satisfied.”]; U.S. v. Khoury (11th Cir. 1990) 901 F.2d 948, 958 [“An inventory search is not a surrogate for investigation, and the scope of an inventory search may not exceed that necessary to accomplish the ends of the inventory.”].

85. U.S. v. Rodriguez-Morales (1st Cir. 1991) 929 F.2d 780, 787. Also see U.S. v. Coccia (1st Cir. 2006) 446 F.3d 233, 239 [“standard protocols have limited utility in circumscribing police discretion in the impoundment context because of the numerous and varied circumstances in which impoundment decisions are made.”].
86. See South Dakota v. Opperman (1976) 428 U.S. 364, 369 [“When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles’ contents.”]; People v. Benites (1992) 9 Cal.App.4th 309, 328 [inventory searches of towed vehicles are “inevitable]; U.S v. Lopez (2nd Cir. 2008) 547 F.3d 364,, 369 [“It is well recognized in Supreme Court precedent that, when law enforcement officials take a vehicle into custody, they may search the vehicle and make an inventory of its contents.”].
87. U.S. v. Wanless (9th Cir. 1989) 882 F.2d 1459, 146
88. See U.S. v. Lopez (2nd Cir. 2008) 547 F.3d 364, 371.
89. See South Dakota v. Opperman (1976) 428 U.S. 364, 372-76; U.S. v. Andrews (5th Cir. 1994) 22 F.3d 1328, 1336.
90. See U.S. v. Johnson (5th Cir. 1987) 815 F.2d 309, 314; U.S. v. Tueller (10th Cir. 2003) 349 F.3d 1239, 1244.
91. See U.S. v. Johnson (5th Cir. 1987) 815 F.2d 309.
92. See Florida v. Wells (1990) 495 U.S. 1, 4; People v. Williams (1999) 20 Cal.4th 119, 138.
93. See U.S. v. Pappas (8th Cir. 2006) 452 F.3d 767, 772; U.S. v. Lumpkin (6th Cir. 1998) 159 F.3d 983, 987-88.
94. See People v. Needham (2000) 79 Cal.App.4th 260, 267 [“We see no reason to treat motorcycles differently from cars”].
95. See U.S. v. Mancera-Londono (9th Cir. 1990) 912 F.2d 373, 376; U.S. v. Petty (8th Cir. 2004) 367 F.3d 1009, 1012.
96. See People v. Needham (2000) 79 Cal.App.4th 260, 267; U.S. v. Tackett (6th Cir. 2007) 486 F.3d 230, 233.
97. See U.S. v. Taylor (8th Cir. 2011) 636 F.3d 461.
98. See U.S. v. Lopez (2nd Cir. 2008) 547 F.3d 364, 371.
99. See Colorado v. Bertine (1987) 479 U.S. 367, 375; People v. Steeley (1989) 210 Cal.App.3d 887, 892.
100. Florida v. Wells (1990) 495 U.S. 1, 4.
101. See People v. Hovey (1988) 44 Cal.3d 543, 571.
102. U.S. v. Khoury (11th Cir. 1990) 901 F.2d 948, 959. Also see U.S. v. Andrews (5th Cir. 1994) 22 F.3d 1328, 1335.
103. See U.S. v. Edwards (5th Cir. 1978) 577 F.2d 883, 893; U.S. v. Lugo (10th Cir. 1992) 978 F.2d 631, 636.
104. See People v. Williams (1999) 20 Cal.4th 119, 123; County of Los Angeles v. Barker (2015) 242 Cal.App.4th 475, 478.
105. (6th Cir. 2007) 486 F.3d 230, 233.
106. People v. Williams (1999) 20 Cal.4th 119, 127 [Edited]. Also see U.S. v. Lopez (2nd Cir. 2008) 547 F.3d 364, 370 [standard NYPD towing policy was established through an officer’s testimony that officers are required to “do a total inventory of a vehicle. Everything has to come out.”].
107. (1996) 46 Cal.App.4th 367, 375. Also see People v. Steely (1989) 210 Cal.App.3d 887, 892 [officer testified that his department’s unwritten policy required that he “inventory the contents of a vehicle prior to towing to make sure what property is in the vehicle in case it shows up missing from the tow yard”].
108. (1991) 228 Cal.App.3d 1049, 1052.
109. See Michigan v. Long (1983) 463 U.S. 1032, 1050 [“If, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.”]; Adams v. Williams (1972) 407 U.S. 143; People v. Perez (1996) 51 Cal.App.4th 1168, 1173 [as passenger stepped outside, a gun fell to the seat]; People v. Molina (1994) 25 Cal.App.4th 1038, 1042 [“Once the officers discovered the knives, they had reason to believe that their safety was in danger and, accordingly, were entitled to search the [passenger] compartment and any containers therein for weapons.”].
110. See Michigan v. Long (1983) 463 U.S. 1032, 1049, 1051 [the officers “did not act unreasonably in taking preventive measures to ensure that there were no other weapons within Long’s immediate grasp.”]; People v. Molina (1994) 25 Cal.App.4th 1038, 1042 [“Once the officers discovered the knives, they had reason to believe that their safety was in danger and, accordingly, were entitled to search the [passenger] compartment and any containers therein for weapons.”]. Also see “Where there’s some, there’s usually more,” in the section “Probable Cause Searches,” above.
111. See Michigan v. Long (1983) 463 U.S. 1032, 1049 [Court limits its holding to “the search of the passenger compartment of an automobile”].
112. (1989) 211 Cal.App.3d 1429, 1433.
113. See Michigan v. Long (1983) 463 U.S. 1032, 1047-48 [the principles pertaining to pat searches were the basis for the Court’s recognition that protective vehicle searches may be reasonably necessary].

114. See, for example, Amacher v. Superior Court (1969) 1 Cal.App.3d 150 [officer “had personally had words with petitioner when he stopped him for a traffic violation. He knew that petitioner had had numerous hostile run-ins with other officers, and that petitioner had little or no respect for law enforcement officers.”]; In re Michael S. (1983) 141 Cal.App.3d 814 [suspect “acted very nervous, started breathing very rapidly, hyperventilating, and became boisterous and angry and very antagonistic [and] clenched and unclenched his fists” and became “borderline combative.”]; People v. Methey (1991) 227 Cal.App.3d 349, 358 [detainee was carrying a pry bar].
115. See People v. Lafitte (1989) 211 Cal.App.3d 1429.
116. See People v. Lafitte (1989) 211 Cal.App.3d 1429 [knife atop an open glove box door]
117. Michigan v. Long (1983) 463 U.S. 1032, 1049 [a protective vehicle search is permissible if the police officer “possesses a reasonable belief based on specific and articulable facts,” including “rational inferences” from those facts"].
118. (1989) 216 Cal.App.3d 1237.
119. Michigan v. Long (1983) 463 US 1032, 1052.
120. (2009) 556 U.S. 332. Also see U.S. v. Scott (8th Cir. 2016) F.3d [“we have rejected the notion that Gant’s requirements apply when no arrest has taken place”].
121. See Veh. Code § 12951(b) [“The driver of a motor vehicle shall present the registration or identification card or other evidence of registration of any or all vehicles under his or her immediate control for examination upon demand of any peace officer” who has been lawfully stopped for a traffic violation.”]; In re Arturo D. (2002) 27 Cal.4th 60, 78 [“When the officer prepared to cite Arturo for a Vehicle Code violation, he had both a right and an obligation to ascertain the driver’s true identity”].
122. See People v. Hart (1999) 74 Cal.App.4th 479, 488.
123. People v. Martin (1972) 23 Cal.App.3d 444, 447. Also see People v. Vermouth (1971) 20 Cal.App.3d 746, 752.
124. People v. Turner (1994) 8 Cal.4th 137, 182,
125. People v. Webster (1991) 54 Cal.3d 411, 431.
126. People v. Remiro (1979) 89 Cal.App.3d 809, 830.
127. People v. Faddler (1982) 132 Cal.App.3d 607, 610.
128. See People v. Webster (1991) 54 Cal.3d 411, 431.
129. See In re Arturo D. (2002) 27 Cal.4th 60, 78, 81; People v. Webster (1991) 54 Cal.3d 411, 431; People v. Turner (1994) 8 Cal.4th 137, 182 [glove box]; People v. Martin (1972) 23 Cal.App.3d 444, 447 [“on the sun visors”].
130. See In re Arturo D. (2002) 27 Cal.4th 60, 78 [search need not be limited to “traditional repositories”].
131. See In re Arturo D. (2002) 27 Cal.4th 60, 86, fn.25 [trunk is not where ID documents reasonably would be expected to be found].
132. See People v. Clark (1993) 5 Cal.4th 950, 979; People v. Carvajal (1988) 202 Cal.App.3d 487, 495-97.
133. See People v. Baker (2008) 164 Cal.App.4th 1152, 1159-60 [“Although the officer testified that he did not know who the purse belonged to when he searched it, there was no reasonable basis to believe the purse belonged to anyone other than the sole female passenger.”]; Raymond v. Superior Court (1971) 19 Cal.App.3d 321, 326 [“[R]eliance upon the third party’s consent is not justified where it is clear that the property belongs to another.”]; People v. Cruz (1964) 61 Cal.2d 861, 866 [“The general consent given by Ann and Susan that the officers could ‘look around’ did not authorize [the officers] to open and search suitcases and boxes that he had been informed were the property of third persons.”].
134. See People v. Schmitz (2012) 55 Cal.4th 909, 926.
135. Veh. Code § 2805.
136. See New York v. Class (1986) 475 U.S. 106; People v. Lindsey (1986) 182 Cal.App.3d 772, 779

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10.2: Arizona v. Gant

PETITIONER	RESPONDENT
Arizona Rodney	Joseph Gant

LOCATION

2524 N. Walnut

DOCKET NO.	DECIDED BY
07-542	Roberts Court

LOWER COURT

Arizona Supreme Court

CITATION

556 US 332 (2009)

GRANTED

Feb 25, 2008

ARGUED

Oct 7, 2008

DECIDED

Apr 21, 2009

ADVOCATES

Josep h T . Maziarz *argued the cause for the petitioner*

Anthony A. Yang *Assistant to the Solicitor General, Department of Justice, for the United States, as amicus curiae, supporting the petitioner*

Thomas F. Jacobs *argued the cause for the respondent*

Facts of the case

Rodney Gant was apprehended by Arizona state police on an outstanding warrant for driving with a suspended license. After the officers handcuffed Gant and placed him in their squad car, they went on to search his vehicle, discovering a handgun and a plastic bag of cocaine. At trial, Gant asked the judge to suppress the evidence found in his vehicle because the search had been conducted without a warrant in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures. The judge declined Gant's request, stating that the search was a direct result of Gant's lawful arrest and therefore an exception to the general Fourth Amendment warrant requirement. The court convicted Gant on two counts of cocaine possession. The Arizona Court of Appeals reversed, holding the search unconstitutional, and the Arizona Supreme Court agreed. The Supreme Court stated that exceptions to the Fourth Amendment warrant requirement must be justified by concerns for officer safety or evidence preservation.

Because Gant left his vehicle voluntarily, the court explained, the search was not directly linked to the arrest and therefore violated the Fourth Amendment. In seeking certiorari, Arizona Attorney General Terry Goddard argued that the Arizona Supreme Court's ruling conflicted with the Court's precedent, as well as precedents set forth in various federal and state courts.

Question

Is a search conducted by police officers after handcuffing the defendant and securing the scene a violation of the Fourth Amendment's protection against unreasonable searches and seizures?

FOR	AGAINST
Stevens Ginsburg Souter Scalia Thomas	Breyer Kennedy Roberts Alito

Conclusion

5–4 Decision

Majority Opinion By John Paul Stevens

Yes, under the circumstances of this case. The Supreme Court held that police may search the vehicle of its recent occupant after his arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of the arrest. With Justice John Paul Stevens writing for the majority, the Court reasoned that "warrantless searches are per se unreasonable" and subject only to a few, very narrow exceptions. Here, Mr. Gant was arrested for a suspended license and the narrow exceptions did not apply to his case. Justice Scalia wrote separately, concurring. Justice Samuel A. Alito dissented and was joined by Chief Justice John G. Roberts, and Justices Anthony M. Kennedy and Stephen G. Breyer. He argued that the majority improperly overruled its precedent in New York v. Belton which held that "when a policeman has made a lawful arrest… he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Justice Stephen G. Breyer also wrote a separate dissenting opinion, where he lamented that the court could not create a new governing rule.

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CHAPTER OVERVIEW

11: Probation and Parole Searches

11.1: Probation and Parole Searches

11.2: Samson v. California

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11.1: Probation and Parole Searches

Parole is a risky business. Recidivism is high.[1]

For some people, committing crimes is a way of life, almost part of the daily routine. As the Supreme Court explained, such people "have necessarily shown a lapse in the ability to control and conform their behavior to the legitimate standards of society by the normal impulses of selfrestraint."[2] In discussing this subject, the writers of the book Inside The Criminal Personality summarized one of their findings as follows: "If we were to calculate the total number of crimes committed by all the men with whom we worked, it would be astronomic."[3]

This is, of course, the main reason that many— maybe most—probationers and all parolees are required to submit to warrantless searches as a condition of their release from custody.[4] The theory is that search conditions help "minimize the risk to the public safety"[5] because the probationer or parolee will be "less inclined" to possess the fruits and instrumentalities of crime, such as weapons.[6] And for those who continue to commit crimes while on the outside, search conditions provide another valuable public service: they help put them back inside. Despite this, the law pertaining to probation and parole searches has been a source of much confusion thanks mainly to several dubious published opinions by some appellate courts. But, as we will explain in this article, thanks to more recent decisions by the United States Supreme Court and the California Supreme Court, most of this confusion has been eliminated.

We will begin by briefly discussing the fundamentals of probation searches, parole searches, and the newer Postrelease Community Supervision (PRCS) searches. Then we will cover the requirements for conducting each of these searches, their permissible scope and intensity, and the special requirements for searching homes, vehicles, and cell phones.

The Basics

PROBATION SEARCHES: When a defendant is convicted of a crime, the judge may grant probation if the defendant agrees to certain conditions which often include submission to warrantless searches.[7] Unlike parole and PRCS searches, however, the scope of probation searches varies because it is determined by the sentencing judge and is based on the circumstances of each case. (This, of course, creates problems for officers, as we will discuss later.) Probation searches are deemed "consent" searches because the probationer is technically free to choose between accepting a search condition or serving time in jail or prison.[8]

PAROLE SEARCHES: In contrast to probationers, California parolees do not consent to search conditions. Instead, they are required to submit per statute. Furthermore, all parolees are subject to searches of the same places and things.[9] This, too, will be discussed later.

PRCS SEARCHES: Under California's Postrelease Community Supervision Act of 2011, people who have been convicted of certain lower-level felonies may be permitted to serve their prison sentences in a local county jail.[10] Then, upon release, they will be supervised for up to three years by a county probation officer. Even though the person is not confined in a state prison or supervised by a parole officer, the Court of Appeal has ruled that his status is substantially the same as that of a parolee.[11] (Because there is no significant difference between PRSC and parole searches, all further references to parole searches will include PRCS searches.)

Requirements

Although probation and parole searches differ in many ways, they share the same four basic requirements:

1. officers must have known that the target of the search was on parole or searchable probation,
2. the search must have furthered a legitimate law enforcement interest,
3. the officers must have confined their search to places and things they were expressly or impliedly permitted to search (see "Scope of the Search," below), and
4. the search must have been reasonable in its intensity (see "Intensity of the Search," below). As noted, there are additional requirements for conducting searches of homes, vehicles, and cell phones which we will discuss later.

Significantly, there is one thing that is *not* required for these searches: Officers are not required to justify the search by proving they had probable cause, reasonable suspicion, or any other level of proof that the probationer or parolee had violated the law or the terms of his release.[12] This is because the main purpose of these searches is to give probationers and parolees an incentive to avoid drugs, weapons, and so forth. And one way to do this is to make them aware that they may be searched at any time for no reason

whatsoever. As the California Supreme Court explained, "[T]he purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches."[13] Regarding probation searches, it should be noted that a sentencing judge might require that officers possess at least a low level of proof that the probationer had committed some crime. But such a requirement is seldom imposed and it will not be implied.[14]

Knowledge of probation or parole status

The first requirement is that officers must have been aware that the target of the search was on parole or searchable probation.[15] This is mainly because a search that is conducted without such knowledge is "wholly arbitrary" and "without any perceived limits to [the officers'] authority."[16]

Legitimate law enforcement purpose

Even if officers had knowledge of the search condition, a warrantless search will not be upheld unless they conducted it for a legitimate law enforcement or rehabilitative purpose.[17] The courts usually express this requirement in the negative; specifically, the search must not have been "arbitrary, capricious, or harassing.[18] And this necessarily occurs if "the motivation for the search was unrelated to rehabilitative, reformative or legitimate law enforcement purposes."[19] In this section we will discuss the types of motivations that have been deemed "legitimate".

ROUTINE SEARCHES: A search is legitimate if it was conducted as a matter of routine and its purpose was just to make sure the probationer or parolee was not carrying drugs, weapons, or instrumentalities of a crime.[20] As the Supreme Court pointed out, "unexpected" and "unprovoked" searches provide information that affords "a valuable measure of the effectiveness of the supervision."[21]

RANDOM SEARCHES: A probation or parole search is not "arbitrary" or "capricious" merely because it was unscheduled and was prompted by the sudden availability of the probationer or parolee (e.g., seeing him walking down a street). While it has been argued that such searches are "arbitrary" (i.e., depending completely on individual discretion) and "capricious" (i.e., sudden, impulsive), the courts permit—and even encourage—them.[22]

For example, in In *re Anthony S.*,[23] officers in Ventura learned that several members of the "Ventura Avenue Gangsters" were on probation, and that the terms of probation included authorization to search their homes for stolen property and gang paraphernalia. So they searched the home of a member named Anthony and found handguns and other contraband. The trial judge ruled that the search was unlawful, claiming it was a "random" search in which the officers decided "let's go search the gang members today." But the court disagreed, ruling "the evidence shows that the officers were motivated by a law enforcement purpose; i.e., to look for stolen property, alcohol, weapons, and gang paraphernalia at the homes of the Ventura Avenue Gangsters members. This is a legitimate law enforcement purpose."

INVESTIGATIVE SEARCHES: A search is not unlawful merely because officers suspected that a particular probationer or parolee had committed a new crime, and the objective of the search was to see if he possessed any evidence of the crime.[24] This is because the commission of a new crime is necessarily a violation of probation or parole.[25] As the California Supreme Court observed in *People v. Stanley*, "Clearly, investigation of defendant's involvement in a murder would have a parole supervision purpose."[26] This probably sounds too obvious to warrant discussion, but the Ninth Circuit took a different position, and was admonished for it by the Supreme Court. This case was *United States v. Knights*.[27]

In Knights, Napa County sheriff's deputies suspected that Knights committed a series of pipe bombings and other acts of vandalism against PG&E and Pacific Bell facilities. They also learned that Knights was on probation in a drug case, and that the terms of probation authorized, among other things, a search of his residence. So, in hopes of obtaining evidence of the crimes, deputies conducted a probation search of his apartment and found a detonation cord, bolt cutters, blueprints stolen from a building that had been bombed, and other evidence linking Knights to the crimes. As the result, Knights was convicted of conspiracy to commit arson and possession of an unregistered destructive device.

But in an especially absurd decision, the Ninth Circuit ruled the search was unlawful because its purpose was to obtain evidence that Knights had committed certain violent crimes, rather than ascertaining whether he was complying with the terms of probation. The Supreme Court was aghast, and it informed the Ninth Circuit that the public and law enforcement have a legitimate interest in determining whether probationers are bombing things, setting buildings on fire, or committing other less serious crimes.

PRETEXT RESIDENTIAL SEARCHES: A search of a home in which a probationer or parolee lives is pretextual if the officers' sole objective was to obtain evidence against another occupant, such as a roommate. Thus, a pretext search is, by definition, an illegal search because its sole objective is to obtain evidence against the roommate, not the probationer or parolee.

Pretext searches are, however, rare since the officers' investigation will seldom focus exclusively on the roommate. Instead, it is often reasonable for them to believe that probationers and parolees know about the criminal activities of the people they live with, and might even be assisting them.28

Dual purpose searches are not, however, without limitation. Specifically, officers who are conducting them will be required to limit their searches to common areas and places and things over which the probationer or parolee had sole or joint control. This subject is discussed in more detail in the section on the scope of probation and parole searches.

SEARCH AFTER ARREST, SUMMARY PROBATION REVOCATION OR PAROLE HOLD: The terms of probation and parole, including search terms, remain in effect even if the probationer or parolee had been arrested, was being held on a parole hold, or if his probation was summarily revoked.29 As the Ninth Circuit observed in *Latta v. Fitzharris*, a parole officer's interest in inspecting a parolee's home does not terminate upon his arrest, "if anything, it intensified."30 Consequently, search conditions and other terms of probation and parole do not terminate until a court has held a hearing and, as the result, ordered the revocation of probation or parole.

For example, in *People v. Hunter* 31 the driver of a stolen car bailed out when officers signaled him to stop. After identifying Hunter as the driver, officers learned that he was back in prison awaiting a parole revocation hearing. They also learned that he had rented a storage unit. So they searched it pursuant to the terms of parole and found stolen property. On appeal, Hunter argued that the search could not be justified as a parole search because his "parole was violated and he had been physically returned to prison as the result of that violation. The court pointed out, however, that the terms of parole remained in effect because "Hunter was still a parolee until his parole was formally revoked."

FREQUENT, PROLONGED, OR LATE NIGHT SEARCHES:

> A probation or parole search might be deemed harassing (and therefore illegal) if it occurred after several unproductive searches with no reason to believe that a new one would be fruitful, or if it was conducted late at night or in the early morning hours and there was insufficient reason for such an intrusion.32 However, the court in *People v. Clower* ruled that "[s]ix searches over a fourto five-month period, without more, do not necessarily indicate harassment,"33 and the court in *People v. Sardinas* ruled that a second search one day after an unproductive search was not harassing because the circumstances surrounding the second search indicated the defendant might have resupplied.34

Scope of the Search

In the context of probation and parole searches, the term "scope" refers to the places and things that officers are permitted to search. As we will now discuss, the permissible scope of a search depends on whether it was a probation or parole search.

Scope of probation searches

Because there are no "standard" probation search conditions, the permissible scope of a probation search depends on what the sentencing judge wrote on the probation order. Thus, the Court of Appeal explained that "the officer must have some knowledge not just of the fact someone is on probation, but of the existence of a search clause broad enough to justify the search at issue."35 Consequently, officers must have knowledge of the places and things that were included in the suspect's probation order. This does not mean, however, that officers must have seen an actual copy of the court's order. Instead, because certain combinations of searchable places and things appear regularly in probation orders, many counties have developed systems by which these combinations have been given code numbers which, in turn, are incorporated into police databases. The following are some examples.

"FULL" SEARCH: The most common search condition, sometimes called a "full" or "four-way," typically authorizes a search of (1) the probationer, (2) his residence, (3) vehicles, and (4) other property under his control. Note that a "full" probation search is the same as a parole search, except that a vehicle search is implied by the terms of parole (i.e., property under the parolee's control) while it is expressly authorized by the terms of probation.

"PROPERTY UNDER YOUR CONTROL": A probation search condition that includes authorization to search property under the probationer's control is tantamount to a four-way because "property under your control" includes his residence.36

LACK OF UNIFORM TERMINOLOGY AND CODING: Before going further, it is necessary to point out that California does not have a statewide coding system by which officers can determine from a computer terminal exactly what they may search.37 Some counties might have a good internal system but others (such as Alameda County) have conflicting and redundant codes that have emerged piecemeal over many years. Furthermore, some terms may lack precise definition.

For example, a judge might authorize searches of property under the probationer's control because he or she thinks (correctly) that this authorizes searches of the probationer's person, residence, vehicle, and personal property—all of which he "controls".38 But another judge sitting at a motion to suppress might conclude that because the search condition did not expressly authorize searches of the probationer's person, home, and vehicles, the scope of the search was limited to whatever personal property he happened to be carrying.39

This uncertainty could be eliminated if the California courts adopted a uniform listing of search terms and a coding system so that officers throughout the state could be certain of the permissible scope of the probation searches they conduct.

Scope of parole searches

Unlike probationers, all parolees are subject to the same search condition: "You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer."40 It should be noted that, unlike California parole, the terms and conditions of federal parole will vary because they are imposed at the discretion of the sentencing judge.41 Thus, officers must ordinarily not conduct federal parole searches until they have confirmed that the parolee is subject to warrantless searches of the places and things they intend to search.

Intensity of the Search

The term "intensity" is used to describe how aggressive or intrusive the search may be. Since there is not much law on the subject, we have looked to cases covering the intensity of warranted searches, consent searches, and searches incident to arrest.

REASONABLY "THOROUGH" SEARCH: Searches of homes, vehicles and other places may be reasonably thorough because, as one court put it, a cursory search "is of little value."42

NO DAMAGE OR DESTRUCTION: The search must not be destructive.43 "Excessive or unnecessary destruction of property in the course of a search," said the Supreme Court, "may violate the Fourth Amendment, even though the entry itself is lawful."44 However, if officers have probable cause to believe that evidence is hidden in a place or thing that must be damaged to seize it, there is authority for doing so.45

LENGTH OF SEARCH: The permissible length of the search will depend on the number and nature of the places and things that will be searched, the amount and nature of the evidence that the officers are seeking, and any problems that caused a delay.46

SEARCHES BY K9S: Officers may use a trained dog (e.g., drugor explosives-seeking) to help with the search. This is because a dog's sniffing does not materially increase the intensity of the search.47

Special Requirements

In addition to the requirements discussed above, there are additional requirements that pertain to searches of homes, vehicles, and cell phones.

Searches of homes

As noted earlier, the terms of all parole searches expressly authorize the search of the parolee's home. In contrast, some probation search agreements expressly authorize searches of homes and some do not. But even if a search of the home is not expressly authorized, officers have implied authority to do so if, as noted earlier, the terms of probation included authorization to search property under the probationer's control.48

PROOF THAT PROBATIONER OR PAROLEE LIVES THERE:

Even if a residential search was expressly or impliedly authorized, officers may not search a residence unless they have "reason to believe"—much less than probable cause—that the probationer or parolee lives there. As the court said in *People v Downey*, "[A]n

officer executing an arrest warrant or conducting a probation or parole search may enter a dwelling if he or she has only a 'reasonable belief,' falling short of probable cause to believe, the suspect lives there and is present at the time."[49]

While some other federal circuit courts (including the Ninth Circuit) have ruled that probable cause is required,50 it doesn't seem to matter which standard of proof is applied because officers usually have sufficient information about where the arrestee lives to satisfy both. In fact, we are unaware of any case in which a court ruled that an entry was illegal because the officers had reasonable suspicion but not probable cause.[50]

What constitutes "living" in a residence? Although this question has "given difficulty to many courts,"[51] it generally occurs if the probationer or parolee has been spending the night there regularly, even if not every night.[52] A probationer or parolee may also be deemed to be living in two or more residences at the same time;[53] and motel guests "live" in the motel in which they are registered.[54] On the other hand, the fact that the probationer or parolee stays in a home "occasionally" is insufficient.[55]

GENERAL PRINCIPLES: In determining whether officers had reasonable suspicion that the probationer or parolee lived in a certain residence, the courts will apply the following principles:

NO HYPERTECHNICAL ANALYSIS: The courts will consider the totality of circumstances known to the officers, and these circumstances will be analyzed by applying common sense, not hypertechnical analysis.[56]

MULTIPLE CIRCUMSTANCES: Although a single circumstance will sometimes suffice, in most cases it takes two or more.

LACK OF DIRECT EVIDENCE: The courts will take into account that the officers' inability to obtain direct evidence that the probationer or parolee lives in a certain house may be the result of his attempt to prevent them from learning his whereabouts.[57] But that doesn't change the fact that reasonable suspicion is required.

FRIENDS MIGHT LIE: Because the friends of the probationer or parolee might lie, officers are not required to accept information from a less-thandisinterested source as to his place of residence.[58]

IF OFFICERS WERE WRONG: It is irrelevant that officers learned afterward that the probationer or parolee did not live in the house they entered. What counts is whether they reasonably believed so at the time.[59]

RELEVANT CIRCUMSTANCES: The following circumstances are relevant in determining whether there is sufficient reason to believe that a probationer or parolee was living in a particular residence:

LISTED ADDRESS: The address was listed as his residence on one or more forms that reasonably appeared to be current, such as a rental or lease agreement,[60] hotel or motel registration,[61] utility billing records,[62] telephone or internet records,[63] credit card application,[64] employment application,[65] post office records,[66] DMV records,[67] vehicle repair work order,[68] jail booking records,[69] bail bond application,[70] police reports and probation and parole records.[71]

INFORMATION FROM OTHERS: A citizen informant or a police informant who has been tested or whose information has been corroborated notified officers that the probationer or parolee presently lived at the address.[72]

CELL PHONE DATA: Cell site location data for the probationer's or parolee's cell phone showed significant recurring contact with a cell tower located in the home's service area.[73]

OBSERVATIONS BY OFFICERS, OTHERS: Officers, neighbors, or others repeatedly or recently saw

the probationer or parolee on the premises.[74] It is especially significant that he was observed doing things that residents commonly do; e.g. taking out the garbage, chatting with neighbors, opening the door with a key.[75]

CAR PARKED OUTSIDE: A car that was owned or used by the probationer or parolee was regularly parked in the driveway, in front of the residence, or nearby.[76]

PRESENCE OF PROBATIONER/PAROLEE NOT REQUIRED: Unless the terms of probation stated otherwise, officers may conduct a search even though the probationer was not present.[77] As for parolees, their presence is not required.

KNOCK-NOTICE: Officers must enter the premises in a "reasonable" manner.[78] As the Court of Appeal explained in *People v. Ureziceanu*, "[T]he remaining policies and purposes underlying the statutory knocknotice provisions must be satisfied in the execution of a probation search of a residence."[79] Accordingly, officers must comply with the knock-notice requirements unless there is good cause to make an unannounced entry.

PROTECTIVE SWEEPS: Upon entering the premises, officers may conduct a protective sweep to locate any people who might constitute a threat.80

WHAT PLACES MAY BE SEARCHED: Officers may search all common areas such as the living room, kitchen, garage, and all other rooms and areas to which the probationer or parolee appeared to have sole or joint access or control.81 This is true regardless of the probationer's or parolee's assurances to the contrary.82 Officers may also search the curtilage; e.g., a garden, yards.83 Conversely, officers may not search places if there is "no basis for officers to reasonably believe the probationer has authority over those areas."84

WHAT THINGS MAY BE SEARCHED: Officers may search a container or personal property inside a residence if they had reasonable suspicion that the probationer or parolee owned or accessed it solely or jointly with another occupant.85 Significantly, probable cause is not required.86 For example, the courts have ruled that officers reasonably believed that probationers or parolees had sole or joint control of the following property:

- A jewelry box on a dresser in the bedroom of a female probationer.87
- A "gender neutral" handbag on a bed in a home occupied by a male parolee and his girlfriend.88
- A paper bag in the parolee's bedroom closet.89
- A stationery box in a drawer in the living room.90
- Trash under the kitchen sink.91
- The refrigerator in the kitchen.92

ARRESTING OCCUPANTS: Officers who enter a residence to conduct a probation or parole search may arrest anyone on the premises if there is probable cause to do so, regardless of whether probable cause existed at the time of entry or developed in the course of the search. In other words, neither a conventional nor a Ramey warrant is required to arrest a person inside a residence if officers have lawfully entered to conduct a probation or parole search.93

Searches of vehicles

The permissible scope of a vehicle search will depend largely on whether the probationer or parolee was the owner or driver, or whether he was merely a passenger.

DRIVER OR OWNER ON PROBATION OR PAROLE: If the probationer or parolee was driving the vehicle or owned it, officers may ordinarily search the following:

PROPERTY OWNED BY PROBATIONER OR PAROLEE: Property that the officers reasonably believed was owned by the probationer or parolee,94 or property over which the officers reasonably believed the probationer or parolee had the ability to exert control.95

PROPERTY BELONGING TO PASSENGER: Officers may search a container belonging to a passenger if they reasonably believed that the parolee could have stowed his personal belongings in the container when he became aware of police interest; e.g., he apparently became aware that he was being followed.96 However, in the absence of direct or circumstantial evidence that a male probationer or parolee attempted to stow property in a female passenger's purse, the court might find that it was unreasonable to search the purse, especially if it was closed and "closely monitored" by the woman; e.g., it was at her feet.97

PASSENGER ON PROBATION OR PAROLE: If only a passenger was on parole or probation, officers may search "those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when he became aware of police interest.98

Officers need not, however, "articulate specific facts indicating that the parolee has actually placed property or contraband in a particular location in the passenger compartment before searching that area." As discussed above, however, a search of a purse may be unlawful if the probationer or parolee was a male. Finally, it is unsettled whether officers may search closed compartments in the vehicle (e.g., glove box, console) if the probationer or parolee was merely a passenger.99 Finally, officers may stop a car for the purpose of conducting a parole or probation search even though the person on parole or probation was only a passenger.100

Search of cell phones

As the result of California's Electronic Communications Privacy Act (CalECPA), it appears that officers may not search a cell phone or other communications device pursuant to a probation or parole search condition. The reason is, although probation

searches are deemed “consensual,” CalECPA requires something it calls “specific consent,” which it defines as “consent provided directly to the government entity seeking information.”101 This seems to mean that searches of electronic communications devices are not covered under the scope of a probation search because such consent is not given “directly” to officers. Instead, it is given directly to the sentencing judge in exchange for the judge’s agreement not to send the probationer directly to jail or prison.102 As for parole searches, there is simply nothing in CalECPA to indicate that communication devices may be searched pursuant to the “property under your control” search authorization.

Consequently, if officers want to search a communication device that is found within a searchable vehicle, and if they believe they have probable cause, they may seize the device and promptly apply for a warrant.103 They may also conduct a warrantless physical examination of its exterior and case because there are weapons on the market that are disguised as cell phones.104

References

1. Latta v. Fitzharris (9th Cir. 1975) 521 F.2d 246, 249.
2. Hudson v. Palmer (1984) 468 U.S. 517, 526.
3. Samuel Yochelson and Stanton Samenow, The Criminal Personality (Published by J. Aronson, 1976)
4. See United States v. Knights (2001) 534 U.S. 112, 116 [a search clause is a “common California probation condition”].
5. People v. Constancio (1974) 42 Cal.App.3d 533, 540.
6. In re Anthony S. (1992) 4 Cal.App.4th 1000, 1002, fn.1.
7. See United States v. Knights (2001) 534 U.S. 112, 116.
8. See People v. Schmitz (2012) 55 Cal.4th 909, 920 [“a probationer who is subject to a search clause has explicitly consented to that condition”].
9. See People v. Schmitz (2012) 55 Cal.4th 909, 916 [“every inmate eligible for release on parole is subject to search or seizure by a parole officer or other peace officer”].
10. See Pen. Code §§ 3450 et seq.
11. People v. Fandinola (2013) 221 Cal.App.4th 1415, 1422 [PRCS is “akin to a state prison commitment; it is not a grant of probation or a conditional sentence.”].
12. See People v. Bravo (1987) 43 Cal.3d 600, 611; People v. Douglas (2015) 240 Cal.App.4th 855, 861.
13. People v. Reyes (1998) 19 Cal.4th 743, 753.
14. See People v. Bravo (1987) 43 Cal.3d 600, 607, fn.6 [“a reasonable-cause requirement will not be implied”].
15. See People v. Sanders (2003) 31 Cal.4th 318, 333; People v. Schmitz (2012) 55 Cal.4th 909, 916.
16. People v. Robles (2000) 23 Cal.4th 789, 797.
17. See People v. Robles (2000) 23 Cal.4th 789, 797; People v. Bravo (1987) 43 Cal.3d 600, 611; People v. Medina (2007) 158 Cal.App.4th 1571, 1577 [search requires “rehabilitative, reformative or legitimate law enforcement purposes”].
18. See Samson v. California (2006) 547 U.S. 843, 856; People v. Bravo (1987) 43 Cal.3d 600, 610; People v. Schmitz (2012) 55 Cal.4th 909, 916 [the search must not be “arbitrary, capricious, or harassing”].
19. People v. Zichwic (2001) 94 Cal.App.4th 944, 951.
20. See United States v. Knights (2001) 534 U.S. 112, 117; People v. Robles (2000) 23 Cal.4th 789, 799; People v. Lewis (1999) 74 Cal.App.4th 662, 671.
21. People v. Mason (1971) 5 Cal.3d 758, 763-64.
22. See People v. Bravo (1987) 43 Cal.3d 600, 608.
23. (1992) 4 Cal.App.4th 1000.
24. See People v. Reyes (1998) 19 Cal.4th 743, 752; People v. Woods (1999) 21 Cal.4th 668, 675, 678; U.S. v. Reyes (2nd Cir. 2002) 283 F.3d 446, 463 [“[T]he objectives and duties of probation officers and law enforcement officers are unavoidably parallel and are frequently intertwined.”].
25. See People v. Robles (2000) 23 Cal.4th 789, 797; U.S. v. Barner (2nd Cir. 2012) 666 F.3d 79, 85; In re Anthony S. (1992) 4 Cal.App.4th 1000, 1004.
26. (1995) 10 Cal.4th 764, 790.
27. (2001) 534 U.S. 112.
28. See People v. Woods (1999) 21 Cal.4th 668, 679; People v. Robles (2000) 23 Cal.4th 789, 797. Also see Maryland v. Pringle (2003) 540 U.S. 366, 373 [drug dealing is “an enterprise to which a dealer would be unlikely to admit an innocent person with

the potential to furnish evidence against him"].

29. See People v. Barkins (1978) 81 Cal.App.3d 30, 33 ["Actual revocation of probation cannot occur until the probationer has been afforded the due process," and until then "the terms of probation remain in effect."]; People v. Burgener (1986) 41 Cal.3d 505, 536 ["Nor is it relevant that the parolee may already be under arrest when the search is conducted."];
30. (9th Cir. Cir. 1975) 521 F.2d 246, 252.
31. (2006) 140 Cal.App.4th 1147, 1152.
32. See People v. Reyes (1998) 19 Cal.4th 743, 753; People v. Zichwic (2001) 94 Cal.App.4th 944, 951; People v. Medina (2007) 158 Cal.App.4th 1571, 157.
33. (1993) 16 Cal.App.4th 1737, 1743.
34. (2009) 170 Cal.App.4th 488, 494.
35. People v. Douglas (2015) 240 Cal.App.4th 855, 863. Also see People v. Bravo (1987) 43 Cal.3d 600, 607 [search conditions "must be interpreted on the basis of what a reasonable person would understand from the language of the condition itself "].
36. See People v. Spratt (1980) 104 Cal.App.3d 562, 566-67 ["property under my control" authorized a search of probationer's residence]; People v. Bravo (1987) 43 Cal.3d 600, 602, fn.1, 607 [Probation order stated: "Submit his person and property to search or seizure"; discussing the search of the probationer's home, the court said, "We think the wording of appellant's probation search condition authorized the instant search."].
37. See People v. Douglas (2015) 240 Cal.App.4th 855, 863 ["probation search clauses are not worded uniformly"].
38. See People v. Bravo (1987) 43 Cal.3d 600, 602, fn.1, 607 [Probation order stated: "Submit his person and property to search or seizure"; discussing the search of the probationer's home, the court ruled, "We think the wording of appellant's probation search condition authorized the instant search."]; People v. Spratt (1980) 104 Cal.App.3d 562, 566-67 ["property under my control" authorized a search of probationer's residence].
39. See U.S. v. Grandberry (9th Cir. Cir. 2013) 730 F.3d 968, 981 ["the government has cited no case—and we have found none—applying the 'property under your control' search condition to a residence."]. Note: It appears the court was unaware of Bravo and Spratt, cited above.
40. 15 CCR § 2511(b)(4). Also see Pen. Code § 3067(b)(3); People v. Middleton (2005) 131 Cal.App.4th 732, 739 ["A search condition for every parolee is now expressly required by statute"].
41. See Johnson v. United States (2000) 529 U.S. 694, 696-97.
42. U.S. v. Torres (10th Cir. 1981) 633 F.2d 1019. 1027. Also see People v. Crenshaw (1992) 9 Cal.App.4th 1403, 1411 ["permission to search contemplates a thorough search. If not thorough it is of little value."].
43. See People v. Crenshaw (1992) 9 Cal.App.4th 1403; U.S. v. Gutierrez-Mederos (9th Cir. Cir.1992) 965 F.2d 800, 804.
44. United States v. Ramirez (1998) 523 U.S. 65, 71.
45. See United States v. Ross (1982) 456 U.S. 798, 818; Dalia v. United States (1979) 441 U.S. 238, 258.
46. See People v. $48,715 (1997) 58 Cal.App.4th 1507, 1510 ["The bed of the truck was loaded with luggage and bags of pasture seed."].
47. See People v. $48,715 (1997) 58 Cal.App.4th 1507, 1516; People v. Bell (1996) 43 Cal.App.4th 754, 769; U.S. v. Perez (9th Cir. 1994) 37 F.3d 510, 516 ["Using a narcotics dog to carry out a consensual search of an automobile is perhaps the least intrusive means of searching because it involves no unnecessary opening or forcing of closed containers or sealed areas of the car unless the dog alerts."].
48. See People v. Bravo (1987) 43 Cal.3d 600, 602, fn.1, 607 [Probation order stated: "Submit his person and property to search or seizure"; discussing the search of the probationer's home, the court ruled, "We think the wording of appellant's probation search condition authorized the instant search."]; People v. Spratt (1980) 104 Cal.App.3d 562, 566-67 ["property under my control" authorized a search of probationer's residence]
49. (2011) 198 Cal.App.4th 652, 662.
50. See U.S. v. Grandberry (9th Cir. Cir. 2013) 730 F.3d 968, 973; Motley v. Parks (9th Cir. 2005) 432 F.3d 1072, 1080; U.S. v. Vasquez-Algarin (3rd Cir. 2016) F.3d [2016 WL 1730540]; U.S. v. Barrera (5th Cir. 2006) 464 F.3d 496, 501, fn.5 ["The disagreement among the circuits has been more about semantics than substance"].
51. U.S. v. Diaz (9th Cir. Cir. 2007) 491 F.3d 1074, 1077.
52. See, for example, Washington v. Simpson (8th Cir. 1986) 806 F.2d 192, 196.
53. See Case v. Kitsap County Sheriff's Department (9th Cir. 2001) 249 F.3d 921, 931; U.S. v. Bennett (11th Cir. 2009) 555 F.3d 962, 965; U.S. v. Bervaldi (11th Cir. 2000) 226 F.3d 1256, 1263.

54. See U.S. v. Franklin (9th Cir. 2010) 603 F.3d 652, 657.
55. See U.S. v. Franklin (9th Cir. 2010) 603 F.3d 652, 656; Perez v. Simpson (9th Cir. 1989) 884 F.2d 1136, 1141.
56. See U.S. v. Graham (1st Cir. 2009) 553 F.3d 6, 14; U.S. v. Lovelock (2nd Cir. 1999) 170 F.3d 339, 344; U.S. v. Gay (10th Cir. 2001) 240 F.3d 1222, 1227.
57. See U.S. v. Gay (10th Cir. 2001) 240 F.3d 1222, 1227.
58. See Motley v. Parks (9th Cir. en banc 2005) 432 F.3d 1072, 1082.
59. See U.S. v. Graham (1st Cir. 2009) 553 F.3d 6, 12; Valdez v. McPheters (10th Cir. 1999) 172 F.3d 1220, 1225; U.S. v. Route (5th Cir. 1997) 104 F.3d 59, 62-63.
60. See, for example, U.S. v. Edmonds (3rd Cir. 1995) 52 F.3d 1236, 1247-48.
61. See People v. Fuller (1983) 148 Cal.App.3d 257, 263; U.S. v. Franklin (9th Cir. 2010) 603 F.3d 652, 657.
62. See People v. Downey (2011) 198 Cal.App.4th 652, 659 [officer testified that "utility bills were a very good source in finding out where someone lives because in his experience many probationers and parolees … did not know that police had access to utility bills"].
63. See People v. Icenogle (1977) 71 Cal.App.3d 576, 581; U.S. v. Terry (2nd Cir. 1983) 702 F.2d 299, 319.
64. See U.S. v. Route (5th Cir. 1997) 104 F.3d 59, 62, fn.1.
65. See People v. Jacobs (1987) 43 Cal.3d 472, 478.
66. See U.S. v. Route (5th Cir. 1997) 104 F.3d 59, 61, fn.1.
67. See People v. Boyd (1990) 224 Cal.App.3d 736, 740; U.S. v. Ayers (9th Cir. 1991) 924 F.2d 1468, 1480.
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71. See People v. Kanos (1971) 14 Cal.App.3d 642, 645, 648; People v. Ott (1978) 84 Cal.App.3d 118, 126; U.S. v. Ayers (9th Cir. 1991) 924 F.2d 1468, 1479; U.S. v. Mayer (9th Cir. 2008) 530 F.3d 1099, 1104; U.S. v. Lovelock (2nd Cir. 1999) 170 F.3d 339, 344; U.S. v. Thomas (D.C. Cir 2005) 429 F.3d 282, 286; U.S. v. Graham (1st Cir. 2009) 553 F.3d 6, 13.
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73. See U.S. v. Bohannon (2nd Cir. 2016) F.3d [2016 WL 3067993].
74. See People v. Gibson (2001) 90 Cal.App.4th 371, 381; U.S. v. Risse (8th Cir. 1996) 83 F.3d 212, 217.
75. See People v. Kanos (1971) 14 Cal.App.3d 642, 648 [officers saw the suspect leaving the house at 7:30 A.M. with his wife and child]; U.S. v. Harper (9th Cir. 1991) 928 F.2d 894, 896.
76. See People v. Icenogle (1977) 71 Cal.App.3d 576, 581; U.S. v. Harper (9th Cir. 1991) 928 F2 894, 896.
77. See People v. Mason (1971) 5 Cal.3d 759, 763; Hart v. Superior Court (1971) 21 Cal.App.3d 496, 502.
78. See Wilson v. Arkansas (1995) 514 U.S. 927, 934.
79. (2005) 132 Cal.App.4th 747, 790.
80. See Samson v. California (2006) 547 U.S. 843]; U.S. v. Lopez (9th Cir. 2007) 474 F.3d 1208, 1213 ["Because a protective sweep is a less intrusive search than an parole search, [the Supreme Court] necessarily makes both the protective sweep, and the parole search, lawful." Citing Samson v. California (2006) 547 US 843].
81. See People v. Schmitz (2012) 55 Cal.4th 909, 917; People v. Ermi (2013) 216 Cal.App.4th 277, 280; People v. Carreon (2016) Cal.App.4th [2016 WL 3566262].
82. See People v. Boyd (1990) 224 Cal.App.3d 736, 749; People v. Britton (1984) 156 Cal.App.3d 689, 701.
83. See People v. Barbarick (1985) 168 Cal.App.3d 731, 741.
84. People v. Robles (2000) 23 Cal. 4th 789, 798
85. See People v. Schmitz (2012) 55 Cal.4th 909, 918, 926; People v. Ermi (2013) 216 Cal.App.4th 277, 280; People v. Baker (2008) 164 Cal.App.4th 1152, 1159; People v. Smith (2002) 95 Cal.App.4th 912, 919; People v. Boyd (1990) 224 Cal.App.3d 736, 749; U.S. v. Davis (9th Cir. 1991) 932 F.2d 752, 758.
86. See People v. Boyd (1990) 224 Cal.App.3d 736, 744; U.S. v. Davis (9th Cir. 1991) 932 F.2d 752, 758.
87. See Russi v. Superior Court (1973) 33 Cal.App.3d 160.
88. See People v. Boyd (1990) 224 Cal.App.3d 736, 749; People v. Ermi (2013) 216 Cal.App.4th 277, 281.
89. See People v. Britton (1984) 156 Cal.App.3d 689.
90. See Russi v. Superior Court (1973) 33 Cal.App.3d 160.

91. See People v. Burgener (1986) 41 Cal.3d 505.
92. See People v. Palmquist (1981) 123 Cal.App.3d 1.
93. See People v. Evans (1980) 108 Cal.App.3d 193, 196; People v. Lewis (1999) 74 Cal.App.4th 662, 673.
94. See People v. Schmitz (2012) 55 Cal.4th 909, 913.
95. See People v. Schmitz (2012) 55 Cal.4th 909, 913.
96. See People v. Schmitz (2012) 55 Cal.4th 909, 926
97. See People v. Schmitz (2012) 55 Cal.4th 909, 932; People v. Baker (2008) 164 Cal.App.4th 1152, 1160 [“Here, there is nothing to overcome the obvious presumption that the purse belonged to the sole female occupant of the vehicle"].
98. See People v. Schmitz (2012) 55 Cal.4th 909, 926; People v. Ermi (2013) 216 Cal.App.4th 277, 281.
99. See People v. Schmitz (2012) 55 Cal.4th 909, 926, fn16.
100. See In re William J. (1985) 171 Cal.App.3d 72, 77.
101. See Pen. Code §§ 1546(k), 1546.1(c)(3).
102. NOTE: Assuming that’s what “specific consent” means, it admittedly represents irrational legislative overreaching. After all, it would mean that officers may search the probationer’s entire home and its contents—including documents and personal property—but not his cell phone. Why should a person’s cell phone be entitled to more privacy than his home? This is a question the Legislature should be required to address.
103. See Riley v. California (2014) U.S. [134 S.Ct. 2473, 2486].
104. See Riley v. California (2014) U.S. [134 S.Ct. 2473, 2485].

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11.2: Samson v. California

PETITIONER	RESPONDENT
Donald Curtis Samson	California
DOCKET NO.	**DECIDED BY**
81-430	Roberts Court

LOWER COURT

State appellate court

CITATION

547 US 843 (2006)

ARGUED

Feb 22, 2006

DECIDED

Jun 19, 2006

GRANTED

Sep 27, 2005

ADVOCATES

Jonathan L. Marcus *argued the cause for Respondent*

Ronald E. Niver *argued the cause for Respondent*

Facts of the case

A police officer stopped and searched Samson on the street in San Bruno, California. The officer had no warrant and later admitted he had stopped Samson only because he knew him to be on parole. The officer found that Samson was in possession of methamphetamines. Samson was arrested and charged with drug possession in state court. At trial Samson argued the drugs were inadmissible as evidence, because the search had violated his Fourth Amendment rights. The trial court denied the motion and the state supreme court declined to hear the case.

Question

Did the Fourth Amendment prohibit the police from conducting a warrantless search of a person who was subject to a parole search condition, where there was no suspicion of criminal wrongdoing and the sole reason for the search was because the person was on parole?

Conclusion

6–3 Decision

FOR	AGAINST
Ginsburg Kennedy Roberts Alito Scalia Thomas	Stevens Souter Breyer

Majority Opinion by Clarence Thomas

No. In a 6-to-3 decision authored by Justice Clarence Thomas, the Supreme Court held that Samson " did not have an expectation of privacy that society would recognize legitimate." Parole allows convicted criminals out of prison before their sentence is completed. An inmate who chooses to complete his sentence outside of direct physical custody, however, remains in the the Department of Correction's *legal* custody until the conclusion of his sentence, and therefore has significantly reduced privacy rights. In this case, Samson had also been required, as a condition of his parole, to sign an agreement that he would be subject to search or seizure by a parole officer or other peace officer..., with or without a search warrant and with or without cause." This written consent to suspicionless searches, along with his already reduced privacy interests as a parolee, combined to make the search constitutional. Justices Stevens, Souter and Breyer dissented, arguing that parolees have an expectation of privacy greater than that of prisoners, which was violated by the search at issue in this case.

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CHAPTER OVERVIEW

12: Exigency and Community Caretaking

12.1: Exigent Circumstances

12.2: Special Needs Detentions

12.3: Huff v. City of Burbank

12.4: Kentucky v. King

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12.1: Exigent Circumstances

Police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving.[1]

Most people would probably agree that officers who encounter exigent circumstances should do whatever is reasonably necessary to quickly defuse the situation, including making a forcible entry into a residence. Certainly, most people who pay taxes would insist upon it. And that is, in fact, the law in California and in most states. Except there's a problem: Nobody is quite sure of what the term "exigent circumstances" encompasses.

Over the years, it has been variously defined as a situation in which there is a "compelling need for official action"[2] or a condition in which "real, immediate, and serious consequences will certainly occur,"[3] and an "immediate major crisis."[4] But the most concise and accurate definition was provided by the Seventh Circuit which said that the term "exigent circumstances" is merely "legal jargon" for an "emergency."[5]

In addition to its fuzziness, the number of situations that qualify as exigent circumstances has expanded greatly. At first it was limited to imminent threats to public safety. But over time the courts started employing it in situations where the threatened harm was the destruction of evidence or the apprehension of fleeing suspects.[6]

And then the courts started to recognize an entirely new type of exigent circumstance that became known as "community caretaking" or sometimes "special needs." These are essentially situations that are "totally divorced from the detection, investigation, or acquisition of evidence,"[7] and which also did not rise to the level of a true emergency—and yet the officers believed they needed to act and their belief was objectively reasonable. As the Ninth Circuit observed, the term "exigent circumstances" has become "more of a residual group of factual situations that do not fit into other established exceptions [to the warrant requirement]."[8]

Another change in the law was the establishment of a simpler and more elastic test for determining whether a situation fell into the category of "exigent." It is known as "The Balancing Test," and that is where we will start.

The Balancing Test

In the past, a threat could qualify as an emergency only if officers had *probable cause* to believe it would materialize.[9] The problem with this requirement was that, by focusing on whether there was sufficient proof that a threat existed, the courts would sometimes ignore the overall reasonableness of an officer's belief that a threat existed. They would also sometimes disregard the reasonableness of the manner in which officers responded. For example, a judge who was only interested in whether there was probable cause to believe that some harm was about to occur would overlook such seemingly important circumstances as the magnitude of the threat, the likelihood that the threat would materialize, and whether the officers' response to the situation was proportionate to the threat.

For these reasons, the Supreme Court decided to abandon the probable cause requirement and, as noted, replace it with a type of the balancing test. Specifically, it ruled that a search or seizure pursuant to the exigent circumstances exception to the warrant requirement would be lawful if the need for the officers' response outweighed its intrusiveness.[10] Or, as the Fourth Circuit put it, "As the likelihood, urgency, and magnitude of a threat increase, so does the justification for and scope of police preventive action."[11]

One important consequence of this test (as opposed to a probable cause requirement) is that if the need for the intrusion was not high, officers might still be able to respond if they could to reduce the intrusiveness to their response.

There is, however, one exception to the rule that probable cause is not required. It pertains to forcible entries into homes which, by their very nature, are so highly intrusive that the need for such a response can outweigh its intrusiveness only if the officers had probable cause to believe the threat would materialize.[12]

The Need for Immediate Action

The first and most important step in applying the balancing test is to assess the strength of the need for an immediate search or seizure. In making this determination, the courts apply the following general principles.

The "reasonable officer" test

In evaluating the significance of a threat— whether it's a threat to a person's life, to an investigation, or to a community caretaking interest— the courts apply the "reasonable officer" test. This means they examine the circumstances from the perspective of the proverbial "reasonable" officer who, while he sometimes makes mistakes, is always able to provide a sensible explanation for his actions.13 "The core question," said the Second Circuit, "is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer to believe that there was an urgent need to render aid or take action."14

Another way to apply this test is to think, "How would the public respond if the threat materialized but I did nothing or waited for a warrant?"15 As the Court of Appeal put it, "In testing reasonableness of the search, we might ask ourselves how the situation would have appeared if the fleeing gunman armed with a shotgun had shot and possibly killed other officers or citizens while the officers were explaining the matter to a magistrate."60

Training and experience

Because an officer's training and experience "can be critical in translating observations into reasonable conclusions,"17 the courts will also take into account the responding officers' training and experience as it pertains to such matters.

Reliability of information

Unlike the probable cause test which focuses heavily on the reliability of the information upon which the officer's judgment was made, the balancing test is more flexible . Instead, the importance of reliable information decreases as the need for immediate action increases.18 Thus, in applying the balancing test in *Florida v. J.L.*, the Supreme Court said, "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."19 Similarly, the Eleventh Circuit said that "when an emergency is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller."20 It should also be noted that the existence of conflicting information as to the nature or scope of a threat does not necessarily eliminate the need for immediate action.21

Magnitude of potential harm

It is not surprising that the most weighty of all the relevant circumstances is the magnitude of the potential harm that might result if the officers delayed taking action. As the Ninth Circuit explained, "[W]hether there is an immediate threat to the safety of the arresting officer or others, the most important factor" is the magnitude of the potential threat.22 We will discuss this subject later in more detail.

Harm is "imminent"

The courts often say the threat must have been "imminent." But this just means that the officers must have reasonably believed that the threat would have materialized before they would have been able to obtain a warrant.23 Thus, the Court of Appeal observed, "*Imminent* essentially means it is reasonable to anticipate the threatened injury will occur in such a short time that it is not feasible to obtain a search warrant."24

The officers' motivation

The officers' motivation for taking action is unimportant in applying the balancing test in emergency aid and investigative emergency situations because their mental state has nothing to do with the magnitude of the threat or the reasonableness of their response.25 Thus, in an emergency aid case, *Brigham City v. Stuart*, the Supreme Court said, "It therefore does not matter here whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence."26

In community caretaking cases, however, the officers' motivation is significant because the word "caretaking" implies that the officers must have been motivated by a "caretaking" interest. As the California Supreme Court observed, "The defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of the police."27

Manner of officer's response

Regardless of the nature of the threat, a warrantless search or seizure will not be upheld if the officers did not respond to the threat in a reasonable manner. As the court explained in *People v. Ray*, "The officer's post-entry conduct must be carefully limited to

achieving the objective which justified the entry—the officer may do no more than is reasonably necessary to ascertain whether someone is in need of assistance or property is at risk and to provide that assistance or to protect that property."[28]

Nevertheless, a delay is apt to be less significant if officers needed additional time to evaluate the situation or devise an appropriate response.[29] As the California Supreme Court pointed out, "An officer is not required to rush blindly into a potential illicit drug laboratory and possibly encounter armed individuals guarding the enterprise, with no regard for his own safety just to show his good faith belief the situation is emergent."[30]

Having examined the general principles that apply in determining whether exigent circumstances existed, we will now show how those principles are applied by the courts in the three categories of exigent circumstances: (1) imminent threat to a person or property, (2) community caretaking, and (2) investigative emergencies.

Imminent Danger to a Person

The need for rapid police intervention is greatest—and will almost always justify an immediate and intrusive response—when officers reasonably believed it was necessary to eliminate or address an imminent threat to a person's health, safety, or sometimes property. "The most pressing emergency of all," said the Court of Appeal, "is rescue of human life when time is of the essence."[31] Or as the Fourth Circuit put it, "[P]rotecting public safety is why police exist."[32]

PERSON INJURED

That a person in a residence had been injured is not an exigent circumstance. But it becomes one if officers reasonably believed that the person's life or safety were at risk, even if it was not life-threatening. For example, in *Brigham City v. Stuart* [33] police responded to a noise complaint at 3 A.M. and were walking up to the house when, as they passed a window, they saw four adults "attempting, with some difficulty, to restrain a juvenile," at which point the juvenile "broke free and hit one of the adults in the face," causing him to spit blood. The officers immediately opened the screen door, entered the residence and stopped the fight. They also arrested some of the adults for disorderly conduct and contributing to the delinquency of a minor.

The arrestees argued in court that the officers' entry was illegal because there was no significant threat to anyone. Specifically, they claimed that "the injury caused by the juvenile's punch was insufficient to trigger the so-called 'emergency aid doctrine'" because the victim was not knocked unconscious or at least semi-conscious. In rejecting this argument, the Supreme Court pointed out that the "role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."

Note that in *Stuart*, the existence of a threat was based on direct evidence. It most cases, however, it will be based on circumstantial evidence, such as the following:

SICK PERSON: Having learned that one of the occupants of an apartment was "sickly," officers knocked on the door. They could hear several moans or groans from inside, but no one answered the door.[34]

UNRESPONSIVE PERSON: Officers were walking by the open door of a hotel room when they saw a man "seated on the bed with his face lying on a dresser at the foot of the bed." They also saw "a broken, jagged piece of mirror" and "dark balls" which appeared to be heroin.[35]

SHOOTING OUTSIDE A HOME: Although the shooting apparently occurred just *outside* the home, there were bloodstains on the door indicating that "a bleeding victim had come into contact with the door, either by entering or by exiting the residence."[36]

SHOOTING INSIDE A HOME: Officers responded to a report of a shooting inside a house. No one met them when they arrived and the house was dark, but there were two cars in the driveway and the lights outside were on. When no one answered the door, the officers went in through a window.[37]

IRRATIONAL AND VIOLENT: A man inside a motel room appeared to be "irrational, agitated, and bizarre"; he had been carrying two knives; his motel room was "in disarray, with furniture overturned, beds torn apart, and the floor littered with syringes and a bloody rag."[38]

CHILD IN DANGER: An anonymous 911 caller reported that a child was being beaten by her parents; i.e., that it was happening now. When officers arrived they heard a man shouting inside the house, and then the man "bombarded" them with a "slew of profanities."[39]

CHILD IN DANGER: Police received a report of "two small children left" alone at an apartment. No one answered door. A woman arrived and started to enter the apartment. An officer saw "considerable trash and dirty clothes strewn about the kitchen area," and the woman was drunk.[40]

911 hangups

When people need immediate help, they usually call 911. But sometimes people who dial 911 hang up before the call is completed or while the dispatcher is trying to obtain information. In such cases, the 911 operator will have no way of knowing whether the connection was lost because the caller lost consciousness, or because someone was preventing the caller from completing the call, or if the caller was a child who was curious about what happens when someone dials 911. The operator cannot, however, ignore the call. As the Seventh Circuit observed, a "911 system designed to provide an emergency response to telephone tips could not operate if the police had to verify the identity of all callers and test their claim to have seen crimes in progress."[41]

So, how can the responding officers determine whether a 911 hangup constitutes an emergency that would justify a search or seizure? While there are no easy answers, the courts often rule that such a response is justified if the officers saw or heard something upon arrival that was consistent with a call for help. For example, in applying this principle, the courts have noted the following:

- "[The] combination of a 911 hang call, an unanswered return call, and an open door with no responses from within the residence is sufficient to satisfy the exigency requirement."[42]
- "Even more alarming, someone was answering the phone but immediately placing it back on the receiver."[43]
- An "hysterical" man phoned the police at 5 A.M. and shouted, "Get the cops here now!" After the man gave his address, the phone was disconnected; the front door was ajar.[44]
- The woman who answered the door for the responding officers was nervous and gave them "obviously false statements," which led them to believe "she had been threatened or feared retaliation should she give honest answers."[45]

Domestic violence

On the subject of domestic violence calls, the Ninth Circuit noted that their volatility makes them "particularly well-suited for an application of the emergency doctrine."[46] Thus, in *Tierney v. Davidson* the Second Circuit said, "Courts have recognized the combustible nature of domestic disputes, and have accorded great latitude to an officer's belief that warrantless entry was justified by exigent circumstances when the officer had substantial reason to believe that one of the parties to the dispute was in danger."[47]

Still, as in 911 hangup cases, the courts seem to require some additional suspicious or corroborating circumstance before officers may enter without a warrant. "We do not suggest," said the Ninth Circuit, "that domestic abuse cases create a per se exigent need for warrantless entry; rather, we must assess the total circumstances, presented to the law officer before a search, to determine if exigent circumstances relieved the officer of the customary need for a prior warrant."[48]

For example, in *People v. Pou* [49] LAPD officers responded to a report of a "screaming woman" at a certain address. When they arrived, they could hear the "very loud" sound of people arguing. The officers knocked and announced several times, but no one responded. Finally, a man opened and door and the officers told him that they needed "to come in and look at the apartment to make sure everybody was okay." When the man refused to admit them, they entered and conducted a protective sweep. "Under these circumstances," said the court, "it was objectively reasonable for an officer to believe that immediate entry was necessary to render emergency assistance to a screaming female victim inside or to prevent a perpetrator from inflicting additional immediate harm to that victim or others inside the house."

Similarly, in *People v. Higgins* [50] officers were dispatched at 11 P.M. to an anonymous report of a domestic disturbance involving "a man shoving a woman around." No one responded to their knocking, but they saw a man inside the residence and then heard a "shout." They knocked again, and a woman answered the door. "She was breathing heavily and appeared extremely frightened, afraid, very fidgety, and very nervous." The officers also noticed a "little red mark" under one eye and "slight darkness under both eyes." The woman tried to explain away the officers' concern by saying that she was injured when she fell down some stairs, and that the noise from the fall might have prompted someone to call the police. When she said that her boyfriend had left, they knew she was lying (because they heard him "shout"), at which point they forcibly entered. In ruling the entry was lawful, the court noted that the woman "was extremely frightened and appeared to have been the victim of a felony battery. Moreover, [she] lied about being alone and gave the officers a suspicious story about having fallen down the stairs."

In *Pou* and *Higgins* the officers had clearly seen and heard enough to reasonably believe that an immediate entry was justified by exigent circumstances. In many cases, however, the responding officers will have nothing more that a report of domestic violence from a 911 caller. Although some additional suspicious circumstance is ordinarily necessary before the officers may forcibly enter a home based on that alone, the courts have ruled that a 911 call may, in and of itself, justify a less intrusive response, such as trespassing. This is because it is common knowledge that 911 calls are traced and recorded, and therefore people who phone 911 instead of a non-emergency line are (at least to some extent) leaving themselves exposed to identification even if they gave a false name or refused to identify themselves.51 As the Supreme Court pointed out, "A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity."52

For example, in *U.S. v. Cutchin* the D.C. Circuit upheld a car stop based solely on a 911 report that the driver had a sawed-off shotgun and a .38 caliber pistol at his side. In such cases, said the court, so long as the caller did not appear to be unreliable, "a dispatcher may alert other officers by radio, who may then rely on the report, even though they cannot vouch for it."53

Missing persons

The courts have usually upheld forcible entries into a home for the purpose of locating a missing person when (1) the officers reasonably believed the report was reliable, (2) the circumstances surrounding the disappearance were sufficiently suspicious, and (3) there was reason to believe that an immediate warrantless entry was necessary to confirm or dispel their suspicions. Two examples:

> In *People v. Rogers* 54 a woman notified San Diego police that a friend named Beatrice had been missing, that she was living with Rogers in an apartment complex that he managed and, even though Beatrice had been missing for three weeks, Rogers had refused to file a missing person report. In addition, she had previously heard Rogers threaten to lock Beatrice in a storage room in the basement. An investigator phoned Rogers who claimed that Beatrice had been missing for only a week or so, at which point Rogers said he "had to go," and quickly hung up. Later that day, the investigator and uniformed officers went to the apartment and spoke with Rogers who claimed that Beatrice might have gone to Mexico "with someone." The investigator asked if he could look in the storage room just to confirm that she was not being held there. At that point, Rogers' "neck started to visibly throb" and he said no. The investigator then forcibly entered and found Beatrice's remains. Rogers was charged with her murder. In ruling that the entry was justified, the court pointed out, among other things, Rogers' "noticeable lack of concern over the whereabouts of his child's mother" and his "physical reaction" when the investigator mentioned his threat to lock Beatrice in the storage room.
>
> In *People v. Macioce*, 55 some friends of Mr. and Mrs. Macioce notified San Jose police that the couple was missing. The friends were especially concerned because the Macioces missed a regular church meeting which they usually attended, and also because Mr. Macioce failed to appear for a knee operation. They also said the Macioce's car was parked in the carport but, during the past two days, they had knocked on the door of the house several times but no one responded and the mail was piling up. When the officers also received no response at the front door, they entered the apartment and discovered the body of Mr. Macioce who, as it turned out, had been killed by Mrs. Macioce. In rejecting Mrs. Macioce's motion to suppress everything in the house (including her husband's corpse) the court said the warrantless entry "was eminently reasonable."

Drug labs

An illegal drug lab in a home or business will constitute an exigent circumstance if officers were aware of facts that reasonably indicated that it posed an imminent threat.56 This requirement is automatically satisfied if officers reasonably believed that the lab was being used to manufacture meth or PCP because the chemicals used to produce these substances tend to explode.57

What about the odor of ether? It is arguable that any detectible odor of ether coming from a home constitutes an exigent circumstance because ether is highly volatile.58 For example, in *People v. Stegman*,59 in which the odor was detected two houses away, the court said, "Ether at such high levels of concentration would be highly dangerous regardless of purpose, thus constituting an exigent circumstance."

Dead bodies

Officers who respond to a report of a dead body inside a home or other place are not required to assume that the reporting person was able to make a medical determination that the person was deceased. Consequently, they may enter the premises to confirm.60

As the D.C. Circuit observed, “Acting in response to reports of dead bodies, the police may find the ‘bodies’ to be common drunks, diabetics in shock, or distressed cardiac patients. Even the apparently dead are often saved by swift police response.”61

If officers detect the odor of a decaying body coming from the premises, it has been held that if one person is dead under suspicious circumstances, it is not unreasonable for officers to enter to make sure there is no one on the premises who might be saved. Said the Ninth Circuit, “[A] report of a dead body can easily lead officers to believe that someone might be in need of immediate aid.”62 Note that the coroner has a legal right to enter to examine the body and take other action required by law.63

Investigative Threats

Although there is no "crime scene" exception to the warrant requirement, the courts have consistently recognized an exception in situations where there existed an imminent threat that evidence of a crime would be destroyed or corrupted, or that a suspect was, or will soon be, in flight.64

The lawfulness of a search based on such a threat—an “investigative emergency”—is technically determined by employing the same balancing test that is used in the other exigent circumstances; i.e., it is lawful if the need for the action exceeded its intrusiveness. As a practical matter, however, the restrictions on investigative threats are greater because the officers’ objective is to protect a law enforcement interest as opposed to a threat to the general public (although these threats are not necessarily mutually exclusive).

The primary restriction on investigative threats pertains to warrantless entries into homes. In these cases the courts still apply the balancing test, but they generally require that the need portion of the test be supported by *probable cause*.65 Although. as noted earlier, probable cause is not required when the emergency entry into a home was based on an imminent threat to people or property, most courts consider it an absolute requirement when the only objective is to defuse a threat that is based solely on a law enforcement interest.66 Moreover, the courts are generally not apt to uphold an intrusion based on destruction of evidence or “fresh” pursuit unless the crime under investigation was especially serious.67 (As we will discuss later, the seriousness of the crime is not an important factor when officers are in “hot” pursuit.)

Destruction of evidence

Probably the most common investigative emergency is a threat that certain evidence would be destroyed if officers waited for a warrant.68 This is because a lot of evidence can be destroyed quickly, and its destruction is a top priority for most criminals when they think the police are closing in. There are, however, three requirements that must be met to invoke this exigent circumstance:

EVIDENCE ON PREMISES

Officers must have had probable cause to believe there was destructible evidence on the premises.69 In the absence of direct proof, probable cause may be based on logical inference. For example, people who commit certain crimes (such a drug dealers) usually possess certain instrumentalities or fruits of the crime, and they usually keep these things in their home, car, or other relatively safe place.70

1. JAILABLE CRIME: Although the crime under investigation need not be “serious” or even a felony,71 it must carry a potential jail sentence.72
2. IMPENDING DESTRUCTION: Officers must have been aware of some circumstance that reasonably indicated the suspect or someone else was about to destroy the evidence.73 Thus, the mere possibility of destruction does not constitute an exigent circumstance.74

A common indication that evidence was about to be destroyed is that, upon arrival to execute a search warrant, the officers saw or heard a commotion inside the residence which, based on the their training and experience, was reasonably interpreted as indicating the occupants were destroying evidence or were about to start.75 For example, in *People v. Ortiz* two officers who were walking past an open door to a hotel room saw a woman “counting out heroin packages and placing them on a table.” The officers then entered without a warrant and court ruled the entry was lawful because:

Viewed objectively, these facts were sufficient to lead a reasonable officer to believe that defendant or the woman saw, or might have seen, the officers. Since it is common knowledge that those who possess drugs often attempt to destroy the evidence when they are observed by law enforcement officers, it was reasonable for [the officer] to believe the contraband he saw in front of defendant and the woman was in imminent danger of being destroyed.76

Some other examples:

- After knocking, the officers "heard noises that sounded like objects being moved."[77]
- After the officers knocked and announced, the suspect "disappeared behind the curtains, and the officers heard a shuffling of feet and the sound of people moving quickly about the apartment."[78]
- When an occupant opened the door and saw that the callers were officers, he immediately attempted to slam the door shut.[79]
- After the officers knocked and announced, the suspect opened the door but immediately slammed it shut when she was informed that her accomplice had consented to a search. The officers then "heard footsteps running away from the door, a faucet turn on, and drawers being banged open and closed." Said the court, "These are classic signs indicating destruction of evidence."[80]
- Another "classic" sign is the "repeated flushing of the toilet behind the locked door of the bathroom in premises where [drugs are] being kept and the police are at the threshold."[81]

It might also be reasonable to believe that a suspect inside the house would destroy evidence if there was reason to believe that he had just learned, or would quickly learn, that an accomplice or cooccupant had been arrested and would therefore have reason to cooperate with officers.[82] As the D.C. Circuit explained, "[T]he police will have an objectively reasonable belief that evidence will be destroyed if they can show they reasonably believed the possessors of the contraband were aware that the police were on their trail."[83]

Thus, in *People v. Freeny* the court concluded that narcotics officers in Los Angeles reasonably believed that the suspect's wife would destroy drugs in the house because she was inside and her husband had just been arrested some distance away after selling drugs to an undercover officer. Said the court, "No reasonable man could conclude other than that Mrs. Freeny would destroy evidence of her guilt, which was equal to that of appellant, if she learned of his arrest."[84]

Note, however, that even if there existed a threat of imminent destruction, a warrantless entry or search will not be upheld if the officers said or did something before entering that they knew, or should have known, would have provided the occupants with a motive to destroy evidence immediately; e.g., an officer without a warrant said "open the door or we'll break it open."[85] Also, in most cases the evidence can be sufficiently protected by securing the premises while seeking a warrant.

Hot pursuits

In the context of exigent circumstances, a "hot" pursuit occurs when (1) officers had probable cause to arrest the suspect, (2) the arrest was "set in motion" in a public place (which includes the doorway of the arrestee's home), and (3) the suspect responded by retreating into his home or other private place. When this happens, officers may pursue him inside because, said the Supreme Court, "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."[86]

For example, in the case of *U.S. v. Santana*,[87] officers in Philadelphia went to Santana's house to arrest her because she had just sold drugs to an undercover officer. As they arrived, they saw her standing at the doorway. She saw them too, and ran inside. After they entered and arrested her, the officers seized evidence in plain view which Santana thought should be suppressed. The Supreme Court disagreed, ruling that officers in "hot" pursuit do not need to terminate a chase when the suspect flees into a residence. Some other examples:

- Responding to a report of a domestic dispute, officers found the victim outside her home. Her face and nose were red and she was "crying uncontrollably." She said her husband, who was inside the house, had "hit her a few times in the face." The husband opened the door when the officers knocked but, seeing the officers, tried to close it. The officers went in.[88]
- While staking out a stolen car, an officer saw a known auto burglar walk up to the driver's side and reach down "as if to open the door." When the burglar saw the officer, he ran into his home nearby. The officer chased him inside and arrested him.[89]
- An officer who was investigating a report of a "very strong odor of ether" coming from an apartment, saw Luna step out of the apartment. Luna appeared to be under the influence of PCP. When the officer ordered her to "come down the stairs," Luna went back into the apartment and closed the door. The officer went in after her.[90]
- An officer attempted to make a traffic stop on Lloyd who disregarded the officer's red light and siren, drove home and ran inside. They went inside and arrested him.[91]

Note that while the other investigative emergencies can be invoked only if the crime under investigation was especially serious, this requirement does not apply to hot pursuits. As the Supreme Court explained, “Where the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant.”92

Finally, a suspect who runs from officers triggers the “hot” pursuit exception even though the crime occurred at an earlier time. Thus, the courts have ruled that a hot pursuit “need not be an extended hue and cry in and about the public streets,”93 but it must be “immediate or continuous.”94 For example, in *People v. Patino*,95 LAPD officers were dispatched late at night to a silent burglary alarm at a bar. As they arrived, they saw a man “backing through the front door carrying a box.” When the man saw the officers, he dropped the box and escaped. About an hour later, the officers saw him again and resumed the chase. When the man ran into an apartment, the officers went in after him and encountered Patino who was eventually arrested for obstruction. Patino contended that the officers’ entry was unlawful, but the court disagreed because “[t]he facts demonstrate that the officers were in hot pursuit of the burglary suspect even though an hour had elapsed after they were first chasing the suspect.”

“Fresh” pursuits

Unlike “hot” pursuits, “fresh” pursuits are not physical chases. Instead, they are pursuits in the sense that officers with probable cause are actively attempting to apprehend the suspect and, in doing so, are quickly responding to developing information as to his whereabouts; and eventually that information adds up to probable cause to believe that he is presently inside his home or other private structure.96 The cases indicate that an entry based on “fresh pursuit” will be permitted if the following circumstances existed:

(1) Serious felony: The crime under investigation must have been a serious felony, usually a violent one.97

(2) Diligence: At all times the officers must have been diligent in their attempt to apprehend the perpetrator.98

(3) Suspect located: The officers must have developed probable cause to believe that the perpetrator was presently inside a certain house or structure.99

(4) Evidence of flight: Officers must have reasonably believed that the perpetrator was in active flight or soon would be.

In some cases, an officer’s belief that a suspect is fleeing will be based on direct evidence. An example is found in *People v. Lopez* where LAPD officers learned that a murder suspect was staying at a certain motel, and that someone would soon be delivering money to him so that he could escape to Texas.100 In most cases, however, evidence of flight will be based on circumstantial evidence. Examples include seeing a fresh trail of blood leading from a murder scene to the suspect’s house,101 and knowing that a violent parolee-at-large was trying to avoid arrest by staying at different homes.102

In some cases, the fact that the suspect had recently committed a serious felony may also justify the conclusion that he is in active flight. This is because the perpetrator of such a crime will expect an immediate, all-out effort to identify and apprehend him. The length of such an effort will vary depending on the seriousness of the crime and the number of leads. In any event, if during this time officers developed probable cause to believe the perpetrator was inside his home or other place, a warrantless entry will usually be justified under the “fresh” pursuit doctrine. Examples:

- At 8 A.M., Hayden robbed a Baltimore cab company employee at gunpoint. As he left, someone in the office yelled “holdup,” and two cab drivers in the vicinity heard this, saw Hayden, and followed him to his home nearby. Police were alerted, arrived quickly, entered and arrested Hayden. Court: “The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given.”103
- The body of a young woman was discovered at 5:20 A.M. along a road in Placer County. She had been raped, robbed, and murdered. Sheriff’s detectives quickly identified the woman and developed probable cause to believe that Williams was the perpetrator. The next day, they found the victim’s stolen car near the apartment of Williams’ girlfriend. They entered the apartment and arrested him. In ruling the arrest was lawful under the “fresh” pursuit doctrine, the court noted that the investigation proceeded steadily and diligently from the time the body was discovered and that “[t]he proximity of the victim’s car clearly suggested defendant’s presence in the apartment, and also made flight a realistic possibility.” 104
- Gilbert killed a police officer in Alhambra during a botched bank robbery. He and one of his accomplices, King, got away but, unknown to them, a third accomplice named Weaver was captured a few minutes later. Weaver identified Gilbert as the shooter

and told officers where he lived. While en route to the apartment, officers learned that King had just left the apartment. Figuring that Gilbert was still inside, officers forcibly entered. Although Gilbert was not there, officers found evidence in plain view. During a suppression hearing, one of the officers testified that "we knew . . . there were three robbers. One was wounded and accounted for, one had just left a few minutes before, and there was a third unaccounted for. Presumably he was in the apartment." The court responded, "Since the officers were in fresh pursuit of two robbers who escaped in the same automobile, [the officer's] assumption was not unreasonable. The officers entered, not to make a general exploratory search to find evidence of guilt, but in fresh pursuit to search for a suspect and make an arrest. A police officer had been shot, one suspect was escaping, and another suspect was likely to escape."105

Community Caretaking

As noted earlier, the role of law enforcement officers in the community has grown over the years. In fact, it now includes an "infinite variety of services,"106 that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."107 Sometimes the responding officers determine that they cannot resolve the matter unless they enter or maybe even search a home, business, or car. Can they do so without a warrant?

In the past, the answer was usually no because there was no demonstrable threat to life or property.108 But as time went on, cases started cropping up in which the courts would acknowledge that, despite the absence of a true emergency, they could not fault the officers for intervening. Some of these courts avoided issue by invoking the "harmless error" or "inevitable discovery" rules, or saying that a true emergency existed even though it obviously didn't. Others would rule that the search was illegal and that the evidence must be suppressed but, at the same time, they would say something like, "I don't think that the officers were wrong in what they did. In fact, I commend them."

Over time, however, the courts started confronting the issue. One of the first to do so was the California Supreme Court which, in *People v. Ray,* pointed out many people nowadays "do not know the names of [their] next-door neighbors" and that "tasks that neighbors, friends or relatives may have performed in the past now fall to the police." And, said the court, there would be "seriously undesirable consequences for society at large" if officers were required to explain to the reporting person, "Sorry. We can't help you. We need a warrant but can't get one because there's no 'crime.'"109

This is why the courts now recognize the relatively new exigent circumstance that has become known as "community caretaking" or "special needs."110 Examples of typical community caretaking situations include "check the welfare calls," clearing vehicle accidents, looking for lost children and, recently, trying to corral a loose horse.111

CARETAKING VS. EXIGENT CIRCUMSTANCES

Although some courts have suggested that community caretaking and exigent circumstances are separate concepts, they are not. On the contrary, they are both (1) based on a situational and readily-apparent need that can only be met, or is traditionally met, by law enforcement officers; and (2) are subject to the same balancing test: the police action is lawful if the need for it outweighed its intrusiveness.

There are, however, three significant differences between community caretaking and exigent circumstances. First, community caretaking situations are, by definition, not as dangerous as traditional exigent circumstances.112 This means that searches and seizures based on community caretaking will ordinarily be upheld only if the officers' response was relatively nonintrusive. Second, an intrusion based on a community caretaking interest may be deemed unlawful if the court finds that the officers' sole motivation was to make an arrest or obtain evidence.113 As the California Supreme Court explained, "[C]ourts must be especially vigilant in guarding against subterfuge, that is, a false reliance upon the personal safety or property protection rationale when the real purpose was to seek out evidence of crime."114

Third, unlike police actions that are based on exigent circumstances, officers are not expected to respond to every situation that could be justified by a community caretaking interest. As the New York Court of Appeals explained:

> [W]e neither want nor authorize police to seize people or premises to remedy what might be characterized as minor irritants. People sometimes create cooking odors or make noise to the point where neighbors complain. But as we live in a free society, we do not expect the police to react to such relatively minor complaints by breaking down the door.115

Still, it may happen occasionally that the officers cannot just ignore the problem just because it might be classified as a "minor irritant." For example, in *U.S. v. Rohrig* 116 officers responded to a report of loud music coming from Rohrig's house. The time

was 1:30 A.M., and the music was so loud that the officers could hear it about a block away. As they pulled up, several "pajama-clad neighbors emerged from their homes to complain about the noise." The officers knocked on Rohrig's door and "hollered to announce their presence" but no one responded. Having no apparent alternatives (other than leaving the neighbors at the mercy of Rohrig's thunderous speakers), the officers entered the house through an unlocked door and saw wall-to-wall marijuana plants. Not only did the court rule that the officers' response was appropriate, it noted the absurdity of prohibiting them from assisting the neighbors:

> [I]f we insist on holding to the warrant requirement under these circumstances, we in effect tell Defendant's neighbors that "mere" loud and disruptive noise in the middle of the night does not pose "enough" of an emergency to warrant an immediate response, perhaps because such a situation 'only' threatens the neighbors' tranquility rather than their lives or property. We doubt that this result would comport with the neighbors' understanding of "reasonableness."

Intrusiveness of Response

So far we have been discussing how the courts determine the strength of the need to enter a residence or take other action in response to an exigent circumstance. Now, having determined the importance of taking action, the courts must weigh this circumstance against the intrusiveness of the officers' actions. And if the need was equal to or greater than the intrusiveness, the police response will be deemed lawful. Otherwise, it won't.

But, in addition to the abstract intrusiveness of the officers' response (or sometimes in place of it), the courts will focus more on whether the officers responded to the threat in a reasonable manner,[117] which essentially means that their response displayed a "sense of proportion." [118]

Officers are not, however, required to utilize the least intrusive means of defusing the emergency. As the Supreme Court explained, "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."[119] Furthermore, the courts have been cautioned to avoid second-guessing the officers' assessment of the need for immediate action so long as it was within the bounds of reasonableness. Thus, the California Court of Appeal observed, "Of course, from the security of our lofty perspective, and despite our total lack of practical experience in the field, we might question whether or not those who physically confronted the danger in this instance, selected the 'best' course of action available."[120]

Although it is not possible to rank the various police responses on an intrusiveness scale, there are some generalizations that can be made.

ENTERING A HOME: The most intrusive of the usual police responses to exigent circumstances is a forcible entry into a home. As the Supreme Court observed, "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[121] For this reason (as discussed earlier) the courts have consistently ruled that such an intrusive response can be justified only if the officers had probable cause to believe the threat would materialize.

Also note that, in addition to the physical entry, the courts will consider whether the officers gave notice of their identity and purpose beforehand. Again quoting the Supreme Court, "[T]he method of an officer's entry into a dwelling [is] among the factors to be considered."[122]

AFTER ENTRY: While a full search is permitted if it was reasonably necessary,[123] it is seldom necessary because most threats can be defused by conducting a "sweep" or "walk-through" to either locate a fleeing suspect or determine if there is anyone inside who needs help or who might destroy evidence. Then, if necessary, officers can secure the premises pending issuance of a warrant, whether by removing the occupants or preventing anyone from entering. For example, in *Segura v. United States* the Supreme Court pointed out that "[i]n this case, the agents entered and secured the apartment from within. Arguably, the wiser course would have been to depart immediately and secure the premises from the outside by a 'stakeout' once the security check revealed that no one other than those taken into custody were in the apartment. But the method actually employed does not require a different result."[124]

TRESPASSING: Merely walking on a suspect's property may constitute a technical search, but it is relatively nonintrusive, and will be deemed reasonable if the officers' entry was restricted to areas that needed to be checked in order to defuse the threat.[125] If there was reason to believe that an emergency existed inside a home, an officer's act of looking through windows from outside is also considered nonintrusive.[126]

MAKE SAFE: If the emergency resulted from a dangerous condition (e.g., a meth lab), officers may do those things that are reasonably necessary to eliminate the threat, including a search. As the Fourth Circuit observed, "The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope."127

SEARCHING CELL PHONES: Officers may access the contents of a cell phone without a warrant if they reasonably believed that immediate access was necessary to defuse an imminent danger of death or serious physical injury.128 Otherwise, officers must seize the phone to protect it and its contents from destruction, then seek a warrant.129

Vacating and Reentry

Officers who have entered a home or business pursuant to exigent circumstances must leave within a reasonable amount of time after the threat to people, property, or evidence has been eliminated. As noted, however, they may secure the premises (i.e., temporarily "seize" it) pending the issuance of a search warrant if they reasonably believed they had probable cause for one.130 Thus, officers must avoid what happened in the landmark case of *Mincey v. Arizona*.131

Here, an officer in Tucson was killed by a drug dealer when officers entered the suspect's apartment to execute a search warrant. After the premises were secured, officers supervised the removal of the officer's body and made sure that "the scene was disturbed as little as possible." These actions were plainly permissible. But then the officers "proceeded to gather evidence." In fact, they remained in the home for four days, during which time they "opened drawers, closets, and cupboards, and inspected their contents; they emptied clothing pockets; they dug bullet fragments out of the walls and floors; they pulled up sections of the carpet and removed them for examination." All told, they seized between 200 and 300 items.

In the Supreme Court, the government urged the Court to establish a "crime scene exception" to the warrant requirement or, at least, a "murder scene" exception. The Court refused. Although it acknowledged that the crime under investigation was exceptionally serious, and although the officers had probable cause for a warrant that could have authorized an intensive search, it ruled that "the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there."

When to vacate

Like most things involving exigent circumstances, there is no simple test to determine the point at which officers must stop and obtain court authorization for any further intrusion. So we will simply review a few examples of situations in which the courts addressed the issue.

EXPLOSIVES: The emergency created by the presence of explosives in a structure ended when the danger has been eliminated.132

DANGEROUS CHEMICALS: The emergency ended when the imminent danger of fire or explosion has been eliminated.133

STRUCTURE FIRES: The exigency caused by a residential or commercial structure fire does not automatically end when the fire is under control or even with the "dousing of the last flame."430 Instead, it ends after investigators have determined the cause and origin of the fire,135 and have determined that the premises were safe for re-occupancy.136 The amount of time that is reasonably necessary for such purposes will depend on the size of the structure; conditions that made the investigation more time-consuming, such as heavy smoke and poor lighting; and whether there were other circumstances that delayed the investigation, such as the presence of explosives or dangerous chemicals.137 Still, a warrant will be required when investigators have concluded that the cause was arson and their purpose had shifted from finding the cause and origin to conducting a criminal investigation.138

SHOOTING INSIDE A RESIDENCE: The emergency created by a murder or non-fatal shooting in a residence ends after officers had determined there were no suspects or other victims on the scene, the victim had been removed, and there was no threat to evidence located inside.139

BARRICADED SUSPECT: The threat ends after the suspect was arrested and officers determined there were no victims or other suspects inside.140

BURGLARY IN PROGRESS: The emergency ends after officers arrested the burglar and had determined there were no accomplices on the premises, and that the residents were not in need of emergency aid.141

Reentry

After vacating the premises, officers may not reenter unless they have a search warrant or consent.[142] Exception: Officers may reenter for the limited purpose of seizing evidence if (1) they saw the evidence in plain view while they were lawfully inside; (2) due to exigent circumstances, it was impractical to seize the evidence before the emergency was neutralized; and (3) the officers had not surrendered their control of the premises.[143]

For example, in *People v. Superior Court (Quinn)* [144] an officer entered a house on grounds of hot pursuit. While looking for the suspect, he saw drugs which he did not seize because the suspect was still at large. Immediately after arresting the suspect and removing him from the premises, the officer reentered the residence and retrieved the drugs. Although the emergency was over when the officer reentered, the court ruled the reentry was lawful because the officer "did not trench upon any constitutionally protected interest by returning for the single purpose of retrieving contraband he had observed moments before in the bedroom but had not then been in a position to seize."

Similarly, in *Cleaver v. Superior Court* two men shot two officers in Oakland then, after a shootout, barricaded themselves in the basement of a home. About two hours later, officers launched a tear gas canister into the building, causing a fire.[145] One of the suspects was shot and killed as he fled; the other, Cleaver, was arrested. Evidence technicians were initially unable to enter the basement because of smoke and tear gas. But about three hours later one of them entered and seized some evidence but could not conduct a thorough search because of impaired visibility. About six hours later, an officer entered and recovered additional evidence.

In upholding both reentries, the California Supreme Court said, "The 11:30 P.M. search was thwarted by residual smoke, fumes and tear gas. The relatively short delays until 2 A.M. and 8 A.M. necessitated by darkness and continuing impaired visibility, cannot be deemed constitutionally improper or unreasonable under all the circumstances yet in this case."

References

1. *Graham v. Connor* (1989) 490 U.S. 386, 397.
2. *Michigan v. Tyler* (1978) 436 U.S. 499, 509.
3. *U.S. v. Williams* (6th Cir. 2003) 354 F.3d 497, 503.
4. *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 766.
5. *U.S. v. Collins* (7th Cir. 2007) 510 F.3d 697, 699.
6. See *Ker v. California* (1963) 374 U.S. 38 [fresh pursuit].
7. *Cady v. Dombrowski* (1973) 413 U.S. 433, 441 [gun in a vehicle].
8. *Murdock v. Stout* (9th Cir. 1995) 54 F.3d 1437, 1440.
9. See, for example, *People v. Ray* (1999) 21 Cal.4th 464, 471.
10. See *Illinois v. McArthur* (2001) 531 U.S. 326, 331 ["[W]e balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable."]; *Illinois v. Lidster* (2004) 540 U.S. 419, 426 ["[I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."].
11. *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 224.
12. See *People v. Lujano* (2014) 229 Cal.App.4th 175, 183 ["But to fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by *both* probable cause *and* the existence of exigent circumstances."]; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193 ["Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home."].
13. See *United States v. Cortez* (1981) 449 U.S. 411, 418; *People v. Ammons* (1980) 103 Cal.App.3d 20, 30.
14. *U.S. v. Klump* (2nd Cir. 2008) 536 F.3d 113, 117-18.
15. See *People v. Superior Court (Peebles)* (1970) 6 Cal.App.3d 379, 382 ["One way of testing the reasonableness of the search is to ask ourselves what the situation would have looked like had another bomb exploded, killing a number of people"]; *U.S. v. Black* (9th Cir. 2007) 482 F.3d 1035, 1040 ["the police would be harshly criticized had they not investigated"].
16. *People v. Bradford* (1972) 28 Cal.App.3d 695, 704.
17. *People v. Ledesma* (2003) 106 Cal.App.4th 857, 866. Also see *Illinois v. Gates* (1983) 462 U.S. 213, 232.
18. See *People v. Wells* (2006) 38 Cal.4th 1078, 1083; *U.S. v. Wheat* (8th Cir. 2001) 278 F.3d 722, 732, fn.8.
19. *Florida v. J.L.* (2000) 529 U.S. 266, 273-74.
20. *U.S. v. Holloway* (11th Cir. 2002) 290 F.3d 1331, 1339.

21. See *U.S. v. Russell* (9th Cir. 2006) 436 F.3d 1086, 1090 [“Given the substantial confusion and conflicting information, the police were justified in searching the house”].
22. *Ames v. King County* (9th Cir. 2017) 846 F.3d 340, 348. Also see *Florida v. J.L.* (2000) 529 U.S. 266, 273-74; *Navarette v. California* (2014) U.S. [134 S.Ct. 1683]; *People v. Coulombe* (2000) 86 Cal.App.4th 52, 58 [report of man with a gun “in a throng of thousands of New Year’s Eve celebrants”].
23. 23 See *People v. Koch* (1989) 209 Cal.App.3d 770, 782; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1206 [“Implicit in this burden is a showing there was insufficient time to obtain a warrant.”]; *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1033 [“[T]he presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant”].
24. *People v. Blackwell* (1983) 147 Cal.App.3d 646, 652.
25. See *Brendlin v. California* (2007) 551 U.S. 249, 260 [what matters is “the intent of the police as objectively manifested”].
26. (2006) 547 U.S. 398, 404. Edited.
27. *People v. Ray* (1999) 21 Cal.4th 464, 471.
28. (1999) 21 Cal.4th 464, 477.
29. See *In re Jessie L.* (1982) 131 Cal.App.3d 202, 214 [“The police did not idly sit by during a period in which a warrant could have been obtained, but promptly gathered together a number of officers and went to the locations involved.”]; *People v. Stegman* (1985) 164 Cal.App.3d 936, 945 [OK to wait for backup]; *U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 719 [“A delay caused by a reasonable investigation into the situation facing the officers does not obviate the existence of an emergency.”].
30. *People v. Duncan* (1986) 42 Cal.3d 91, 104.
31. *People v. Riddle* (1978) 83 Cal.App.3d 563, 572.
32. *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 228.
33. (2006) 547 U.S. 398. Also see *People v. Pou* (2017) 11 Cal.App.5th 143, 149 [“[e]ven a casual review of [*Stuart*] reveals officers do not need ironclad proof of a likely serious, life-threatening injury to invoke the emergency aid doctrine”].
34. *People v. Roberts* (1956) 47 Cal.2d 374.
35. *People v. Zabelle* (1996) 50 Cal.App.4th 1282, 1287-88 [“The circumstances justified the officer’s belief that defendant might have overdosed on heroin. Thus, his entry into the room to check on defendant’s condition was justified.”].
36. *People v. Troyer* (2011) 51 Cal.4th 599, 607. Also see *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1013.
37. *People v. Soldoff* (1980) 112 Cal.App.3d 1.
38. *U.S. v. Arch* (7th Cir. 1993) 7 F.3d 1300, 1304-5.
39. *Schreiber v. Moe* (6th Cir. 2010) 596 F.3d 323, 330-31.
40. *People v. Sutton* (1976) 65 Cal.App.3d 341.
41. *U.S. v. Wooden* (7th Cir. 2008) 551 F.3d 647, 650.
42. *Johnson v. City of Memphis* (6th Cir. 2010) 617 F.3d 864, 869. Also see *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335, 337 [“A lack of an answer on the return of an incomplete emergency call implies that the caller is unable to pick up the phone—because of injury, illness (a heart attack, for example), or a threat of violence.”]. Compare *U.S. v. Martinez* (10th Cir. 2011) 643 F.3d 1292, 1297-98 [a 911 call in which the dispatcher hears only static does not warrant the same concern as a call in which the caller hung up].
43. *U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 720.
44. *U.S. v. Snipe* (9th Cir. 2008) 515 F.3d 947.
45. *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335, 338.
46. *U.S. v. Martinez* (9th Cir. 2005) 406 F.3d 1160, 1164. Also see *Tierney v. Davidson* (2nd Cir. 1998) 13 F.3d 189, 197 [the courts “have recognized the combustible nature of domestic disputes, and have accorded great latitude to an office’s belief that warrantless entry was justified by exigent circumstances.”].
47. (2nd Cir. 1998) 133 F.3d 189, 197.
48. *U.S. v. Brooks* (9th Cir. 2004) 367 F.3d 1128, 1136.
49. (2017) 11 Cal.App.5th 143, 152.
50. (1994) 26 Cal.App.4th 247.
51. See *People v. Brown* (2015) 61 Cal.4th 968, 982 [a call to 911 constitutes “[a]nother indicator of veracity”]; *People v. Dolly* (2007) 40 Cal.4th 458, 467 [“[M]erely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify the caller by his voice.”].
52. *Navarette v. California* (2014) U.S. [134 S.Ct. 1683, 1689].

53. (D.C. Cir. 1992) 956 F.2d 1216, 1217.
54. (2009) 46 Cal.4th 1136.
55. (1987) 197 Cal.App.3d 262.
56. See *People v. Duncan* (1986) 42 Cal.3d 91, 103 ["[T]here is no absolute rule that can accommodate every warrantless entry into premises housing a drug laboratory . . . the emergency nature of each situation must be evaluated on its own facts."].
57. See *People v. Duncan* (1986) 42 Cal.3d 91, 105 ["The extremely volatile nature of chemicals, including ether, involved in the production of drugs such as PCP and methamphetamine creates a dangerous environment"]; *People v. Messina* (1985) 165 Cal.App.3d 937, 943 ["[T]he types of chemicals used to manufacture methamphetamines are extremely hazardous to health."]; *U.S. v. Cervantes* (9th Cir. 2000) 219 F.3d 882, 891-91 ["sickening chemical odor" that "might be associated with methamphetamine production"].
58. See *People v. Osuna* (1986) 187 Cal.App.3d 845, 852 [expert witness "stressed that the primary danger associated with ethyl ether anhydrous is flammability. Its vapors are capable of traveling long distances and can be ignited by a gas heater, a catalytic converter or a car, a cigarette"].
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60. See *People v. Wharton* (1991) 53 Cal.3d 522, 578 ["Because there existed the possibility that the victim was still alive, we cannot fault the officers' decision to investigate further."]; *U.S. v. Richardson* (7th Cir. 2000) 208 F.3d 626 [officers testified that "laypersons without medical knowledge are not in a position to determine whether a person is dead or alive"].
61. *Wayne v. U.S.* (D.C. Cir. 1963) 318 F.2d 205, 213, 241.
62. *U.S. v. Stafford* (9th Cir. 2005) 416 F.3d 1068, 1074 ["[A] report of a dead body can easily lead officers to believe that someone might be in need of immediate aid."].
63. See *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1023; Gov. Code, §§ 27491.1, 27491.2.
64. See *Illinois v. McArthur* (2001) 531 U.S. 326, 330; *Mincey v. Arizona* (1978) 437 U.S. 385, 392 [no "crime scene" exception].
65. See *People v. Lujano* (2014) 229 Cal.App.4th 175, 183 ["But to fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by *both* probable cause *and* the existence of exigent circumstances."]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1399.
66. See *People v. Troyer* (2011) 51 Cal.4th 599, 607 ["We decline to resolve here what appears to be a debate over semantics. Under either approach [i.e., reasonableness vs. probable cause] our task is to determine whether there was an objectively reasonable basis [for the entry]."]; *U.S. v. Alaimalo* (9th Cir. 2002) 313 F.3d 1188, 1193 ["Even when exigent circumstances exist, police officers must have probable cause to support a warrantless entry into a home."].
67. See *People v. Herrera* (1975) 52 Cal.App.3d 177, 182 [the more serious the crime, "the greater the governmental interest in its prevention and detection"]; *People v. Higgins* (1994) 26 Cal.App.4th 247, 252 ["If the suspected offense is extremely minor, a warrantless home entry will almost inevitably be unreasonable under the Fourth Amendment."].
68. See *Kentucky v. King* (2011) 563 U.S. 452, 460 ["to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search"]; *Missouri v. McNeely* (2013) U.S. [133 S.Ct. 1552, 1559].
69. See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32; *People v. Thompson* (2006) 38 Cal.4th 811, 820-22.
70. See *People v. Senkir* (1972) 26 Cal.App.3d 411, 421; *People v. Farley* (2009) 46 Cal.4th 1053, 1099.
71. See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.
72. See *Illinois v. McArthur* (2001) 531 U.S. 326, 336; *People v. Torres* (2012) 205 Cal.App.4th 989, 995.
73. See *People v. Koch* (1989) 209 Cal.App.3d 770, 782; *Ferdin v. Superior Court* (1974) 36 Cal.App.3d 774, 782.
74. See *Richards v. Wisconsin* (1997) 520 U.S. 385, 391; *People v. Bennett* (1998) 17 Cal.4th 373, 384; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1209 ["Where the emergency is the imminent destruction of evidence, the government agents must have an objectively reasonable basis for believing there is someone inside the residence who has reason to destroy the evidence."].
75. See *U.S. v. Moreno* (2nd Cir. 2012) 701 F.3d 64, 75; *Richards v. Wisconsin* (1997) 520 U.S. 385, 396.
76. *People v. Ortiz* (1995) 32 Cal.App.4th 286, 293.
77. *People v. Seaton* (2001) 26 Cal.4th 598, 632.
78. *People v. Hill* (1970) 3 Cal.App.3d 294, 299-300.
79. *People v. Baldwin* (1976) 62 Cal.App.3d 727, 739.
80. *U.S. v. Andino* (2nd Cir. 2014) 768 F.3d 94, 100-101.
81. *People v. Clark* (1968) 262 Cal.App.2d 471, 475.

82. See *Illinois v. McArthur* (2001) 531 U.S. 326, 332 [suspect knew that his wife was cooperating with officers and they reasonably could have concluded that he would, if given the chance, get rid of the drugs fast].
83. *U.S. v. Socey* (D.C. Cir. 1988) 846 F.2d 1439, 1445, fn.6.
84. (1974) 37 Cal.App.3d 20, 33. Also see *U.S. v. Ramirez* (8th Cir. 2012) 676 F.3d 755, 764.
85. *Kentucky v. King* (2011) 563 U.S. 452, 469 ["the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment"].
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93. *United States v. Santana* (1976) 427 U.S. 38, 43.
94. *Welsh v. Wisconsin* (1984) 466 U.S. 740, 743. Also see *White v. Hefel* (7th Cir. 2017) 875 F.3d 350, 356 ["the police did not lose track of [the suspect] for any signficant time"].
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96. See *People v. Escudero* (1979) 23 Cal.3d 800, 808.
97. See *Minnesota v. Olson* (1990) 495 U.S. 91, 100; *People v. Escudero* (1979) 23 Cal.3d 800, 811.
98. See *People v. Williams* (1989) 48 Cal.3d 1112, 1139 ["no unjustified delay"].
99. See *People v. Benton* (1978) 77 Cal.App.3d 322, 327; *People v. Smith* (1966) 63 Cal.2d 779, 797.
100. (1979) 99 Cal.App.3d 754, 766.
101. *People v. McDowell* (1988) 46 Cal.3d 551.
102. *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 362.
103. *Warden v. Hayden* (1967) 387 U.S. 294, 298.
104. *People v. Williams* (1989) 48 Cal.3d 1112.
105. *People v. Gilbert* (1965) 63 Cal.2d 690.
106. *U.S v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 784-85.
107. *Cady v. Dombrowski* (1973) 413 U.S. 433, 441.
108. See, for example, *People v. Smith* (1972) 7 Cal.3d 282, 286.
109. *People v. Ray* (1999) 21 Cal.4th 464, 472, 480. Also see *U.S. v. Rohrig* (6th Cir. 1996) 98 F.3d 1506, 1519.
110. See *Cady v. Dombrowski* (1973) 413 U.S. 433, 441; *People v. Ray* (1999) 21 Cal.4th 464, 472; *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785.
111. *People v. Williams* (2017) 15 Cal.App.5th 111.
112. See *People v. Ray* (1999) 21 Cal.4th 464, 476-77; *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785.
113. See *People v. Morton* (2004) 114 Cal.App.4th 1039, 1047; *U.S. v. Orozco* (9th Cir. 2017) 858 F.3d 1204, 1216.
114. *People v. Ray* (1999) 21 Cal.4th 464, 477.
115. *People v. Molnar* (N.Y. App. 2002) 774 N.E.2d 738, 741.
116. (6th Cir. 1996) 98 F.3d 1506.
117. See *Mincey v. Arizona* (1978) 437 U.S. 385, 393 ["[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation."]; *Thompson v. Louisiana* (1985) 469 U.S. 17, 22 ["Petitioner's call for help can hardly be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary."]; *People v. Gentry* (1992) 7 Cal.App.4th 1255, 1261, fn.2 ["The nature of the exigency defines the scope of the search"]; *Henderson v. Simi Valley* (9th Cir. 2002) 305 F.3d 1052, 1060 ["The officers' intrusion into the house was limited to those particular areas where entry was required to retrieve [the owner's daughter's] property. The officers played no active role in [the] court-ordered foray. They merely stood by to prevent a beach of the peace while the court's order was implemented."].
118. *McDonald v. United States* (1948) 335 U.S. 451, 459. Also see *People v. Ray* (1999) 21 Cal.4th 464, 477 [the officers' conduct "must be carefully limited to achieving the objective which justified the entry"].
119. *United States v. Sharpe* (1985) 470 U.S. 675, 686.

120. *People v. Osuna* (1986) 187 Cal.App.3d 845, 855.Also see *San Francisco v. Sheehan* (2015)
121. *Payton v. New York* (1980) 445 U.S. 573, 585.
122. *Wilson v. Arkansas* (1995) 514 U.S. 927, 934. U.S. [135 S.Ct.1765, 1777].
123. See *People v. Sirhan* (1972) 7 Cal.3d 710, 740 ["Only a thorough search in the house could insure that there was no evidence therein of such a conspiracy."]; *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 226 ["The authority to defuse a threat in an emergency necessarily includes the authority to conduct searches aimed at uncovering the threat's scope."].
124. (1984) 468 U.S. 796, 811. Also see *Illinois v. McArthur* (2001) 531 U.S. 326, 336 ["Temporarily keeping a person from entering his home is considerably less intrusive than police entry."]; *Mincey v. Arizona* (1978) 437 U.S. 385, 394 [any threat to the destruction of evidence was minimized because of "the police guard at the apartment"]; *People v. Bennett* (1998) 17 Cal.4th 373, 387.
125. See *Florida v. Jardines* (2013) U.S. [133 S.Ct. 1409, 1415]; *People v. Lujano* (2014) 229 Cal.App.4th 175, 183-84; *People v. Gemmill* (2008) 162 Cal.App.4th 958, 970; *People v. Camacho* (2000) 23 Cal.4th 824, 836; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 364.
126. *People v. Gemmill* (2008) 162 Cal.App.4th 958, 971.
127. *Mora v. City of Gaithersburg* (4th Cir. 2008) 519 F.3d 216, 226.
128. See Pen. Code § 1546.1(c)(6).
129. See *Riley v. California* (2014) U.S. [134 S.Ct. 2473, 2486]; *U.S. v. Henry* (1st Cir. 2016) 827 F.3d 16, 27.
130. See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32; *People v. Bennett* (1998) 17 Cal.4th 373, 386.
131. (1978) 437 U.S. 385.
132. See *People v. Remiro* (1979) 89 Cal.App.3d 809, 830-31.
133. See *People v. Avalos* (1988) 203 Cal.App.3d 1517, 1523; *People v. Duncan* (1986) 42 Cal.3d 91, 105; *People v. Blackwell* (1983) 147 Cal.App.3d 646, 653; *People v. Abes* (1985) 174 Cal.App.3d 796, 807-9.
134. *Michigan v. Tyler* (1978) 436 U.S. 499, 510.
135. See *Michigan v. Tyler* (1978) 436 U.S. 499, 510; *Michigan v. Clifford* (1984) 464 U.S. 287, 293; *People v. Glance* (1989) 209 Cal.App.3d 836, 845 [officers may "remain for a reasonable time in order to ascertain the cause and origin of the blaze"].
136. See *U.S. v. Buckmaster* (6th Cir. 2007) 485 F.3d 873, 876.
137. See *Michigan v. Tyler* (1978) 436 U.S. 499, 510, fn.6; *People v. Avalos* (1988) 203 Cal.App.3d 1517, 1523 [meth lab.
138. See *Michigan v. Clifford* (1984) 464 U.S. 287, 298, fn.9; *U.S. v. Rahman* (7th Cir. 2015) 805 F.3d 822, 833.
139. See *People v. Amaya* (1979) 93 Cal.App.3d 424, 430-32; *People v. Boragno* (1991) 232 Cal.App.3d 378, 392.
140. See *People v. Keener* (1983) 148 Cal.App.3d 73, 77.
141. See *People v. Bradley* (1982) 132 Cal.App.3d 737.
142. See *People v. Lucero* (1988) 44 Cal.3d 1006, 1018.
143. See *San Francisco v. Sheehan* (2015) U.S. [135 S.Ct. 1765, 1775]; *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1014.
144. (1978) 83 Cal.App.3d 609.
145. (1979) 24 Cal.3d 297.

Contributors and Attributions

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12.2: Special Needs Detentions

Special law enforcement concerns will sometimes justify detentions without reasonable suspicion. —Illinois v. *Lidster* 1

For years and years, every police interaction with the citizenry was classified by the courts as a contact, an investigative detention, or an arrest. Over time, however, a fourth category started to appear in the cases—and today it has become firmly established in the law. Commonly known as a "special needs" or "community caretaking" detention, it is defined as a temporary seizure of a person that serves a public interest *other than* the need to determine if the detainee had committed a crime or was committing one.

Why was a new type of detention necessary? It was because the role of law enforcement officers in the community has expanded over the years to include an "infinite variety of services"2 that are "totally divorced" from the apprehension of criminals."3 As the First Circuit observed in *U.S. v. Rodriguez-Morales*, officers are now expected to "aid those in distress, combat actual hazards, [and] prevent potential hazards from materializing."4

As the result of these new demands, it is sometimes necessary for officers to stop and speak with people who are not suspected of criminal activity. This creates a problem: When an officer signals or otherwise instructs a person to stop, that person is automatically "detained."5 And, under the old law, it would be an *illegal* detention because officers were only allowed to detain suspected criminals; i.e., the officers must have had reasonable suspicion. So, they would often find themselves in a classic Catch-22 situation: the public interest would be served if they detained the person; but if they did so, they would be breaking the law. Commenting on this dilemma, the Supreme Judicial Court of Maine said:

> If we were to insist upon suspicion of activity amounting to a criminal or civil infraction to meet the [detention] standard, we would be overlooking the police officer's legitimate role as a public servant to assist those in distress and to maintain and foster public safety.6

And that, in a nutshell, is why special needs detentions are now recognized by the courts. But this recognition came slowly. There were no "major" cases or public outcry over death or destruction resulting from the inability of officers to make special detentions.7 Instead, it happened slowly as state appellate courts and the federal circuits were called upon more and more to address these situations. As the California Court of Appeal observed in 2008, "Though no published California case has specifically addressed this question, a number of other states recognize that a police officer may utilize the community caretaking exception to justify the stop."8

But without a groundbreaking case, there have been no authoritative decisions setting forth the precise requirements for detaining people under the many and varied circumstances that constitute special needs. Nevertheless, as we will discuss in this article, the number of published cases on this issue has reached the point that most of the uncertainty has been eliminated.

When Permitted

There is general agreement that officers may conduct special needs detentions if both of the following circumstances existed:

1. **Public interest**: The primary purpose of the detention must have been to further a public interest *other than* determining whether the detainee had committed a crime.9 The most common public interests that fall into this category are checking welfare or otherwise preventing harm, locating witnesses to a crime, securing the scene of police activity, and conducting noncriminal detentions on school grounds.
2. **Public interest outweighed intrusiveness**: This public interest must have outweighed the intrusiveness of the detention.

As the U.S. Supreme Court explained, "[I]n judging reasonableness, we look to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."10

Public interests vs. law enforcement interests While all lawful detentions serve the public interest, the courts sometimes say that special needs detentions are permitted only if their primary purpose was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."11 To put it another way, the objective must have been something other than a "general interest in crime control."12

Yet, this concept can be confusing because many of the special needs that result in detentions are linked indirectly—and sometimes directly—to criminal activity. As the Supreme Court of Connecticut observed, "Police often operate in the gray area between their community caretaking function and their function as criminal investigators."13

Fortunately, much of the confusion surrounding the terms “totally divorced” and “general interest in crime control” was eliminated by the Supreme Court in its most recent case on the subject, *Illinois v. Lidster*.14 Specifically, the Court ruled that this language simply means that a detention will not be upheld under a special needs theory if the officers’ *primary* objective was to determine if there were grounds to arrest the detainee.

The facts in Lidster are illustrative. Officers in Lombard, Illinois had been unable to locate the hitand-run driver of a car that had struck and killed a bicyclist. So, one week after the accident, they set up a checkpoint near the scene and asked each passing motorist if he had seen anything that might help identify the perpetrator. Lidster was one of the drivers who was stopped, and he was arrested after officers determined that he was under the influence of alcohol. Lidster argued that the detention was unlawful because its purpose was to apprehend the hit-and-run driver. While that was its ultimate purpose, said the court, it met the requirement for a special needs detention because its immediate objective was “to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.”

Another objective that often falls into the gray area between special needs and crime control is public safety. Thus, while one of the objectives of DUI checkpoints is to arrest impaired motorists, these checkpoints fall into the category of special interest detentions because their co-objective is to reduce the death and destruction that results from drunk driving.15

An additional public safety interest that sometimes touches on crime control is the stopping of cars that are being operated in an unusual manner, but not so unusual or erratic as to be “worthy of a citation.”16 For example, in *People v. Bellomo* 17 an LAPD motorcycle officer noticed that the driver of a car stopped at a red light had his head “resting on the window” and his eyes “appeared to be closed.” The officer stopped the car because he thought it was “very strange for the driver of the vehicle to be in this condition in a moving lane of traffic,” and because he was concerned there was “something physically or mentally wrong” with him. It turned out the driver, Bellomo, was under the influence of alcohol, and he argued that the detention was unlawful because the officer saw nothing to indicate that he was impaired or citable. Even so, said the court, the detention was warranted because the officer’s conduct was “reasonably consistent with his overall duties of protecting life and property and aiding the public.”

In contrast, officers in *Indianapolis* v. *Edmond* established a drug-interdiction checkpoint in which they would walk a drug-detecting dog around each car in the line. Thus, unlike the situation in *Lidster*, the purpose of the checkpoint in *Edmond* was, in fact, to determine if the occupants were committing a crime. Edmond sued the city, arguing that the checkpoint resulted in an unlawful detention, and the United States Supreme Court agreed. Said the Court, “Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.”18

Similarly, in *State v. Hayes* 19 officers in Chattanooga set up a roadblock outside a high-crime housing project for the purpose of “excluding trespassers.” Although one of its objectives was “to help [the residents’] quality of life issues,” the court ruled it did not qualify as a special needs detention because its immediate objective was to identify and exclude those vehicle occupants who were believed to be causing problems.

Weight of the public interest

As noted, even if the primary purpose of the detention was to further a public interest other than general crime control, it will not be permitted unless the need for the detention outweighed its intrusiveness.20 Consequently, it is necessary to determine the weight of the public interest that was served by taking into account the following: (1) its importance to the public, (2) the likelihood that the detention would effectively serve that public interest, and (3) whether there were any less intrusive alternatives that were readily available.

IMPORTANCE OF THE PUBLIC INTEREST: Although a special needs detention is much less intrusive than an arrest or search, it will not be upheld unless is serves a sufficiently important public interest.21 As the Washington Supreme Court explained, “We must cautiously apply the community caretaking function exception because of a real risk of abuse in allowing even well-intentioned stops to assist.”22 Or, as the court put it in *People v. Molnar*, “[W]e neither want not authorize police to seize people or premises to remedy what might be characterized as minor irritants.”23 For example, in *U.S.* v. *Dunbar,* where an officer stopped a motorist because he appeared lost, the court pointed out that the “policy of the Fourth Amendment is to minimize governmental confrontations with the individual”; but that policy is not served if the courts permit officers to detain people “simply for the well-intentioned purpose of providing directions.”24

On the other hand, the California Court of Appeal explained that, while officers are not permitted to "go around promiscuously bothering citizens," they may take actions that are "reasonably consistent" with their "overall duties of protecting life and property and aiding the public in maintaining lives of relative serenity and tranquility."[25] For example, the Supreme Court in *Michigan State Police v. Sitz* upheld a DUI checkpoint because of, among other things, the "magnitude of the drunken driving problem," and the "State's interest in preventing drunken driving."[26] Similarly, in determining the need for the detentions of possible witnesses in *Lidster* (the felony hit-and-run case discussed earlier) the Court pointed out that "[t]he relevant public concern was grave. Police were investigating a crime that had resulted in a human death."[27] (Several other examples of significant public interests will be discussed later.)

PROOF OF EFFECTIVENESS: The strength of the need to detain will also depend on the likelihood that the detention would effectively serve that need; i.e., that it will be "a sufficiently productive mechanism" to justify the intrusion.[28] For example, in *Delaware v. Prouse* the Supreme Court invalidated a departmental practice in which officers would make random car stops to determine whether the drivers were properly licensed. Said the Court, it was apparent that "the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed."[29]

In contrast, the Court in *Lidster* pointed out that there was reason to believe the checkpoint to locate witnesses would be effective because it "took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night."[30]

ALTERNATIVES? Finally, the need to detain a person would necessarily be greater if there were no less intrusive alternatives that were readily available. For example, in *People* v. *Spencer* 31 officers stopped a car because the driver was a friend of the suspect in a day-old assault, and the officer wanted to determine if he knew the suspect's whereabouts. But the court ruled there was insufficient need for the detention because the officers knew the detainee's name and they could have contacted him at home. Said the court, "[T]here was no genuine need for so immediate and intrusive an action as pulling over defendant's freely moving vehicle." In contrast, the court in *U.S. v. Ward* ruled that a car stop of a potential witness by FBI agents was lawful because, although the agents knew the witness's name and address, they could not question him at his home because his roommates were suspected fugitives.[32]

Note that the mere existence of a less intrusive alternative will not invalidate a detention unless the officers were negligent in failing to recognize and implement it.[33] As the Supreme Court put it, "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."[34]

Intrusiveness of the Detention

Until now, we have been discussing only one half of the balancing equation: the strength of the need for the detention. But, as noted, the legality of a special needs detention depends on whether this need outweighed the intrusiveness of the stop. "[T]he manner in which the seizure was conducted," said the Supreme Court, "is as vital a part of the inquiry as whether it was warranted at all."[35]

How do the courts assess a detention's intrusiveness? The most cited circumstances are, (1) the manner in which the detainee was stopped, (2) whether officers utilized officer-safety precautions, (3) the length of the detention, and (4) whether it was conducted in a place and in a manner that would have caused embarrassment or unusual anxiety.

Although the above circumstances are relevant, in most cases a special needs detention is not apt to be viewed as excessively intrusive if, (1) it was brief, and (2) officers did only those things that were reasonably necessary to accomplish their objective. That is because brief and efficient detentions are viewed by the courts as "modest" or "minimal" intrusions. Thus, in ruling that special needs detentions were relatively nonintrusive, the courts have noted:

• "Such a stop entailed only a brief detention, requiring no more than a response to a question or two and possible production of a document."[36]

• The detention was "minimally" intrusive as it lasted "a very few minutes at most."[37]

• "Several circumstances diminish the intrusiveness of the initial detention here. First and foremost, it was extremely brief." [38]

• "[T]he restraint at issue was tailored to that need, being limited in time and scope."[39]

• Traffic stop was only a “minor annoyance.”40

• The officer “did no more than was reasonably necessary to determine whether [the detainee] was in need of assistance.”41

• “At a minimum, officers had a right to identify witnesses to the shooting, to obtain the names and addresses of such witnesses, and to ascertain whether they were willing to speak voluntarily with the officers.”42

As for roadblocks and checkpoints, they too will usually be considered only a minor intrusion if, (1) they were brief, (2) all vehicles were stopped (i.e., vehicles were not singled out), and (3) it would have been apparent to the motorists that the stop was being conducted by law enforcement officers.43

Having examined the procedure for determining whether a special needs detention was justified, we will now look at the most common special needs cited by officers, and how the courts have analyzed them.

Types of Special Needs Detentions

There are essentially four types of special needs detentions that have been recognized to date: community caretaking detentions, stops to locate witnesses to a crime, securing the scene of police activity, and noncriminal detentions on school grounds.

Community caretaking detentions

Of all the circumstances that may warrant a special needs detention, the most urgent is an officer’s reasonable belief that the detainee was in imminent danger or was otherwise in need of immediate assistance. Thus, in discussing these types of stops—commonly known as “community caretaking detentions”44—the Montana Supreme Court pointed out that “the majority of the jurisdictions that have adopted the community caretaker doctrine have determined that a peace officer has a duty to investigate situations in which a citizen may be in peril or need some type of assistance from an officer.”45

The following are the most common justifications that are cited for community caretaking detentions.

SICK OR INJURED PERSON

Whether officers may detain a person whom they believe may be sick or injured will generally depend on “the nature and level of distress exhibited.”46 The following are examples of circumstances that have been found to generate a strong need:

- The victim of an assault had just left the crime scene in the car; officers stopped the vehicle because the crime was “potentially serious” and “the victim, with knowledge of the incident and possibly in need of medical attention, had just left the scene.47
- An officer detained a man who was sitting in a vehicle that was parked at the side of a roadway at 3 A.M.; the headlights were off but the motor was running. Although the man appeared to be asleep, the court pointed out that “he might just as likely have been ill and unconscious and in need of help.”48
- The driver of a car that was stopped at a traffic light was leaning his head against the window, and his eyes “appeared to be closed. Said the court, “The operation of a motor vehicle by a driver disabled for *any* reason be it a disability that is statutorily prohibited or not, is manifestly a serious event and the need for swift action is clear beyond cavil.”49
- At 3 A.M., the driver of a car “stopped or slowed considerably five times within approximately 90 seconds” and then pulled off the road. The court ruled that “it was reasonable for the officer to conclude, among other things, that “something was wrong” with the driver or his vehicle.50
- Responding to a report that a man in a field was “unconscious in a half-sitting, half-slumpedover position,” officers found him on the ground and detained him so that fire department personnel could examine him.51

In contrast, the California Court of Appeal in *People v. Madrid* ruled that a community caretaking detention was unwarranted because the detainee was merely “walking with an unsteady gait and sweating” and “stumbled.” Such symptoms, said the court, demonstrated “a low level of distress.”52

MISSING PERSON: Another significant circumstance is that the detainee had been reported missing. Thus, in *State v. Diloreto*, the New Jersey Supreme Court ruled that a car stop was warranted because, per NCIC, a possible occupant of the vehicle was an “endangered missing person.”53

MENTAL HEALTH ISSUES: A detention may be warranted if it appeared that the detainee was so mentally unstable as to constitute a threat to himself or others. Some examples:

- Detainee “was possibly intoxicated and was observed exiting and reentering a vehicle that was parked on a dead-end street.”54

- Detainee was walking down the street at 1 A.M. “crying and talking really loudly or shouting,” “his hands were over his face.”55
- Detainee had reportedly taken “some pills,” he was “agitated” and “physically aggressive” and he “did not know where he was.”56
- Before driving off in a car, the detainee went “ballistic,” screaming and banging her head on the car.57

WARN OF DANGER: Officers may detain a person to notify him of a dangerous condition or prevent him from entering a dangerous place.58 For example, in *People v. Ellis* the California Court of Appeal ruled that an officer properly stopped a car at 2 A.M. in a parking lot to warn the driver that his lights were off. Said the court, the officer was “not required to wait until appellant actually drove upon a public street to stop appellant.”59

Similarly, in *State v. Moore* a park ranger signaled the defendant to stop because, although he was not speeding, he was driving too fast for conditions; i.e., pedestrians in the campground did not have a clear view of approaching cars because of parked vehicles. Said the court, “Although defendant makes a plausible argument that his driving did not constitute a criminal violation, the park ranger nevertheless could have reasonably concluded that it posed a threat to the safety of other persons in the park.”60

Finally, in *In re Kelsey C.R.*61 officers in Milwaukee were patrolling a high-crime neighborhood at about 7:40 P.M. when they saw a 17-year old girl who was leaning against a storefront in a “huddled position.” Thinking that she might be a runaway, the officers detained her and subsequently discovered she was armed with a handgun. On appeal, the Supreme Court of Wisconsin ruled that these circumstances constituted sufficient reason to detain her, pointing out, among other things, that “something bad could have happened” to her if the officers had not intervened; and that a minor “alone in a dangerous neighborhood is vulnerable to kidnappers, sexual predators, and other criminals.”

Locate witnesses

The need to locate or identify witnesses to a crime may also constitute a special need, especially if the crime was serious and if it had just occurred. The theory here is that, while many witnesses will voluntarily come forward and tell officers what they saw, some will not because they are hesitant about becoming involved or because they don’t realize they saw or heard something significant. This can create a problem for officers at the crime scene because the only way to determine whether someone was a witness is to talk to him; and if he is leaving, they must either let him go (and lose whatever information he might have) or detain him.

While some courts ruled in the past that detentions for such an objective are not permitted,62 the U.S. Supreme Court rejected this view in 2004. The case was *Illinois v. Lidster* 63 (the felony hit-and-run case discussed on page two) and the Court ruled that, like other special needs detentions, detentions for the purpose of locating and identifying witnesses are lawful if the need to find a witness outweighed the intrusiveness of the stop. As the Court observed, it would seem “anomalous” if the law allowed officers “to seek the voluntary cooperation of pedestrians but ordinarily to forbid police to seek similar voluntary cooperation from motorists.”

Before we discuss how officers can determine whether a need to locate witnesses is sufficiently strong, it should be noted that in many cases the circumstances that would justify a detention of a person as a potential witness would also warrant a detention of that person to determine if he was the perpetrator. This is especially true if officers arrived shortly after the crime occurred or if there was some other reason to believe that the perpetrator was still on or near the scene. Thus, in one such case, the D.C. Circuit ruled that officers who had just arrived at the scene of a shooting were “not required to sort out appellant’s exact role—participant or witness—before stopping him to inquire about a just-completed crime of violence.”64

SERIOUSNESS OF THE CRIME: The most important circumstance is, of course, the seriousness of the crime that the detainee might have witnessed. In most cases, these types of detentions will be upheld only when the crime was especially serious, usually a felony and oftentimes one that resulted in an injury or an imminent threat to life or property.65

LIKELIHOOD THE DETAINEE WITNESSED THE CRIME:

The need for a detention will also depend on the likelihood that the detainee had, in fact, witnessed the crime. While officers must, at a minimum, have reasonable suspicion,66 their belief that the detainee was a witness may be based on direct evidence or reasonable inference. An example of direct evidence is found in *Williamson* v. *U.S.*67 in which two officers on patrol in Washington D.C. heard several gun shots nearby at about 3:45 A.M. As they looked in the direction of the shots, they saw one car speeding off and some people starting to get into a second car in a “very quick hurry.” The officers stopped the second car because, as one of

them testified, he was unsure whether the occupants were the shooters or the targets of the shooting. In the course of the stop, one of the occupants was arrested for carrying an unregistered firearm. On appeal, he contended that the gun should have been suppressed because the officers lacked grounds to stop the car. But the court disagreed, pointing out that the officers had first-hand knowledge that the occupants of the second car "were either participants in the shooting or witnesses to it who could provide material information about the event and the possible identity of the shooter."

An officer's belief that a person was a witness to a crime may also be based on circumstantial evidence, such as the following: (1) the crime had just occurred, (2) the perpetrator fled toward a certain area, (3) the detainee was the only person in that area or one of only a few, and (4) it was likely that anyone in the area would have seen the perpetrator. It may also be reasonable to believe that a person was a witness if the crime had just occurred and he was one of few people at the scene when officers arrived. As the Minnesota Supreme Court observed, "Our court, as well as courts of other states, have recognized that in order to 'freeze' the situation, the stop of a person present at the scene of a recently committed crime of violence may be permissible."[68]

IMPORTANCE OF INFORMATION: Even if officers had good reason to believe that the detainee was a witness, the legality of the detention will depend on whether they reasonably believed that he would be able to provide important information. It seems apparent, however, that anyone who was reasonably believed to have been a witness to all or part of the crime would qualify because he could be expected to, among other things, identify or describe the perpetrator, describe the perpetrator's vehicle, explain what the perpetrator said or did, explain what the victim said or did, recount how the crime occurred, eliminate another suspect as the perpetrator, lead officers to physical evidence, or provide officers with the names of other witnesses.

For example, in *Wold v. Minnesota*,[69] officers in Duluth were dispatched at about 11 P.M. to a stabbing that had just occurred on a street. When they arrived, they noticed that two men were shouting at the paramedics who were treating the unconscious victim. So the officers detained the men and, as things progressed, determined that one of them, Wold, was the assailant. On appeal, the court ruled that the officers had good reason to detain the men because, as the only people on the scene (other than the victim), they might have seen what had happened. Said the court, "[W]e cannot fault [the officers'] conclusion that both of the individuals may have witnessed the crime, or that either or both might be potential suspects involved in the commission of this violent assault."

Similarly, in *Barnhard v. State*,[70] police officers in Maryland were dispatched to a report of a stabbing at Bubba Louie's Bar. One of the patrons, Barnhard, told them that he knew where the knife had been discarded. But then he became uncooperative and started to leave. So the officers detained him, apparently for the purpose of learning where the knife was located. But Barnhard fought the officers and was charged with, among other things, battery on an officer in the performance of his duties. Barnhard claimed that the officers were not acting in the performance of their duties because they did not have grounds to believe he was the perpetrator. It didn't matter, said the court, because Barnhard had indicated that he possessed "material information" pertaining to the stabbing.

It appears that a person who was not an eyewitness to the crime might, nevertheless, be detained if officers reasonably believed he had seen the perpetrator or his car. For example, in *Baxter* v. *State*,[71] two men armed with handguns and wearing Halloween masks robbed a jewelry store in Little Rock at about 4 P.M. Witnesses reported that the men ran out the back door. One of the responding officers was aware that the back door of the jewelry store led to a wooded area that adjoined Kanis Park. So he headed for the park and, just as he arrived, he saw a man in a car traveling in the direction away from the jewelry store. The officer decided to stop the car to determine if the driver "had seen anybody." It turned that out he had. In fact, he was the getaway driver and the two robbers were found hiding in the back seat. In ruling that the stop was justified by the need to locate a witness, the court pointed out that "[t]he time sequence was such that a person in Kanis Park about the time that appellant was stopped likely would have seen the robbers—there being no one else in the park on this rainy afternoon."

In a similar case, *Beauvois v. State*,[72] a man armed with a knife robbed a 7-Eleven store in Fairbanks, Alaska at about 2:50 A.M. He was last seen on foot and, according to witnesses, he was running in the direction of a campground. Within a minute of receiving the call, an officer arrived at the only entrance to the campground, intending to "stop any moving vehicle" on the theory that, while "most people would be sleeping at 3 A.M., anyone who was awake might have seen something." The first car he saw was a Corvette occupied by two men, so he stopped it and discovered that one of the men was the robber. In ruling that the detention was lawful, the court said:

> It was reasonable to suspect that the occupants of the Corvette had been awake in the campground when the robber came through, and that they might have seen something. Under these circumstances, and especially given the recency and the seriousness of the crime, prompt investigative efforts were justified.

Securing the scene of police activity

Officers who are conducting a search, making an arrest, or processing a crime scene may, of course, take "unquestioned police command" of the location.

As the Supreme Court observed, "[A] police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety."73 Similarly, the Eleventh Circuit noted that "a police officer performing his lawful duties may direct and control—to some extent—the movements and location of persons nearby."74

But because a command to such a person will necessarily result in a detention (since a reasonable person in such a situation would not feel free "to decline the officer's requests" 75) it falls into the category of a special needs detention. The following are the most common situations in which these types of detentions occur:

CAR STOPS: When officers make a car stop, they will usually have grounds to detain the driver and sometimes one or more of the passengers. But what about passengers for whom reasonable suspicion does not exist?

In the past, this was problematic because, in the absence of reasonable suspicion, officers could not lawfully command a non-suspect occupant to do anything without converting the encounter into an illegal detention. In 2007, however, the United States Supreme Court ruled in *Brendlin v. California* that, because of the overriding need of officers to exercise control over all of the occupants, any non-suspect passengers will be deemed detained under what is essentially a special needs theory.76

HIGH-RISK RESIDENTIAL SEARCHES: Because of the increased danger associated with the execution of warrants to search private residences for drugs, illegal weapons, or other contraband, the Supreme Court ruled that officers may detain all residents and other occupants pending completion of the search.77 Officers may also briefly detain people who arrive outside the residence while officers are on the scene if the person's identity and connection to the premises are unknown and cannot be immediately determined without detaining him.78 The purpose of these types of detentions is to ascertain whether the person is a detainable occupant or merely an uninvolved visitor.

EXECUTING ARREST WARRANTS: Officers who have entered a home to execute an arrest warrant, like officers who have made a car stop, need to exercise unquestioned control over all of the occupants. Consequently, they may detain people who are inside when they arrive, or who are about to enter.79

SEARCHES AND ARRESTS IN PUBLIC PLACES: Officers who are searching a business or other place that is open to the public may detain a person on or near the premises only if there was reasonable suspicion to believe that *that* person was connected to the illegal activities under investigation.80 In other words, a special needs detention will not be permitted merely because the detainee was present in a public place in which criminal activity was occurring. Officers may, however, prevent people from entering a public place that is about to be searched pursuant to a warrant.81

PAROLE AND PROBATION SEARCHES: A brief detention of people leaving the home of a probationer has been deemed a special need when officers, who had arrived to conduct a probation search, detained them to determine if they were felons. This information was relevant in determining whether the probationer was associating with felons, which is ordinarily a violation of probation.82

DETENTIONS WHILE DETAINING OTHERS: There is authority for ordering a person at the scene of a detention to stand at a certain place if, (1) it reasonably appeared that person and the detainee were associates, and (2) there was some reason to believe the person posed a threat to officers.83

EXECUTING A CIVIL COURT ORDER: Officers who are executing a civil court order may detain a person on the premises who reasonably appears to pose a threat to them or others. For example, in *Henderson* v. *City of Simi Valley* 84 officers were standing by while a minor was removing property from her mother's home pursuant to a court order. While the officers were outside the house, the mother made threats to release her two Rottweilers on them." The dogs were inside her house, and when she started to untie them, the officers entered and detained her. In ruling that their entry into the house was reasonable, the court noted that they "were serving as neutral third parties acting to protect all parties," and that they "did not enter the house to obtain evidence."

Detentions on school grounds

Officers may, of course, detain students or anyone else on school grounds if they have reasonable suspicion. In the absence of reasonable suspicion, certain special needs detentions are permitted on school grounds because of the overriding need to provide students with a safe environment and to restrict access by outsiders.[85] These types of detentions are permitted if the following circumstances existed:

(1) **School resource officer**: These types of detentions must be conducted by a school resource officer (i.e., police officers or sheriff 's deputies who are specially assigned to the school by their departments) or an officer who is employed by the school district.[86]

(2) **Proper school-related interest**: The detention must have served a school-related interest, such as safety or maintaining order.

DETENTIONS OF STUDENTS: Detentions of students are permitted so long as the stop was not arbitrary, capricious, or harassing. As the California Supreme Court put it:

> [S]chool officials [must] have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner.[87]

For example, in *In re William V.*[89] the court ruled that a detention was warranted even though it was based solely on a violation of a school rule.[88] The facts in the case were as follows: A school resource officer at Hayward High School in Alameda County saw that a student, William, was displaying a folded red bandana. The bandanna was hanging from William's back pocket and it caught the officer's attention because, as he testified, colored bandanas "commonly indicate gang affiliation" and are therefore not permitted on school grounds. Furthermore, he explained that the manner in which the bandanna was folded and hanging from the pocket indicated to him that "something was about to happen or that William was getting ready for a confrontation." The officer's suspicions were heightened when William, upon looking in the direction of the officer, "became nervous and started pacing" and began "trembling quite heavily, his entire body, especially his hands, his lips, his jaw." At that point, the officer detained him and subsequently discovered that he was carrying a knife. William contended that the detention was unlawful because the officer did not have reasonable suspicion to believe he was committing a crime. It didn't matter, said the court, because "William's violation of the school rule prohibiting bandannas on school grounds justified the initial detention."

DETENTIONS OF NONSTUDENTS: A nonstudent may be detained during school hours to confirm he has registered with the office as required by law.[90] An outsider may also be detained after school hours to confirm he has a legitimate reason for being on the school grounds.

For example, in *In re Joseph F.*[91] an assistant principal and school resource officer at a middle school in Fairfield saw a high school student named Joseph on campus at about 3 P.M. At the request of the assistant principal, the officer tried to detain Joseph to determine whether he had registered, but Joseph refused to stop, and the officer had to forcibly detain him. As the result, Joseph was arrested for battery on a peace officer engaged in the performance of his duties.

On appeal, Joseph argued that the officer was not acting in the performance of his duties because the registration requirement does not apply after school hours. Even so, said the court, it is appropriate for officers to determine whether any outsider on school grounds has a legitimate reason for being there. This is because "schools are special places in terms of public access," and also because "outsiders commit a disproportionate number of the crimes on school grounds." Accordingly, the court ruled that "school officials, or their designees, responsible for the security and safety of campuses should reasonably be permitted to detain an outsider for the limited purpose of determining such person's identity and purpose regardless of 'school hours.'"

References

1. (2004) 540 U.S. 419, 424. Edited.
2. *U.S.* v. *Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 785. ALSO SEE *People* v. *Madrid* (2008) 168 Cal.App.4th 1050, 1055 [the community caretaking exception "derives from the expanded role undertaken by the modern police force"]; *U.S.* v. *Dunavan* (6th Cir. 1973) 485 F.2d 201, 204 ["[P]articularly in big city life, the Good Samaritan of today is more likely to wear a blue coat than any other."]; *U.S.* v. *Finsel* (7th Cir. 2003) 326 F.3d 903, 907 ["But in addition to chasing criminals, law enforcement officers have another role in our society, a community caretaking function."].
3. *Cady* v. *Dombrowski* (1973) 413 U.S. 433, 441.
4. (1st Cir. 1991) 929 F.2d 780, 784-85.

5. See *Brendlin* v. *California* (2007) 551 U.S. 249, 254 [a seizure results "when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement"].
6. *State* v. *Pinkham* (Me. 1989) 565 A.2d 318, 319.
7. See *People* v. *Hernandez* (N.Y. App. 1998) 679 N.Y.S. 790, 793 ["[T]his issue [stopping suspected victims of a crime] has received little attention in the reported case law because victims and witnesses have little reason to challenge in court their detention."].
8. *People* v. *Madrid* (2008) 168 Cal.App.4th 1050, 1057-58. Edited. Citations omitted. ALSO SEE *State* v. *Lovegren* (Mont. 2002) 51 P.3d 471, 474 ["[W]e note that the majority of the jurisdictions that have adopted the community caretaker doctrine have determined that a peace officer has a duty to investigate situations in which a citizen may be in peril or need some type of assistance from an officer." Citations omitted.]; *State* v. *Marcello* (Vt. 1991) 599 A.2d 357, 358 ["safety reasons alone can be sufficient to justify a stop"]. ALSO SEE *Illinois* v. *McArthur* (2001) 531 U.S. 326, 330 ["When faced with special law enforcement needs . . . the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable." Citations omitted.].
9. **NOTE RE PRETEXT DETENTIONS**: If the officer's reasons for detaining the person were objectively reasonable, the officer's motivation for doing so is immaterial. See *Brigham City* v. *Stuart* (2006) 547 U.S. 398, 404-5; *Whren* v. *United States* (1996) 517 U.S. 806, 813 ["[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"].
10. *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427.
11. *Cady* v. *Dombrowski* (1973) 413 U.S. 433, 441.
12. *Indianapolis* v. *Edmond* (2000) 531 U.S. 32, 41.
13. *State* v. *Blades* (Conn. 1993) 626 A.2d 273, 279.
14. (2004) 540 U.S. 419, 423 ["The stop's primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime"].
15. See *Michigan State Police* v. *Sitz* (1990) 496 U.S. 444, 451 ["No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."]; *Indianapolis* v. *Edmond* (2000) 531 U.S. 32, 37 [Court notes that the DUI checkpoint it approved in *Sitz* was "aimed at removing drunk drivers from the road"]; *Illinois* v. *Lidster* (2004) 540 U.S. 419, 424 [Court refers to DUI checkpoints as a "special law enforcement *concern*." Emphasis added.].
16. *State* v. *Pinkham* (Me. 1989) 565 A.2d 318, 318. ALSO SEE *State* v. *Rinehart* (S.D. 2000) 617 N.W.2d 842.
17. (1984) 157 Cal.App.3d 193.
18. (2000) 531 U.S. 32, 48.
19. (Tenn. 2006) 188 S.W.3d 505.
20. See *Indianapolis* v. *Edmond* (2000) 531 U.S. 32, 47; *People* v. *Glaser* (1995) 11 Cal.4th 354, 365; *In re Randy G.* (2001) 26 Cal.4th 556, 566 ["there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizure entails"].
21. See *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427 ["we look to the gravity of the public concerns served by the seizure"]; *People* v. *Profit* (1986) 183 Cal.App.3d 849, 883 [the seriousness of the offense is a "highly determinative"].
22. *State* v. *Acrey* (Wash. 2003) 64 P.3d 594, 600.
23. (N.Y. App. 2002) 774 N.E.2d 738, 741.
24. (D. Conn. 1979) 470 F.Supp. 704, 708. ALSO SEE *Stevens* v. *Rose* (9th Cir. 2002) 298 F.3d 880, 884 [detention unlawful because its purpose was to obtain a set of keys that were the subject of a civil dispute].
25. *Batts* v. *Superior Court* (1972) 23 Cal.App.3d 435, 439.
26. (1990) 496 U.S. 444, 451.
27. 2004) 540 U.S. 419, 427.
28. *Delaware* v. *Prouse* (1979) 440 U.S. 648, 659. ALSO SEE *Michigan State Police* v. *Sitz* (1990) 496 U.S. 444, 455 [consider "the extent to which [checkpoints] can reasonably be said to advance that interest"].
29. (1979) 440 U.S. 648, 660.
30. *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427.
31. (N.Y. App. 1995) 646 N.E.2d 785. ALSO SEE *State* v. *Ryland* (Neb. 1992) 486 N.W.2d 210 [detention unnecessary because the officer knew the witness's phone number, and the crime occurred a week earlier].

32. (9th Cir. 1973) 488 F.2d 162, 164. ALSO SEE *In re Kelsey C.R.* (Wisc. 2001) 626 N.W.2d 777, 789 ["there were not any alternatives"]; *State* v. *Pierce* (Vt. 2001) 787 A.2d 1284, 1289 ["the license number will not always allow identification of the occupants of a vehicle, and a very brief stop will produce that identification"]; *Wold* v. *State* (Minn. 1988) 430 N.W.2d 171, 175 ["An atmosphere of haste pervaded the scene."].
33. See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 350; *People* v. *Bell* (1996) 43 Cal.App.4th 754, 761, fn.1.
34. *United States* v. *Sharpe* (1985) 470 U.S. 675, 687.
35. *United States* v. *Place* (1983) 462 U.S. 696, 707-8. ALSO SEE *Meredith* v. *Erath* (9th Cir. 2003) 342 F.3d 1057, 1062 ["the reasonableness of a detention depends not only on *if* it is made, but also on *how* it is carried out"].
36. 36 *Ingersoll* v. *Palmer* (1987) 43 Cal.3d 1321, 1333.
37. *Illinois* v. *Lidster* (2004) 540 U.S. 419, 427. ALSO SEE *People* v. *Dominguez* (1987) 194 Cal.App.3d 1315, 1318 ["brief stop at the side of a public roadway"]; *People* v. *Hannah* (1996) 51 Cal.App.4th 1335, 1344 ["Although the duration of a detention is not determinative of its reasonableness, its brevity weighs heavily in favor of a finding of reasonableness."].
38. *People* v. *Glaser* (1995) 11 Cal.4th 354, 366.
39. *Illinois* v. *McArthur* (2001) 531 U.S. 326, 331. ALSO SEE *Palacios* v. *Burge* (2nd Cir. 2009) 589 F.3d 556, 565 ["there was appropriate tailoring"]; *U.S.* v. *Garner* (10th Cir. 2005) 416 F.3d 1208, 1213 ["the detention must last no longer than is necessary to effectuate its purpose, and its scope must be carefully tailored to its underlying justification"].
40. *People* v. *Bellomo* (1984) 157 Cal.App.3d 193, 198.
41. *State* v. *Crawford* (Iowa 2003) 659 N.W.2d 537, 543.
42. *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148.
43. See *Illinois* v. *Lidster* (2004) 540 U.S. 419, 425 ["information-seeking highway stops are less likely to provoke anxiety or to prove intrusive"]; *United States* v. *Martinez-Fuerte* (1976) 428 U.S. 543, 557-58 ["brief detention of travelers" was "quite limited"]; *Michigan State Police* v. *Sitz* (1990) 496 U.S. 444, 451 ["the measure of the intrusion on motorists stopped briefly at sobriety checkpoints is slight"]. ALSO SEE *People* v. *Manis* (1969) 268 Cal.App.2d 653, 666 ["The temporary loss of personal mobility which accompanies detention may be deemed part payment of the person's obligation as a citizen to assist law enforcement authorities in the maintenance of public order."].
44. See, for example, *People* v. *Madrid* (2008) 168 Cal.App.4th 1050, 1060 [car stop was appropriate to discharge "community caretaking functions"]; *U.S.* v. *Garner* (10th Cir. 2005) 416 F.3d 1208, [detention of ill man fell within the "community caretaking function"]; *In re Kelsey C.R.* (Wisc. 2001) 626 N.W.2d 777, 789 [detention of suspected runaway "was reasonable under the police community caretaker function"]; *State* v. *Diloreto* (N.J. 2004) 850 A.2d 1226, 1233 [detention of missing person fell within the "community caretaker doctrine"]. ALSO SEE *Cady* v. *Dombrowski* (1973) 413 U.S. 433, 441 [the Court's first reference to "community caretaking functions"].
45. *State* v. *Lovegren* (Mont. 2002) 51 P.3d 471, 474. Citations omitted. ALSO SEE *State* v. *Litschauer* (Mont. 2005) 126 P.3d 456, 45758 ["[O]fficers have a duty not only to fight crime, but also to investigate uncertain situations in order to ensure the public safety."].
46. *Corbin* v. *State* (Tex. App. 2002) 85 S.W.3d 272, 277. ALSO SEE *U.S.* v. *King* (10th Cir. 1993) 990 F.2d 1552, 1560 ["In the course of exercising this noninvestigatory function, a police officer may have occasion to seize a person in order to ensure the safety of the public and/or the individual."]; *Wright* v. *State* (Tex. 1999) 7 S.W.3d 148, 151 ["As part of his duty to 'serve and protect,' a police officer may stop and assist an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help."]. **NOTE**: While this type of special need is similar to traditional exigent circumstances, it is treated differently because it involves detentions of people as opposed to searches of people or property.
47. *Metzker* v. *State* (Alaska App. 1990) 797 P.2d 1219, 1222. ALSO SEE *People* v. *Hernandez* (N.Y. App. 1998) 679 N.Y.S.2d 790 [officers reasonably believed that one of the occupants of the stopped vehicle had just been shot].
48. *State* v. *Lovegren* (Mont. 2002) 51 P.3d 471. ALSO SEE *State* v. *Pinkham* (Me. 1989) 565 A.2d 318, 319 ["Police officers do not violate the Fourth Amendment if they stop a vehicle when they have adequate grounds to believe the driver is ill or falling asleep."].
49. *People* v. *Bellomo* (1984) 157 Cal.App.3d 193, 197.
50. *State* v. *Bakewell* (Neb. 2007) 730 N.W.2d 335, 339. ALSO SEE *State* v. *Reinhart* (S.D. 2000) 617 N.W.2d 842 [car stop because the driver was driving 20-25 m.p.h. in 40 m.p.h. zone, and the officer believed "he might have a medical problem such as a stroke"]; *State* v. *Marcello* (Vt. 1991) 599 A.2d 357, 358 [motorist told an officer to stop the defendant's car because "there's something wrong with that man."]; *State* v. *Vistuba* (Kan. 1992) 840 P.2d 511, 514.

51. *U.S.* v. *Garner* (10th Cir. 2005) 416 F.3d 1208.
52. (2008) 168 Cal.App.4th 1050, 1060.
53. (N.J. 2004) 850 A.2d 1226.
54. *Winters* v. *Adams* (8th Cir. 2001) 254 F.3d 758, 760.
55. *Gallegos* v. *City of Colorado Springs* (10th Cir. 1997) 114 F.3d 1024.
56. *State* v. *Crawford* (Iowa 2003) 659 N.W.2d 537, 543.
57. *State* v. *Litschauer* (Mont. 2005) 126 P.3d 456.
58. See *People* v. *Williams* (2007) 156 Cal.App.4th 949, 959 [deputy detained a motorcyclist to prevent him from driving into a forested area in which officers were about to conduct a raid on a marijuana grow; in addition, a deputy testified that "[o]ftentimes these fields are booby-trapped"]; *U.S.* v. *King* (10th Cir. 1993) 990 F.2d 1552, 1559 [at the scene of a traffic accident, an officer detained the driver of a passing vehicle "to alleviate what she perceived as a traffic hazard resulting from [the driver's] incessant honking at the intersection"].
59. (1993) 14 Cal.App.4th 1198, 1202.
60. (Iowa 2000) 609 N.W.2d 502, 503.
61. (Wisc. 2001) 626 N.W.2d 777. ALSO SEE *State* v. *Acrey* (Wash. 2003) 64 P.3d 594, 601 ["a 12-year-old boy, out after midnight on a weeknight without adult supervision"].
62. See *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148 ["[S]ome courts have prohibited the involuntary detention of witnesses to a crime." Citations omitted.].
63. (2004) 540 U.S. 419, 426-27. ALSO SEE *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148 [*Lidster* "suggests that a brief detention of a witness is in fact permitted, provided it meets the reasonableness test"]; *State* v. *Gorneault* (Me. 2007) 918 A.2d 1207, 1209 [applying *Lidster*, the court ruled that officers who were investigating a burglary that had occurred 30 minutes earlier could briefly stop passing motorists to determine if they saw anything suspicious].
64. *Williamson* v. *U.S.* (D.C. App. 1992) 607 A.2d 471, 476.
65. See *Illinois* v. *Lidster* (2004) 540 U.S. 419 [felony hit-and-run]; *Williamson* v. *U.S.* (D.C.App. 1992) 607 A.2d 471 [shooting]; *Wold* v. *State* (Minn. 1988) 430 N.W.2d 171 [stabbing]; *Walker* v. *City of Orem* (10th Cir. 2006) 451 F.3d 1139, 1148 [shooting]; *State* v. *Gorneault* (Me. 2007) 918 A.2d 1207 [burglary]; Beauvois v. State (Alaska App. 1992) 837 P.2d 1118 [robbery]; *State* v. *Pierce* (Vt. 2001) 787 A.2d 1284, 1289 [DUI was sufficiently serious]. **COMPARE**: *State* v. *Dorey* (Wash.App. 2008) 186 P.3d 363, 368 [a "disturbance"]; *Castle* v. *State* (Alaska App. 2000) 999 P.2d 169, 173 [driving on a revoked license]; *State* v. *Ryland* (Neb. 1992) 486 N.W.2d 210 [week-old traffic accident]; *City of Kodiak* v. *Samaniego* (Alaska 2004) 83 P.3d 1077 [INS investigation]; *State* v. *Wixom* (Idaho 1997) 947 P.2d 1000 [non-injury traffic accident].
66. **NOTE**: Probable cause is the standard of proof suggested in the Model Code of Pre-Arraignment Procedure. Although the Code uses the term "reasonable cause," it used that term elsewhere to denote probable cause. ALSO SEE 2 LaFave, *Search and Seizure* (3rd edition) § 3.2(e) p.64; *People* v. *Hernandez* (Sup.Ct. Bronx County 1998) 679 N.Y.S.2d 790, 794 ["[T]he Model Code proposes appropriate guidelines"].
67. (D.C. App. 1992) 607 A.2d 471.
68. *Wold* v. *State* (Minn. 1988) 430 N.W.2d 171, 174. COMPARE *State* v. *Dorey* (Wash. App. 2008) 186 P.3d 363, 368 ["there was no reason to believe that [the detainee] could assist in the investigation"].
69. (Minn. 1988) 430 N.W.2d 171.
70. (Md. App. 1992) 602 A.2d 701.
71. (Ark. 1982) 626 S.W.2d 935.
72. (Alaska 1992) 837 P.2d 1118.
73. *Brendlin* v. *California* (2007) 551 U.S. 249, 258. ALSO SEE *Arizona* v. *Johnson* (2009) U.S. [129 S.Ct. 781, 783] [officer was "not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in doing so, she was not permitting a dangerous person to get behind her"].
74. *Hudson* v. *Hall* (11th Cir. 2000) 231 F.3d 1289, 1297; *U.S.* v. *Clark* (11th Cir. 2003) 337 F.3d 1282, 1286-87.
75. *Florida* v. *Bostick* (1991) 501 U.S. 429, 436.
76. (2007) 551 U.S. 249, 257.
77. See *Michigan* v. *Summers* (1981) 452 U.S. 692. 705 ["[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."];

People v. *Thurman* (1989) 209 Cal.App.3d 817, 823 [“That appellant’s posture, at that moment, was nonthreatening does not in any measure diminish the potential for sudden armed violence that his presence within the residence suggested.”].

78. See *People* v. *Glaser* (1995) 11 Cal.4th 354; *People* v. *Samples* (1996) 48 Cal.App.4th 1197 [detainee arrived at a residence as officers were arriving to execute a warrant to search for drugs]; *U.S.* v. *Fountain* (9th Cir. 1993) 2 F.3d 656, 663 [officers may detain residents and any other occupant who is present when officers arrive]; *U.S.* v. *Bohannon* (6th Cir. 2000) 225 F.3d 615, 616 [officers may detain people who arrive at the scene after officers arrived]; *Burchett* v. *Kiefer* (6th Cir. 2002) 310 F.3d 937, 943-44 [officers may detain a person “who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down”].
79. See *People* v. *Hannah* (1996) 51 Cal.App.4th 1335, 1346 [the officers “were entering a residence, the exact floor plan of which they were unaware, to arrest a juvenile . . . when they encountered individuals whose identity and relationship to the juvenile they were seeking was unknown”]; *U.S.* v. *Maddox* (10th Cir. 2004) 388 F.3d 1356, 1363 [“officer safety may justify protective detentions”].
80. See *Ybarra* v. *Illinois* (1979) 444 U.S. 85.
81. See *People* v. *Williams* (2007) 156 Cal.App.4th 949, 959.
82. See *People* v. *Matelski* (2000) 82 Cal.App.4th 837, 850.
83. See *U.S.* v. *Clark* (11th Cir. 2003) 337 F.3d 1282, 1288; *State* v. *Childress* (Ariz. App. 2009) 214 P.3d 422, 427.
84. (9th Cir. 2002) 305 F.3d 1052.
85. See *Wofford* v. *Evans* (4th Cir. 2004) 390 F.3d 318, 321 [“School officials must have the leeway to maintain order on school premises and secure a safe environment in which learning can flourish.”]. ALSO SEE *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325, 339 [“Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”].
86. See *In re William V.* (2003) 111 Cal.App.4th 1464, 1471 [“We see no reason to distinguish for this purpose between a non law enforcement security officer and a police officer on assignment to a school as a resource officer.”].
87. *In re Randy G.* (2001) 26 Cal.4th 556, 559.
88. See *New Jersey* v. *T.L.O.* (1985) 469 U.S. 325 [detention for smoking in a lavatory]; *Wofford* v. *Evans* (4th Cir. 2004) 390 F.3d 318, 327 [detention to investigate a report that a student was carrying a gun].
89. (2003) 111 Cal.App.4th 1464.
90. See Penal Code § 627.2.
91. (2000) 85 Cal.App.4th 975.

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12.3: Huff v. City of Burbank

PETITIONER

Darin Ryburn, et al.

RESPONDENT

George R. Huff, et al.

LOCATION

Bellarmine-Jefferson High School

DOCKET NO.

11-208

DECIDED BY

Roberts Court

LOWER COURT

United States Court of Appeals for the Ninth Circuit

CITATION

565 US _(2012)

GRANTED

Jan 23, 2012

DECIDED

Jan 23, 2012

Facts of the case

Darin Ryburn and Edmundo Zepeda were Burbank Police Officers. Vincent Huff was a student at Bellarmine-Jefferson High School, who was rumored to be intending to "shoot-up" the school. Ryburn, Zepeda, and other officers arrived at the school to investigate the rumors. After conducting some interviews, the officers went to Vincent Huff's home. The officers attempted to speak with Vincent Huff and his parents. Eventually, Mrs. Huff came out of the house, but she refused to let the officers to enter her home. After the police asked if there were any weapons in the house, Mrs. Huff ran back into the house. Officer Ryburn followed Mrs. Huff into the house, because he believed that Mrs. Huff's behavior was unusual and further believed that the officers were in danger. Officer Zepeda and the other officers followed Officer Ryburn into the house. The officers briefly questioned the Huffs and left after concluding that Vincent Huff did not actually pose any danger.

The Huffs brought an action against the officers. The Huffs claimed that the officers entered their home without a warrant and thereby violated the Huffs' Fourth Amendment rights. The district court entered a judgment in favor of the officers, concluding that the officers had qualified immunity because Mrs. Huff's odd behavior made it reasonable for the police to believe that they were in imminent danger. The U.S. Court of Appeals for the Ninth Circuit partially reversed the district court's ruling. The court acknowledged that the police officers could enter a home without a warrant if they reasonably believed that immediate entry was necessary to protect themselves or others from imminent serious harm, but the court concluded that the officers' belief that they were in serious immediate danger was objectively unreasonable. The officers appealed the Supreme Court.

Question

Did the police officers violate the Fourth Amendment by entering a home without a warrant when the homeowner exhibited unusual behavior leading the officers to believe they were in danger?

Conclusion

Decision for Darin Ryburn, Et Al.

Per Curiam Opinion

UNANIMOUS

Roberts

Scalia

Kennedy

Thomas

Ginsburg

Breyer

Alito

Sotomayor

Kagan

No. In an unsigned, *percuriam* opinion, the Court disagreed with the lower court's decision and held that there was no Fourth Amendment violation on the facts presented by this case. The Court stated that the Fourth Amendment permits the police to enter a residence if an officer has a reasonable basis for concluding that there is an imminent threat of danger. The Court determined that reasonable police officers could have come to the conclusion that the violence was imminent and that they were therefore permitted to enter a home without a warrant.

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12.4: Kentucky v. King

PETITIONER	RESPONDENT
Kentucky Hollis	Deshaun King

LOCATION

Residence of Hollis King

DOCKET NO.	DECIDED BY
09-1272	Roberts Court

LOWER COURT

Kentucky Supreme Court

CITATION

563 US 452 (2011)

GRANTED

Sep 28, 2010

ARGUED

Jan 12, 2011

DECIDED

May 16, 2011

ADVOCATES

Joshua D. Farley *for the petitioner*

Ann O'Connell *Assistant to the Solicitor General, Department of Justice, as amicus curiae, supporting the petitioner*

Jamesa J. Drake *for the respondent*

Facts of the case

Police officers in Lexington, Ky., entered an apartment building in pursuit of a suspect who sold crack cocaine to an undercover informant. The officers lost sight of the suspect and mistakenly assumed he entered an apartment from which they could detect the odor of marijuana. After police knocked on the door and identified themselves, they heard movements, which they believed indicated evidence was about to be destroyed. Police forcibly entered the apartment and found Hollis King and others smoking marijuana. They also found cash, drugs and paraphernalia. King entered a conditional guilty plea; reserving his right to appeal denial of his motion to suppress evidence obtained from what he argued was an illegal search.

The Kentucky Court of Appeals affirmed the conviction, holding that exigent circumstances supporting the warrantless search were not of the police's making and that police did not engage in deliberate and intentional conduct to evade the warrant requirement. In January 2010, the Kentucky Supreme Court reversed the lower court order, finding that the entry was improper. The court held that the police were not in pursuit of a fleeing suspect when they entered the apartment, since there was no evidence that the original suspect even knew he was being followed by police.

Question

Does the exclusionary rule, which forbids the use of illegally seized evidence except in emergency situations, apply when the emergency is created by lawful police actions?

Conclusion

8–1 Decision for Kentucky Majority Opinion by Samuel A. Alito,

FOR	AGAINST
Sotomayor Kagan Breyer Kennedy Roberts Alito Scalia Thomas	Ginsburg

The Supreme Court reversed and remanded the lower court order in a decision by Justice Samuel Alito. "The exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment," Alito wrote for the majority. Justice Ruth Bader Ginsburg dissented, contending that "the Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."

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CHAPTER OVERVIEW

13: The Warrant Process

13.1: Search Warrants
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13.3: Executing Search Warrants
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13.1: Search Warrants

There's a simple way for the police to avoid many complex search and seizure problems: Get a search warrant.[1]

That's good advice, except for two things: Officers cannot simply "get" a search warrant; they must *apply* for one. And there is nothing "simple" about the application process. On the contrary, even with the advent of email warrants it is one of the more tedious and vexing legal hoops through which officers are required to jump.[2] While some veterans, having suffered through the process for many years, can crank out search warrants with relative ease, for most officers it's a challenge. In this article, we hope to make it much less challenging. But before we begin, it will be helpful to briefly explain the organization of the subject and some of its terminology. The legal issues can be divided into two broad categories. The first consists of the various requirements for establishing probable cause, a subject we covered in the Fall 2008 edition. The second—which is the subject of this article—covers the requirements as to the form and content of the warrant and, except for demonstrating probable cause, the affidavit. Although some of these requirements are technical in nature, most are substantive and, if not complied with, will invalidate a warrant just as surely as the absence of probable cause.

As for terminology, the following are the principal terms that are used in the law of search warrants and which are used in this article:

AFFIDAVIT: An affidavit is a document signed under penalty of perjury.[3]

MAGISTRATE: In the context of search warrants, the term "magistrate" is synonymous with "judge."[4] In this article, we use the terms interchangeably.

GENERAL WARRANT: A warrant will be deemed "general"—and therefore unlawful—if it contained such a broad description of the evidence to be seized that officers were permitted to conduct a virtually unrestricted search of the premises.[5] Examples include warrants to search for "all evidence" or "stolen property." Unless the severance rule applies (discussed later), evidence seized pursuant to a general warrant will be suppressed.

OVERBROAD WARRANT: A warrant is "overbroad" if its affidavit failed to demonstrate probable cause to believe that each of the things that officers were authorized to search for and seize were, in fact, evidence of a crime and would be found in the place to be searched.[6] Overbreadth is a fatal defect unless the severance rule applies.

PARTICULARITY: The term "particularity" refers to the constitutional requirement that a search warrant must clearly describe (1) the places and things that officers may search, and (2) the property they are permitted to search for and seize.[7] (The terms "overbreadth" and "particularity" are often confused.[8])

The Affidavit

A search warrant affidavit is a document signed under penalty of perjury that contains the following: (1) the statement of probable cause, (2) descriptions of the place to be searched and the evidence to be seized, (3) justification for implementing special procedures (if any), and (4) other information required by California law.

The statement of probable cause

Writing the statement of probable cause is, by far, the most difficult and time consuming part of the process, as the affiant must persuade the judge there is a fair probability that the evidence he is seeking exists, that it is now located at the place to be searched, and that it will still be there when the warrant is executed.[9]

ORGANIZE THE FACTS: The affiant should usually start by jotting down the main facts upon which probable cause will be based. This will reduce the chances that important facts are inadvertently left out.[10] Although a statement of probable cause will not be judged as "an entry in an essay contest,"[11] the affiant should present the facts in a logical sequence. This is especially important in complex cases.[12]

EDIT AND SIMPLIFY: The statement of probable cause should seldom include everything that officers have learned about the crime under investigation and the suspect. Instead, it "need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense [probable cause] determination."[13]

WHO SHOULD BE THE AFFIANT? The affiant should normally be the investigator who is "most directly involved in the investigation and most familiar with the facts stated in the affidavit."[14] While most affiants are peace officers, anybody can be one; e.g., a prosecutor or an informant.[15]

TRAINING AND EXPERIENCE: The affiant should include a *brief* statement of his training and experience if (1) the existence of probable cause will be based, even partly, on his opinion concerning the meaning or significance of information contained in the affidavit; or (2) the description of the evidence to be seized will be based in part on an inference he has drawn. (We will discuss descriptions based on training and experience later in this article.) Note that the affiant need not have qualified as an expert witness in court to offer an opinion.[16]

USING ATTACHMENTS: Probable cause may be based in part on information that is contained in another document, such as a police report, a fingerprint or DNA report, a witness's statement, or a photograph. The subject of incorporating attachments into affidavits and warrants is covered later in the section on describing evidence.

SHOULD A PROSECUTOR REVIEW IT? A prosecutor (preferably one who knows the law of search and seizure) should ordinarily review an affidavit if there are legal issues with which the affiant is unfamiliar or uncertain. A review is also recommended if the existence of probable cause is a close question. This is because a prosecutor's approval is a circumstance that the courts will consider in determining whether the good faith rule applies.[17]

Other affidavit requirements

In addition to the statement of probable cause, the affidavit must include the following.

DESCRIPTIVE INFORMATION: The affidavit must contain descriptions of (1) the person, place, or thing to be searched; and (2) the evidence to be seized.[18] Although this information must also appear on the warrant, it must be included in the affidavit because the affiant must swear that it is true, and only the information contained in the affidavit is subject to the oath. The requirements pertaining to the quality and quantity of descriptive information are covered later in this article.

GROUNDS TO UTILIZE SPECIAL PROCEDURES: The affiant will usually request authorization to implement one or more special procedures, such as night service, no-knock entry, or affidavit sealing. While such authorization must appear on the warrant, the affidavit must contain the facts upon which the request is based. We will cover the subject of special procedures in the Summer 2011 edition.

WHEN TO SIGN: The affiant must not sign the affidavit until he is directed to do so by the judge. This is because the judge must state on the warrant that the affidavit was "sworn to and subscribed before me." See "The jurat," below.

The Warrant

Technical Requirements

Because a search warrant is a court order,[22] it must contain the information that is necessary to constitute an enforceable judicial command, plus certain information required by California statute.

THE HEADING: Like any court order, the heading must identify the issuing court:

SUPERIOR COURT OF CALIFORNIA

County of

IDENTIFY THE OFFICERS: The warrant must identify the officers who are ordered to conduct the search. Thus, most warrants begin with the following: *The People of the State of California to any peace officer in the County of* .[23]

THE OATH: The affiant must sign the affidavit under oath; e.g., *"I declare under penalty of perjury that the foregoing is true."*[19] By doing so, he is swearing that (1) the information within his personal knowledge is accurate; and (2) the information that was not within his personal knowledge was, in fact, received by him from others, and that he had no reason to doubt its accuracy.[20] Note it is inappropriate for affiants to swear that their information establishes probable cause (this is a legal determination to be made by the judge), or that they "believe" they have probable cause (this is irrelevant). As the court noted in *People* v. *Leonard*, "Warrants must be issued on the basis of facts, not beliefs."[21]

WHAT COUNTY? The county that is listed must be the same as the county in which the issuing judge sits. For example, if the warrant was issued by a judge in Alameda County, the warrant must be directed to "any peace officer in the County of Alameda." As we will discuss in the Summer 2011 edition, this requirement will not bar a judge from issuing a warrant to search a person, place, or thing located in another county in California.

THE JURAT AND IDENTIFICATION OF THE AFFIANT:

The warrant must identify the affiant,24 and the judge must confirm by means of the jurat that the affiant signed the affidavit under oath in the judge's presence; e.g., *"An affidavit by [name of affiant], sworn and subscribed before me on this date . . . "* 25 Note that if the affiant is a confidential informant who is covered under California's nondisclosure privilege, the warrant may be modified as follows: *"An affidavit by a confidential informant . . ."* 26

DISPOSITION OF SEIZED EVIDENCE

The warrant must include instructions as to what the officers must do with any evidence they seize. Although Penal Code sections 1523 and 1529 state that the officers must bring the evidence to the judge, Penal Code sections 1528(a) and 1536 state that the officers must retain it pending further order of the court. Because judges do not want officers to deliver to their chambers loads of drugs, firearms, stolen property, and other common fruits of search warrants, the Court of Appeal has ruled that the evidence must be retained by the officers unless the warrant directs otherwise.27

Note that because the officers hold the evidence on behalf of the court, they may not transfer possession of it to any other person or agency except per further court order. As the California Supreme Court explained, "Law enforcement officers who seize property pursuant to a warrant issued by the court do so on behalf of the court, which has authority pursuant to Penal Code section 1536 to control the disposition of the property."28

EVIDENCE CLASSIFICATION: Penal Code section 1524(a) states that search warrants may be issued for certain types of evidence, depending mainly on whether the crime under investigation was a felony or misdemeanor. (See this footnote for a listing of seizable evidence.29) Consequently, the affiant should specify (usually by checking one or more preprinted boxes) that the listed evidence falls into one or more of these categories.

The question has arisen whether officers who are investigating a misdemeanor can obtain a warrant to search for evidence that is not listed in Penal Code section 1524(a). It is arguable that a judge could do so because the statute does not say that judges are prohibited from issuing warrants for other types of evidence; it is merely a permissive statute, and the distinction between prohibitive and permissive statutes has long been recognized by the courts.30 Furthermore, evidence that was obtained by means of a warrant that was constitutionally valid cannot be suppressed on grounds that the warrant violated a state statute.31 As a practical matter, however, judges may be unwilling to issue warrants that do not comply with state law.

FORMS AVAILABLE: Search warrant forms and related documents are available to officers and prosecutors. For information, go to our website: a link to the Alameda County District Attorney's website for law enforcement officers and prosecutors. (click on "Forms").

Describing the Place To Be Searched

The requirement that search warrants describe the people, places, and things that may be searched will be deemed satisfied if the quality and quantity of the descriptive information is such that the search team can "ascertain and identify the place intended" with "reasonable effort."32 While this "reasonable effort" test is somewhat ambiguous, as we will now discuss, the courts have generally agreed on what descriptive information will suffice.

SINGLE-FAMILY RESIDENCES: In most cases, a simple street address will do if the place to be searched is a house, apartment, condominium, or motel room.33 If, however, street signs or unit numbers are lacking or obscured, the warrant must include a physical description of the premises or some other information that will direct the officers to the right place; e.g., a photograph, diagram, map, or image from Google Earth or Google Street View.34 Although affiants sometimes describe the premises by inserting the name of the owner, this is not a requirement.35 Moreover, it would ordinarily be of dubious value because ownership is a legal determination that seldom can be made at the scene prior to entry.

DETACHED BUILDINGS: If officers have probable cause to search detached structures on residential property (e.g., detached garage, storage shed), the warrant must indicate which structures may be searched. There are two ways to do this. First, the affiant

can describe their physical characteristics; e.g., “The house at 415 Hoodlum Place and the red storage shed located approximately 100 feet behind the house.” The other method is to insert the word “premises” in the description of the place to be searched (e.g., “The *premises* at 415 Hoodlum Place”) as the courts have interpreted the word “premises” as expanding the scope of the search to all outbuildings that are ancillary to the main house.[36]

MULTI-OCCUPANT RESIDENCES: A multi-occupant residence is loosely defined as a building that has been divided into entirely separate living units, each under the exclusive control of different occupants. For example, a motel is a multi-occupant building, while a single motel room is a single-family residence. Another example of a multiple-occupant residence (although unusual) is found in *Mena v. Simi Valley* [37] where a single-family house was occupied by several unrelated people, each of whom occupied rooms that were “set up as studio apartment type units, with their own refrigerators, cooking supplies, food, televisions, and stereos.”

The rule regarding multiple-occupant residences is straightforward: If, as is usually the case, officers have probable cause to search only a particular living unit, the warrant must direct them to search only *that* unit; e.g., “apartment 211,” “the lower unit of the two-story duplex,” “room number one of the Bates Motel.”[38] As the court explained in *People* v. *Estrada*, a warrant for a multiple-occupant residence must “limit the search to a particular part of the premises either by a designation of the area or other physical characteristics of such part or by a designation of its occupants.”[39]

Note that a single-family residence does not turn into a multiple-occupant residence merely because the occupants had separate bedrooms; e.g., roommates. For example, in *People v. Gorg* [40] officers in Berkeley developed probable cause to believe that a man named Fontaine was selling marijuana out of a three-bedroom flat that he shared with Gorg and another man. So they obtained a warrant to search the flat and, in the course of the search, found marijuana in Gorg’s bedroom. Gorg argued that the flat was a multiple-occupant residence and, therefore, the search of his bedroom was unlawful because the warrant did not restrict the search to Fontaine’s bedroom and the common areas. The court disagreed, explaining:

> [The warrant] was issued for a search of the lower flat in question, and Fontaine was named as the one occupying the named premises. Actually three people lived in this flat, sharing the living room, kitchen, bath and halls. The three bedrooms opened on these rooms and were not locked. All of the rooms constituted one living unit.

BUSINESSES: If the business occupies the entire building, and if there is probable cause to search the entire business, the warrant can simply identify the building by its street address and direct officers to search the entire structure. But, as with multipleoccupant residences, a more restrictive description will be required if probable cause is limited to a certain area or room.[41]

DETACHED COMMERCIAL STRUCTURES: If officers also have probable cause to search structures that are ancillary to the main business office, the affiant should ordinarily describe each building for which probable cause exists. This is because the relationship between the various structures on commercial property is often ambiguous.

VEHICLES: It is sufficient to identify vehicles by their license number and a brief description. If the license number is unknown or if there are no plates on the vehicle, it may be identified by its VIN number, or its location and a detailed description.[42] A warrant may authorize a search of “all vehicles” on the premises, but only if there is probable cause to believe that at least some of the listed evidence will be found in *each* vehicle.[43]

PEOPLE A warrant to search a person must identify the person by name, physical description, or both.[44] If necessary, a photograph of the person may be attached to the warrant; e.g., DMV or booking photo.[45] A warrant may authorize a search of “all residents” of the premises or everyone who is present when officers arrive, but only in those rare cases in which the affidavit establishes probable cause to believe that at least some of the listed evidence will be found on *every* resident or occupant.[46]

COMPUTERS: If officers have probable cause to search a home or business for information, data, or graphics, it is usually reasonable to believe that some or all of it has been stored in a computer or external storage device. But officers will seldom know what type of computer or device they will find; and the only way they can learn is to obtain a warrant. A classic Catch-22 situation.

Some courts have resolved this dilemma by ruling that authorization to search all computer devices on the premises will be implied if the warrant authorized a search for data that could have been stored digitally.[47] But the better practice is to seek express authorization by particularly describing the data or graphics to be seized, then adding language that authorizes a search for it in any form in which it could have been stored; e.g., *“[After particularly describing the data to be seized] whether stored on paper or on*

electronic or magnetic media such as internal or external hard drives, diskettes, backup tapes, compact disks (CDs), digital video disks (DVDs), optical discs, electronic notebooks, video tape, or audio tape." 48

Describing the Evidence

Next to establishing probable cause, the most difficult part of the application process is usually describing the evidence to be seized. This is because officers will not know exactly what the evidence looks like unless they had seen it. As we will discuss, however, the problem is not insurmountable, as the courts have ruled that descriptions may be based on reasonable inference.

But before going further, we must stress that providing a description of the evidence is not a mere "technical" requirement that requires little effort. On the contrary, it is crucial because a detailed description provides the courts with the necessary assurance that the officers will confine their search to places and things in which specific evidence may be found, and that they will seize only evidence for which probable cause exists. Thus, the Ninth Circuit noted that search warrants will be deemed invalid "when they are so bountiful and expansive in their language that they constitute a virtual, all-encompassing dragnet of personal papers and property to be seized at the discretion of the State."49

It is understandable that affiants may worry that their searches will be unduly restricted if they describe the evidence too narrowly. But this is seldom a problem because most warrants include authorization to search for small objects (such as drugs) or documents (such as indicia) that can be found almost anywhere on the premises.

The "particularity" requirement

While a warrant must contain a description of the evidence to be seized, not just any description will do. The description must be "particular," a word having such significance that it was incorporated into the Fourth Amendment to the United States Constitution.50 Thus, the Supreme Court ruled that "a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."51

What, then, constitutes a "particular" description? Although the issue "has been much litigated with seemingly disparate results,"52 a description will ordinarily suffice if it imposes a "meaningful restriction" on the scope of the search,53 or if it otherwise "sets out objective standards"54 by which officers can determine what they may, and may not, search for and seize.

Later, we will discuss specific applications of this test. But first, it is necessary to cover the principles that the courts apply in determining whether a description was sufficiently particular, and also some practices that have tended to cause problems.

PRACTICAL –NOT ELABORATE–DESCRIPTIONS

While some courts in the past elevated form over substance and required technical precision and elaborate specificity,55 that has changed. Today, as the Court of Appeal observed, "the requirement that a search warrant describe its objects with particularity is a standard of 'practical accuracy' rather than a hypertechnical one."56

Consequently, a description will suffice if it contains just the amount of information that is reasonably necessary to identify the evidence to be seized.57 Or, in the words of the First Circuit, the warrant must provide "clear, simple direction":

Specificity does not lie in writing words that deny all unintended logical possibilities. Rather, it lies in a combination of language and context, which together permit the communication of clear, simple direction.58

TOTALITY OF DESCRIPTIVE INFORMATION

In determining whether a description was sufficiently particular, the courts will consider the descriptive language as a whole, meaning they will not isolate individual words and ignore the context in which they appeared.59 As the Supreme Court observed, "A word is known by the company it keeps."60

REASONABLY AVAILABLE INFORMATION

As noted, it happens that, despite their best efforts, officers are simply unable to provide a detailed description of the evidence. In these situations, a description will ordinarily suffice if the affiant provided as much descriptive information as he had or could have obtained with reasonable effort (including, as we will discuss later, as much descriptive information as he could reasonably infer).61 Thus, the Eleventh Circuit pointed out the following in *U.S.* v. *Santarelli*:

> There are circumstances in which the law enforcement officer applying for a warrant cannot give an exact description of the materials to be seized even though he has probable cause to believe that such materials exist and that they are being used in

the commission of a crime. In these situations we have upheld warrants when the description is as specific as the circumstances and the nature of the activity under investigation permit.62

This also means, however, that a warrant is apt to be invalidated if officers could have—but did not— provide a particular description. For example, in *U.S. v. Stubbs* the court ruled that a warrant obtained by IRS agents to search the defendant's office for evidence of tax evasion was not sufficiently particular because, as the court pointed out, "The IRS knew both what the seizable documents looked like and where to find them, but this information was not contained in the warrant."63

Similarly, in *Center Art Galleries v. U.S.*64 officers developed probable cause to search several art galleries for stolen paintings by Salvador Dali. In the course of the investigation, they obtained warrants to search the defendant's galleries for, among other things, "sales records and customer/client information, lithographic and etching plates." But the court ruled this description was insufficiently particular because it "failed to limit the warrants to items pertaining to the sale of Dali artwork." This failure, said the court, was especially egregious because "the government had the means to identify accounts which may have involved Dali artwork. The lead government investigator was aware that a special card was created for the file of all clients who were interested in Dali artwork."

Problem areas

Before we discuss the ways in which officers can provide a particular description, it is necessary to address some issues and practices that have tended to cause problems or confusion.

BOILERPLATE: In the context of search warrants, the term "boilerplate" means a list—usually lengthy— of descriptions copied verbatim from other warrants and affidavits.65 Because boilerplate is now commonly stored in computer files, it now takes only a few clicks or keystrokes to provide *pages* of boilerplated descriptions—much of it worthless, if not potentially destructive.

The problem with boilerplate is that, unless it has been carefully edited, the descriptions it contains often have little or no resemblance to the evidence for which there is probable cause. Thus, warrants that authorize searches for boilerplated evidence often contain overbroad descriptions that may render the warrant invalid unless, as discussed below, the severance rule applies. This does not mean that officers should never utilize boilerplate. As we will discuss later, it may properly be used to provide descriptions of evidence that can only be described by inference.

TRAINING AND EXPERIENCE: Like boilerplate, statements by affiants of their training and experience tend to be too lengthy and are frequently unnecessary. In the context of describing evidence, they are usually relevant only if the description was based on an inference that, in turn, was based on the affiant's training and experience; e.g., a description of drug paraphernalia based on the affiant's knowledge of the common instrumentalities used by drug users and traffickers. (For a discussion of training and experience as it pertains to establishing probable cause, see "The Affidavit," above.)

"AMONG OTHER THINGS": Affiants will sometimes provide a particular description of some evidence, then add some language that authorizes a search for similar things that have not been described; e.g., "including, but not limited to," "among other things," "etc." Such indefinite language—sometimes called a "wildcard"66 or a "general tail"67—may render a warrant insufficiently particular if, when considered in context, it authorizes an unrestricted search. For example, a warrant that simply authorizes a search for "Heroin, among other things" is insufficiently particular (and also overbroad) because it contains no restriction on what officers may search for and seize. Thus, in *Aday v. Superior Court* 68 the California Supreme Court invalidated a warrant to search for "all other records and paraphernalia" connected with the defendants' business because, said the court, "[t]he various categories, when taken together, were so sweeping as to include virtually all personal business property on the premises and placed no meaningful restriction on the things to be seized."

Similarly, in *U.S. v. Bridges* 69 the affiant described the evidence to be seized as all records relating to the suspect's clients and victims, "including but not limited to" certain records that were particularly listed in the warrant. But because this language effectively authorized a search for "all records"— regardless of whether they were particularly described—the court ruled the warrant was invalid. As it pointed out, "[I]f the scope of the warrant is not limited to the specific records listed on the warrant, it is unclear what is its precise scope or what exactly it is that the agents are expected to be looking for during the search."

This does not mean that wildcards are forbidden. In fact, there are three situations in which they are regularly used without serious objection. First, there are situations in which the evidence is limited to fruits or instrumentalities of a certain crime, and the wildcard could be interpreted as merely providing descriptive examples of seizable evidence pertaining to that crime.70 For

instance, in *Toubus v. Superior Court* 71 a warrant authorized a search for "any papers or writings, records that evidence dealings in controlled substances, including, but not limited to address books, ledgers, lists, notebooks, etc." In ruling that this language did not render the warrant insufficiently particular, the court pointed out that it permitted a seizure of only those things pertaining to "dealings in controlled substances."

Second, a wildcard may be appropriate when a warrant authorized a search of a crime scene, but officers could not be expected to know exactly what types of evidence pertaining to the crime they would find. For example, in *People* v. *Schilling* 72 the body of a woman was discovered in the Angeles National Forest. Having developed probable cause to believe that Schilling had shot and killed the woman in his home, a homicide detective with the Los Angeles County Sheriff's Department obtained a warrant to search Schilling's house for, among other things, "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, photographs, measurements, bullet holes, hair, fibers." On appeal, Schilling argued that the "but not limited to" language rendered the warrant insufficiently particular, but the court disagreed, pointing out that the warrant "simply authorized seizure of additional scientific evidence" pertaining to the murder that the affiant "was unable to detail."

Third, as we will discuss later, wildcards are commonly used to provide examples of the types of indicia that officers may seize.

THE SEVERANCE EXCEPTION: If the affiant fails to satisfactorily describe some, but not all, of the listed evidence, the courts will ordinarily suppress only those items that were inadequately described.73 For example, if items A and B were adequately described but item C was not, it is likely that only item C would be suppressed. The severance exception will not, however, be applied if the inadequately-described evidence so predominated the warrant that it effectively authorized a general search. As the Ninth Circuit observed, "[S]everance is not available when the valid portion of the warrant is a relatively insignificant part of an otherwise invalid search."74 For example, in *Burrows* v. *Superior Court* the court ruled that, "[a]ssuming arguendo that the warrant is severable, the direction to seize 'any file or documents' relating to the [suspects] is too broad to comport with constitutional requirements."75 (Note that severance may also be appropriate when the affidavit fails to establish probable cause to search for some— but not all—of the listed evidence.76)

Basics of providing particular descriptions

Although the courts understand that officers may sometimes be unable to provide much descriptive information, they expect them to utilize all reasonably available means to limit, at least to some extent, the scope of their warranted searches. The following are the most common ways in which this is done.

AVOID GENERAL TERMS: The use of precise language to describe evidence is the mark of a particular description. The following are examples:

- illegal drugs consisting of heroin and crack cocaine 77
- records relating to loan sharking and gambling, including pay and collection sheets, lists of loan customers, loan accounts, line sheets, bet slips, and tally sheets 78
- blue plaid long-sleeved flannel shirt 79
- fingerprints, powder burns, blood, blood spatters, bullet holes 80
- vehicles with altered or defaced identification numbers 81
- a 14-inch security hole opener cutter attached to a hole opener 82
- oil and water drill bits in sizes from four inches to 18 inches, having altered or defaced serial numbers 83

In contrast, the following descriptions were plainly inadequate:

- stolen property 84
- all other property owned by [the theft victim].85
- any and all illegal contraband 86
- certain personal property used as a means of committing grand larceny 87
- all business records and paraphernalia 88
- other evidence 89

DESCRIBE BY LOCATION: If officers know exactly where on the premises the evidence is located (e.g., in a certain room, closet, cabinet, file, or box), this information may be included in the description.90 But unless officers are certain that the evidence

will be found only in that location when the warrant is executed, the affiant should explain that this information is being provided only to assist in the identification of evidence, not to restrict the scope of the search.

UTILIZING ATTACHMENTS: One of the most efficient means of inserting information into affidavits and warrants—whether to establish probable cause or to provide a description—is to incorporate documents that already contain that information; e.g., witness statements, prior affidavits, police reports, autopsy reports, rap sheets, business records, maps, photographs. As the court observed in *State* v. *Wade*, incorporation "is a recognized method of making one document of any kind become a part of another separate document without actually copying it at length in the other."[91]

An attachment will not, however, be deemed incorporated merely because it was submitted to the judge along with the affidavit and search warrant.

Instead, the law imposes three requirements that are designed to eliminate any confusion as to the status of supplementary documents:

1. **IDENTIFY THE ATTACHMENT**: The affiant must clearly identify the document that is being incorporated into the warrant or affidavit.[92] This is typically accomplished by assigning it an exhibit number or letter, then writing that number or letter in a conspicuous place at the top of the attachment.
2. **INCORPORATE BY REFERENCE**: The affiant must then insert into the search warrant or affidavit "appropriate words of reference"[93] or other "clear words"[94] that give notice to the judge that the identified document is being incorporated.[95] As the Third Circuit explained in *United States* v. *Tracey*, "Merely referencing the attached affidavit somewhere in the warrant without expressly incorporating it does not suffice." [96] Although there are no "magic" or required words of incorporation,[97] it is usually best to use the direct approach; e.g., *"The police report containing the list of stolen property, identified as Exhibit 4, is attached hereto and incorporated by reference."* [98]
3. **PHYSICAL ATTACHMENT**: If the attachment is being utilized solely to establish probable cause in the affidavit, the courts do not require that it be physically attached to the affidavit [99] (but it's a good practice). If the attachment is used to describe the place to be searched or the evidence to be seized, the United States Supreme Court indicated in *Groh* v. *Ramirez* that the attachment need only be "present" when the warrant is served; i.e., physical attachment is not required.[100] But because some pre-*Groh* cases in California required physical attachment,[101] it is recommended that officers avoid this issue by affixing to the warrant any attachments containing descriptive information.

Two other things about attachments to warrants and affidavits. First, they must be legible.[102] Second, because judges are required to read all attachments to affidavits,[103] officers should not incorporate lengthy attachments that contain only a small amount of relevant information. Instead, this information should be extracted from the attachment or summarized in the affidavit.

SEARCH PROTOCOLS: If the affiant is unable to particularly describe the evidence to be seized, but there is a procedure that will enable the search team to identify it after they enter the premises, it may be deemed sufficiently described if the search warrant sets forth a procedure—commonly known as a "protocol"—by which officers could make the determination. For example, if officers want to look for stolen property that may have been intermingled with similar looking items, they may seek authorization to employ a protocol that would permit them to seize items that conform to certain criteria; e.g., a particular VIN or serial number.[104]

One of the most common uses for protocols today is in computer searches when officers expect to find seizable files intermingled with non-seizable files. In such cases, they may seek authorization to conduct the search pursuant to a protocol that sets forth the manner in which the search team can distinguish between the two. For example, in one case the protocol required "an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches."[105]

Having covered the general principles pertaining to descriptions of evidence, we will now look at the ways in which evidence may be described when the description is based on direct observation or inference. We will also examine warrants to search for entire classes of items and documents, including documents stored in computers.

Description based on direct observation

Officers will sometimes seek a warrant to search for evidence that an officer, victim, or witness had previously observed, such as property that the victim of a burglary had reported stolen, a handgun or clothing that was seen in a surveillance video, or drug lab

equipment that an undercover officer or informant had seen when negotiating a drug purchase. Describing this type of evidence is, of course, much easier than describing evidence whose appearance can only be based on inference. But, as discussed earlier, because the affiants in such cases have the ability to provide a particular description, the courts will readily invalidate a warrant if they fail to do so.

For example, in *Millender* v. *County of Los Angeles* 106 a woman notified sheriff 's deputies that her boyfriend, Jerry Bowen, had tried to shoot her during an argument. Although the woman described the weapon as a "black sawed-off shotgun with a pistol grip," and even though she provided deputies with a photograph of the weapon, they obtained a warrant to search Bowen's house for the following: *"All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition."* In ruling that this language rendered the warrant insufficiently particular, the court said:

> [W]here the police do have information more specifically describing the evidence or contraband, a warrant authorizing search and seizure of a broader class of items may be invalid.

Another example is found in *People* v. *Tockgo* 107 where officers in Los Angeles developed probable cause to believe that boxes containing stolen cigarettes were located in a certain liquor store. They had also learned from the victim that certain invoice numbers were printed on each box, that each box contained a tax stamp, and that the cigarette cartons were sealed with a unique colored glue. Although this information was contained in the affidavit, it was omitted from the warrant, which simply described the evidence to be seized as "cigarettes, cellophane wrappers, cigarette cartons." In ruling that this description was insufficient, the court pointed out that "[t]he vice of this uncertainty is particularly objectionable because the procuring officer's affidavit provided a ready means for effective description and identification of the particular cigarette packages to be seized."

Descriptions based on inference

In many cases, an affiant cannot provide a particular description of evidence inside a home or business because, for example, no officer or informant had been inside or because the evidence was hidden. As we will now discuss, in situations such as these officers may ordinarily provide a description that, based on their training and experience, can be reasonably inferred.

FRUITS AND INSTRUMENTALITIES OF A CRIME

Descriptions are commonly based on inference when officers have probable cause to believe that the premises are being used to carry out a certain type of criminal activity and, thus, they have probable cause to believe that the premises contain the common fruits and instrumentalities of such a crime.108 For example, in *United States* v. *Holzman* 109 officers in Scottsdale, Arizona arrested Holzman and Walsh for using and possessing stolen credit cards. Having probable cause to believe they were co-conspirators in an identify theft operation, but not knowing exactly what fruits and instrumentalities they possessed, an officer obtained a warrant to search their hotel rooms for, among other things, "All credit cards under miscellaneous issuance names and account numbers" and "credit card drafts under miscellaneous issuance and names." In ruling that these descriptions were sufficiently particular, the court said, "In the absence of complete and detailed knowledge on the part of the police, the magistrate was justified in authorizing the search for these generic classes of items."

Similarly, if the affiant has probable cause to believe that the suspect is selling drugs out of his house, a general description of typical sales paraphernalia and instrumentalities ought to suffice; e.g., items commonly used to ingest, weigh, store, and package drugs; documents identifying buyers and sellers; drug transaction records.110

Another example is found in cases where officers are seeking a warrant to search for evidence of sexual exploitation of a child. Here, a description might include such things as sexually explicit material or paraphernalia used to lower the inhibition of children, sex toys, photography equipment, address ledgers, journals, computer equipment, digital and magnetic storage devices.111 Finally, a warrant to search for evidence of loan sharking or gambling might authorize a search for pay and collection sheets, lists of loan customers, loan accounts and telephone numbers, line sheets, and bet slips.112

EVIDENCE AT CRIME SCENES: At crime scenes, officers will often have probable cause to believe that certain evidence will be found on the premises depending on the nature and freshness of the crime. But because they cannot know exactly what's there, the courts permit them to describe the evidence in terms of what is commonly found at the scenes of such crimes.

For example, in *People* v. *Schilling*,113 discussed earlier, an LASD homicide detective developed probable cause to believe that Schilling had shot and killed an out-call masseuse whose body had been dumped in a remote area. Because the woman had an appointment to meet with Schilling at his home shortly before the approximate time of death, the detective sought a warrant to

search the house for evidence that, based on his training and experience, would likely be found at the scene of a shooting; namely, "scientific evidence, including but not limited to fingerprints, powder burns, blood, blood spatters, bullet holes, hairs, fibers." The search turned up incriminating evidence which, according to Schilling, should have been suppressed because the description was too general. But the court disagreed, saying it "was clearly a particularized specification of the scientific evidence that could reasonably be obtained in defendant's residence in light of the facts set forth in [the] affidavit."

Warrant to seize entire class

A warrant may authorize the seizure of every item in a broad class (e.g., all credit cards, all firearms) if there is a fair probability that all such items are evidence. For example, in *Vitali* v. *U.S.*[114] officers obtained a warrant to search Vitali's offices for all Speidel watch bands on the premises, having developed probable cause to believe that he was selling these types of watch bands from a back room. In ruling the warrant was sufficiently particular, the First Circuit said:

> Where goods are of a common nature and not unique there is no obligation to show that the ones sought (here a substantial quantity of watch bands) necessarily are the ones stolen, but only to show circumstances indicating this to be likely.

If officers have probable cause to believe that only some of the items in the class are evidence, the warrant may authorize a search for, and inspection of, all items in the class to determine which are seizable if the warrant provides them with some criteria for making this determination. As the Ninth Circuit explained:

> When there is probable cause to believe that premises to be searched contains a class of generic items or goods, a portion of which are stolen or contraband, a search warrant may direct inspection of the entire class of all of the goods if there are objective, articulated standards for the executing officers to distinguish between property legally possessed and that which is not.[115]

An example of a case in which a warrant failed to provide officers with an adequate means of identifying seizable evidence in a class is found in *U.S.* v. *Klein.*[116] Here, officers developed probable cause to believe that the owners of a music store were selling pirated 8-track tapes. So they obtained a warrant to search the store for "8-track electronic tapes and tape cartridges which are unauthorized 'pirate' reproductions." In ruling the warrant was not sufficiently particular, the court noted that "the affidavit and the warrant failed to provide any before the fact guidance to the executing officers as to which tapes were pirate reproductions."

In cases such as *Klein* where a cursory examination of a class of items may be insufficient to identify seizable evidence, the warrant may include a protocol (discussed on page 14), describing a procedure that officers must utilize to make the determination. For example, in *U.S.* v. *Hillyard* [117] FBI agents developed probable cause to believe that stolen vehicles were being stored in a certain wrecking yard. Although the agents were able to describe some of the stolen vehicles, they had probable cause to believe there were others on the premises. So they obtained a warrant authorizing a seizure of the particularly described vehicles plus any others on the premises that "possess altered or defaced identification numbers or which are otherwise determined to be stolen." In upholding the warrant, the court pointed out that "the affidavit explained that vehicle alterations could be discovered by comparing secret identification numbers with those openly displayed, that true numbers could be checked with law enforcement computerized lists."

Describing documents and computer files

The rule that warrants must describe the evidence to be seized with reasonable particularity seems to be enforced more strictly when the evidence consists of documents, whether hard copies or computer files. There are four reasons for this. First, a search for documents is especially intrusive as officers must usually examine every room, container, and computer file in which they may be found. Second, every document and computer file on the premises must ordinarily be read (or at least skimmed) to determine whether it is covered under the warrant.[118] Third, the reading of documents constitutes "a very serious intrusion into personal privacy."[119] Fourth, officers will usually have *some* information that would have made it possible to distinguish between relevant and irrelevant documents.

Even so, the courts require only reasonable particularity. As the court explained in *U.S.* v. *Phillips*:

> A warrant need not—and in most cases, cannot—scrupulously list and delineate each and every item to be seized. Frequently, it is simply impossible for law enforcement officers to know in advance exactly what business records the defendant maintains.[120]

Consequently, a warrant to search for documents, like other types of warrants, will be deemed sufficiently particular if officers described the documents as best they could.

DESCRIPTION LIMITED BY SENDER, RECIPIENT, DATE:

If the relevance of a document depends on who sent it, its date, or to whom it was addressed, this information should be included as it will significantly narrow the description.121

DESCRIPTION LIMITED BY CRIME OR OTHER SUBJECT

MATTER: Probably the most common method of describing documents is to state their subject matter, such as the nature of the crime for which the documents are evidence.122 The following are some examples:

- "Loan records reflecting the $500,000 teamster trust fund loan and its subsequent disbursement."123
- "Drug trafficking records, ledgers, or writings identifying cocaine customers, sources."124
- Documents "pertaining to the Windward International Bank."125
- "All property constituting evidence of the crimes of making and conspiring to make extortionate extensions of credit, financing extortionate extensions of credit, and collections of and conspiracy to collect extortionate extensions of credit."126
- "Books" and "records" that "are being used as means and instrumentalities" by the perpetrators of hijackings.127
- "Title notes and contracts of sale pertaining to the crime of false pretenses pertaining to Lot 13T."128
- "Child pornography."129
- "Documents,photographs, and instrumentalities" constituting harassment and threats.130
- "Monopoly money" and "maps of Churchill County" (Monopoly money was found near the body of the murder victim in Churchill County, Nevada).131

In contrast, the following descriptions of documents were plainly insufficient because they contained absolutely no limiting criteria:

- All financial records.132
- All medical records.133
- Any and all records and paraphernalia pertaining to [defendant's] business.134

Note that a description that is limited only by reference to a broadly-worded criminal statute may not suffice. Thus, affiants who restrict the seizure of documents to general crimes should describe the crime or the manner in which it was carried out;135 e.g., affidavit provided details of defendant's illegal kickbacks to physicians,136 the affidavit "described the extortion scheme in detail, including that [the suspect] possessed a computer-generated database and communicated with Paycom over email."137

ALL DOCUMENTS: **"PERMEATED WITH FRAUD"**

There is a long-standing exception to the specificity requirement for business records when the affiant establishes probable cause to believe that the enterprise was so corrupt—so "permeated with fraud"— that all, or substantially all, of its records would likely constitute evidence of a crime.138 As the Ninth Circuit explained in *United States* v. *Kow:*

> A generalized seizure of business documents may be justified if the government establishes probable cause to believe that the entire business is merely a scheme to defraud or that all of the business's records are likely to evidence criminal activity.139

For example, in *People* v. *Hepner* 140 the California Court of Appeal concluded that authorization to seize all files in a doctor's office was justified under the "permeated with fraud" rule because the affidavit demonstrated that about 90% of his files constituted evidence of insurance fraud. Similarly, in a case involving a precious metals investment scam, *U.S.* v. *Bentley*, the Fourth Circuit upheld a search for "21 categories of documents that collectively covered every business document" on the premises because, said the court, "This is the rare case in which even a warrant stating 'Take every piece of paper related to the business' would have been sufficient. [The business] was fraudulent through and through. Every transaction was potential evidence of that fraud."141

A "permeated with fraud" warrant must not, however, authorize the seizure of all documents if it is reasonably possible to isolate those documents that constitute evidence of the crime.142 For example, if the fraud pertained only to a certain product or occurred only during a certain time period, the warrant should ordinarily authorize a search for documents pertaining only to *that* product or *that* period. Similarly, the Ninth Circuit pointed out in *Solid State Devices, Inc.* v. *U.S.* that, "[w]here a business appears to be engaged in some legitimate activity, this Court has required a more substantial showing of pervasive fraud."143

Finally, it should be noted that the "permeated with fraud" doctrine may also be applied to searches of homes, but the required level of proof of widespread fraud may be greater.144

COMPLEX "PAPER PUZZLE" CASES: The courts may ease the requirement for a particular description of documents in cases where a detailed description is impossible because (1) the crime under investigation was a complex scheme that could only be proved by linking many bits of documentary evidence, and (2) officers described the documents as best they could.145 As the California Supreme Court observed, "In a complex case resting upon the piecing together of many bits of evidence, the warrant properly may be more generalized than would be the case in a more simplified case resting upon more direct evidence."146

For example, in a real estate fraud case, *Andresen* v. *Maryland*, the United States Supreme Court ruled that a warrant to search a lawyer's office for an array of documents was sufficiently particular because, said the Court:

> Like a jigsaw puzzle, the whole picture of petitioner's false-pretense scheme could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little.147

The Court added that, when officers have probable cause to search for large numbers of documents "[t]he complexity of an illegal scheme may not be used as a shield to avoid detection."

Indicia

When a warrant authorizes a search for evidence which, if found, would incriminate the people who own or control the home or business that was searched, affiants will almost always seek permission to search for and seize documents and other things that tend to identify these people. Authorization to search for such things—commonly known as "indicia" or "evidence of dominion and control"—is especially apt to be granted when the primary objective of the warrant is to search for drugs, weapons, child pornography, stolen property, or other fruits or instrumentalities of the crime under investigation.

It is true, of course, that authorization to search for indicia may significantly expand the scope of the search.148 Nevertheless, the additional intrusion is almost always deemed justified by the overriding need for proof of control.149

The problem with indicia is that, while officers can be reasonably certain that it will be found on the premises,150 they can never know for sure what form it will take. Consequently, the courts permit a description of the *types* of things that tend to establish dominion and control, such as the following:

- Delivered mail
- Bills and receipts
- Bail contracts and other legal documents
- Keys to cars, safe deposit boxes, and post office boxes
- Photographs
- Answering machine tapes 151

Note, however, that a description must not be so broad as to permit the seizure of documents that do not establish ownership or control; e.g., "All papers bearing the [suspect's] name."

In the next -, we will continue our discussion of search warrants by examining the various special procedures that may be employed if approved by the issuing judge. These include night and no-knock entry, the sealing of warrants, contingent and out-of-county warrant service, and searches by special masters.

References

1. *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 895.
2. See *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581 ["One of the major difficulties which confronts law enforcement . . . is the time that is consumed in obtaining search warrants."]; *U.S.* v. *Garcia* (7th Cir. 1989) 882 F.2d 699, 703 ["Yet, one of the major practical difficulties that confronts law enforcement officials is the time required to obtain a warrant."].
3. See Code Civ. Proc. § 2003 ["An affidavit is a written declaration under oath, made without notice to the adverse party."].
4. See Pen. Code §§ 807, 808 [magistrates are judges of the California Supreme Court, the Court of Appeal, and Superior Court]
5. See *U.S.* v. *Kimbrough* (5th Cir. 1995) 69 F.3d 723, 727 ["The Fourth Amendment prohibits issuance of general warrants allowing officials to burrow through a person's possessions looking for any evidence of a crime."].

6. See *People* v. *Hepner* (1994) 21 Cal.App.4th 761, 773-74 ["[T]he concept of breadth may be defined as the requirement that there be probable cause to seize the particular thing named in the warrant."]; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based."].
7. See *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Particularity means that the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize."]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024 ["Particularity is the requirement that the warrant must clearly state what is sought."].
8. See *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["The district court only made one inquiry, which explicitly conflated particularly and overbreadth."]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1024 ["We read the Fourth Amendment as requiring 'specificity,' which has two aspects, 'particularity and breadth.'"].
9. See Pen. Code § 1527 ["The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist."]; *Illinois* v. *Gates* (1983) 462 U.S. 213, 238 [probable cause to search exists if "there is a fair probability that contraband or evidence of a crime will be found in a particular place"].
10. See *People* v. *Bell* (1996) 45 Cal.App.4th 1030, 1956 ["[T]he most obvious and routine things are those easiest to forget and their absence least noticeable."].
11. *United States* v. *Harris* (1971) 403 U.S. 573, 579. ALSO SEE *State* v. *Multaler* (Wis. 2002) 643 N.W.2d 437, 447 [an affidavit "is not a research paper or legal brief that demands citations for every proposition"].
12. See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 967 [a 157-page affidavit was "nonindexed, unorganized"].
13. *People* v. *Kurland* (1980) 28 Cal.3d 376, 384.
14. *Bennett* v. *City of Grand Rapids* (5th Cir. 1989) 883 F.2d 400, 407.
15. See *People* v. *Bell* (1996) 45 Cal.App.4th 1030, 1055 ["no section of the [Penal] code requires the person seeking a search warrant be a peace officer"].
16. See *Wimberly* v. *Superior Court* (1976) 16 Cal.3d 557, 565.
17. See *People* v. *Camarella* (1991) 54 Cal.3d 592, 605, fn.5 ["It is, of course, proper to consider . . . whether the affidavit was previously reviewed by a deputy district attorney."]; *U.S.* v. *Otero* (10th Cir. 2009) 563 F.3d 1127, 1135 ["[One of the more important facts. . . is the officers' attempts to satisfy all legal requirements by consulting a lawyer."].
18. See *People* v. *Coulon* (1969) 273 Cal.App.2d 148, 152 ["both the affidavit upon which [the warrant] is based and the warrant itself must describe the place of search with particularity"].
19. See *People* v. *Hale* (2005) 133 Cal.App.4th 942, 947 ["The test of the sufficiency of an officer's oath in support of a search warrant is whether he can be prosecuted for perjury should his statement of probable causes prove false."]; *People* v. *Leonard* (1996) 50 Cal.App.4th 878, 884 ["The failure of the affiant to swear to the truth of the information given to the magistrate cannot be construed as a 'technical' defect. It is a defect of substance, not form."].
20. See *Johnson* v. *State* (Fla. 1995) 660 So.2d 648, 654 ["As to hearsay, officers obviously are vouching for nothing more than the fact that the hearsay was told them and they have no reason to doubt its truthfulness."].
21. (1996) 50 Cal.App.4th 878, 883.
22. See *People* v. *Fisher* (2002) 96 Cal.App.4th 1147, 1150 ["A search warrant is not an invitation that officers can choose to accept, or reject, or ignore . . . . It is an order of the court."]; Pen. Code § 1523 ["A search warrant is an order . . . directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property"].
23. See Pen. Code §§ 1529, 1530; *People* v. *Fleming* (1981) 29 Cal.3d 698, 703.
24. See Pen. Code § 1529 [the warrant must name "every person whose affidavit has been taken"].
25. See *People* v. *Egan* (1983) 141 Cal.App.3d 798, 801, fn.3 ["Although no particular form is required, a proper and usual form of jurat is 'sworn to and subscribed before me,' followed by the date and the taking officer's signature."]. **NOTE**: It appears that a warrant will not be invalidated if the judge did not administer the oath to the affiant, so long as the affiant signed the affidavit under penalty of perjury. See *U.S.* v. *Bueno-Vargas* (9th Cir. 2001) 383 F.3d 1104, 1110 [court rejects argument that a faxed statement of probable cause under penalty of perjury was constitutionally deficient "because no one administered an oath to [the affiant]."
26. See *People* v. *Sanchez* (1972) 24 Cal.App.3d 664, 677-78, fn.8.
27. *People* v. *Superior Court (Loar)* (1972) 28 Cal.App.3d 600, 607, fn.3 ["[Pen. Code §§ 1528 and 1536] prevail[] over conflicting language in Penal Code Sections 1523 and 1529"]. ALSO SEE *Oziel* v. *Superior Court* (1990) 223 Cal.App.3d 1284, 1292-93 ["possession by the officer is, in contemplation of the law, possession by the court."].

28. *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.
29. **NOTE**: Penal Code § 1524(a) states that a warrant may authorize the seizure of evidence pertaining to a felony when the evidence (1) tends to identify the perpetrator, (2) tends to show that a felony was committed, or (3) was used to commit a felony. A warrant may be issued to seize evidence pertaining to any crime when the evidence (1) is possessed by a person who intends to use it as a means of committing a felony or misdemeanor; (2) consists of stolen or embezzled property; (3) is possessed by a person to whom it was delivered for the purpose of concealing it; (4) consists of records in the possession of a provider of an electronic communications service or a remote computing service, and it tends to prove that certain property was stolen; (5) tends to show that sexual exploitation of a child occurred in violation of Penal Code § 311.3; or (6) tends to show that a person possesses child pornography in violation of Penal Code § 311.11. Warrants may also authorize a search for a person who is wanted on an arrest warrant, or for deadly weapons inside premises that are (1) occupied or controlled by a person who is being held in custody pursuant to Welfare and Institutions Code § 5150, (2) occupied or controlled by a person who has been arrested for domestic violence involving threatened harm, or (3) owned or controlled by a person who is prohibited from possessing firearms pursuant to Family Code § 6389.
30. See *United States* v. *Ramirez* (1998) 523 U.S. 65, 72.
31. See *Virginia* v. *Moore* (2008) 553 U.S. 164, 176; *People* v. *McKay* (2002) 27 Cal.4th 601, 608.
32. *Steele* v. *United States* (1925) 267 U.S. 498, 503. ALSO SEE *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 222.
33. See *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 [“As the search warrant included the street address of the premises, the premises were adequately identified”]; *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225 [“the more conventional method of identifying a particular residence [is] by street number”] ALSO SEE *U.S.* v. *Hinton* (7th Cir. 1955) 219 F.2d 324, 325-26 [“searching two or more apartments in the same building is no different than searching two or more completely separate houses”].
34. See *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 225 [description was necessary because the homes on the street “did not have house numbers, nor were the streets described by signs”].
35. See *Hanger* v. *U.S.* (8th Cir. 1968) 398 F.2d 91, 99 [“Although desirable, a search warrant otherwise sufficient is not rendered invalid by the omission of the name of the owner or occupant”].
36. See *People* v. *Mack* (1977) 66 Cal.App.3d 839, 859 [“premises” included “both the house and [detached] garage”]; *People* v. *Dumas* (1973) 9 Cal.3d 871, 881, fn.5 [“premises” included “outbuildings and appurtenances in addition to a main building when the various places searched are part of a single integral unit”]; *People* v. *Grossman* (1971) 19 Cal.App.3d 8, 12 [“premises” authorized search of a cabinet in an adjacent carport]; *People* v. *Weagley* (1990) 218 Cal.App.3d 569, 573 [“premises” authorized a search of a mailbox]; *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 [“premises . . . has been held to embrace both the house and the garage”].
37. (9th Cir. 2000) 226 F.3d 1031.
38. See *People* v. *Govea* (1965) 235 Cal.App.2d 284, 300 [“A warrant directing a search of an apartment house or other dwelling house containing multiple living units is void unless issued on probable cause for searching each apartment or living unit or for believing that the entire building is a single living unit.”]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 754-55 [“the warrant would allow the officers to search every part of the fraternity house [but] probable cause existed to search appellant’s room”].
39. (1965) 234 Cal.App.2d 136, 148. Edited.
40. (1958) 157 Cal.App.2d 515. ALSO SEE *People* v. *Superior Court (Meyers)* (1979) 25 Cal.3d 67, 79 [house occupied by several individuals]; *Hemler* v. *Superior Court* (1975) 44 Cal.App.3d 430, 433 [“At most, the evidence shows that three individuals lived in the residence, sharing the living room, bathroom, kitchen and hallways, and that defendant’s bedroom opened onto the other rooms and was not locked.”]; *People* v. *Govea* (1965) 235 Cal.App.2d 285, 300-301 [“[The evidence disclosed] that Mendoza used the front of the house as a bedroom and that defendant Govea and his family, at least on the night of the search, were using a bedroom. This does not show that the premises were not a single living unit.”].
41. See *Dalia* v. *United States* (1979) 441 U.S. 238, 242, fn.4.
42. See *People* v. *Dumas* (1973) 9 Cal.3d 871, 881 [the warrant “must, at the very least, include some explicit description of a particular vehicle or of a place where a vehicle is later found”]; *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469 [warrant was sufficient when it described the car as a gold Cadillac with a black landau top and no license plates, and that it was parked in certain driveway].
43. See *People* v. *Sanchez* (1981) 116 Cal.App.3d 720, 727-28; *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341.

44. See Pen. Code § 1525 [affidavit must contain the name or description of the person]; *People* v. *Tenney* (1972) 25 Cal.App.3d 16, 22-23 [warrant to search "unidentified persons" was not sufficiently particular].
45. See *People* v. *Superior Court (Fish)* (1980) 101 Cal.App.3d 218, 220 [CDL was attached to warrant].
46. See *Ybarra* v. *Illinois* (1979) 444 U.S. 85, 91; *People* v. *Tenney* (1972) 25 Cal.App.3d 16, 22-23.
47. See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 218 [a laptop "amounts to an electronic container capable of storing data similar in kind to the documents stored in an ordinary filing cabinet, and thus potentially within the scope of the warrant"]; *U.S.* v. *Giberson* (9th Cir. 2008) 527 F.3d 882, 887 [search of computer was impliedly authorized "where there was ample evidence that the documents authorized in the warrant could be found on [the] computer"].
48. See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973 ["computer storage devices" was sufficient "because there was no way to know where the offending images had been stored"]; *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535 [the description, "Any and all computer software and hardware . . . computer disks, disk drives . . . " was sufficient because it "was about the narrowest definable search and seizure reasonably likely to obtain the images"]; *U.S.* v. *Brobst* (9th Cir. 2009) 558 F.3d 982, 994 ["At the time Detective Yonkin applied for the warrant, he could not have known what storage media Brobst used."].
49. *U.S.* v. *Bridges* (9th Cir. 2003) 344 F.3d 1010, 1016. Edited.
50. See U.S. Const. Amend. IV. ALSO SEE Pen. Code § 1525.
51. *Massachusetts* v. *Sheppard* (1984) 468 U.S. 981, 988, n.5.
52. *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535.
53. See *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249 [the warrant must impose "a meaningful restriction upon the objects to be seized"]; *People* v. *Tockgo* (1983) 145 Cal.App.3d 635, 640 ["meaningful restriction" is required].
54. *U.S.* v. *Lacy* (9th Cir. 1997) 119 F.3d 742, 746, fn.7. ALSO SEE *Davis* v. *Gracey* (10th Cir. 1997) 111 F.3d 1472, 1478 ["[We ask] did the warrant tell the officers how to separate the items subject to seizure from irrelevant items"].
55. See, for example, *People* v. *Frank* (1985) 38 Cal.3d 711, 726.
56. *People* v. *Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 95.
57. See *United States* v. *Ventresca* (1965) 380 U.S. 102, 108 [interpret in "a commonsense and realistic fashion"]; *People* v. *Amador* (2000) 24 Cal.4th 387, 392 ["Complete precision in describing the place to be searched is not required."]; *People* v. *Minder* (1996) 46 Cal.App.4th 1784, 1788 ["Technical requirements of elaborate specificity have no proper place in this area."]; *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705, 716 ["The prohibition of general searches is not to be confused with a demand for precise *ex ante* knowledge of the location and content of evidence related to the suspected violation."]; *U.S.* v. *Williams* (4th Cir. 2010) 592 F.3d 511, 519 [the description "should be read with a commonsense and realistic approach, to avoid turning a search warrant into a constitutional straight jacket."]; *U.S.* v. *Otero* (10th Cir. 2009) 563 F.3d 1127, 1132 ["A warrant need not necessarily survive a hypertechnical sentence diagramming and comply with the best practices of *Strunk & White* to satisfy the particularity requirement."].
58. *U.S.* v. *Gendron* (1st Cir. 1994) 18 F.3d 955, 966. **NOTE**: In *Marron* v. *United States* (1927) 275 U.S. 192, 196 the U.S. Supreme Court seemed to set an impossibly high standard for search warrant descriptions when it said, "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Over the years, however, most courts have interpreted this language in a practical manner. See, for example, *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1007 ["but few warrants could pass [the *Marron* test] and thus it is more accurate to say that the warrant must be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty."]; *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1349, fn.4 ["[if *Marron*] were construed as a literal command, no search would be possible"].
59. See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 480; *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1031.
60. *Gustafson* v. *Alloyd Co.* (1995) 513 U.S. 561, 562.
61. See *Maryland* v. *Garrison* (1987) 480 U.S. 79, 85 ["The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate."]; *People* v. *Smith* (1986) 180 Cal.App.3d 72, 89 ["particularity" reflects "the degree of detail known by the affiant and presented to the magistrate"]; *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705, 716 ["The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation"].
62. (11th Cir. 1985) 778 F.2d 609, 614.
63. (9th Cir. 1989) 873 F.2d 210, 211. ALSO SEE *People* v. *Tockgo* (1983) 145 Cal.App.3d 635; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016.
64. (9th Cir. 1989) 875 F.2d 747.

65. See *People* v. *Frank* (1985) 38 Cal.3d 711, 722 ["boilerplate lists [are] routinely incorporated into the warrant without regard to the evidence"]; *U.S.* v. *Ribeiro* (1st Cir. 2005) 397 F.3d 43, 51 [boilerplate is "stereotyped or formulaic writing"]; *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 636, fn.5 [the affiant used "stock language" that "could be applied to almost any crime"].
66. *In re Search Warrant Dated July 4, 1977* (D.C. Cir. 1977) 572 F.2d 321, 329.
67. See *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 547.
68. (1961) 55 Cal.2d 789.
69. (9th Cir. 2003) 344 F.3d 1010. ALSO SEE *Roman Catholic Archbishop of Los Angeles* v. *Superior Court* (2005) 131 Cal.App.4th 417, 460 ["But the crucial defect in *Bridges* was that the search warrant nowhere stated what criminal activity was being investigated."].
70. See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 207 ["the itemized list following the word 'including' may reasonably be interpreted as nonexclusive and merely descriptive examples of items likely to show who occupied the residence"]; *U.S.* v. *Riley* (2nd Cir. 1990) 906 F.2d 841, 844 ["In upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items."]; *U.S.* v. *Washington* (9th Cir. 1986) 797 F.2d 1461, 1472; *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 547 ["the general 'tail' of the search warrant will be construed so as not to defeat the 'particularity' of the main body of the warrant."]; *Roman Catholic Archbishop of Los Angeles* v. *Superior Court* (2005) 131 Cal.App.4th 417, 460 [subpoena for documents including "but are not limited to" was not insufficiently particular because it was linked to language indicating "what criminal activity was being investigated"]. ALSO SEE *Andresen* v. *Maryland* (1976) 427 U.S. 463, 479-80 [Warrant: "[listing of documents pertaining to Lot 13T] together with other fruits, instrumentalities and evidence of crime at this time unknown." Court: "[T]he challenged phrase must be read as authorizing only the search for and seizure of evidence relating to 'the crime of false pretenses with respect to Lot 13T'"].
71. (1981) 114 Cal.App.3d 378.
72. (1987) 188 Cal.App.3d 1021, 1031.
73. See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *U.S.* v. *Gomez-Soto* (9th Cir. 1984) 723 F.2d 649, 654; *U.S.* v. *Christine* (3rd Cir. 1982) 687 F.2d 749759 ["redaction is an efficacious and constitutionally sound practice, and should be utilized in order to avoid unnecessary social costs"].
74. *In re Grand Jury Subpoenas* (9th Cir. 1991) 926 F.2d 847, 858. ALSO SEE *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 797; *U.S.* v. *Sears* (9th Cir. 2005) 411 F.3d 1124, 1130 ["We also take into account the relative size of the valid and invalid portions of the warrant in determining whether severance is appropriate."]; *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 641 ["Here, the invalid portions of the warrant are sufficiently broad and invasive so as to contaminate the whole warrant."]; *U.S.* v. *Sells* (10th Cir. 2006) 463 F.3d 1148, 1158 ["Total suppression may still be required even where a part of the warrant is valid (and distinguishable) if the invalid portions so predominate the warrant that the warrant in essence authorizes a general [search]."].
75. (1974) 13 Cal.3d 238, 250.
76. See, for example, *People* v. *Joubert* (1983) 140 Cal.App.3d 946, 952-53; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 707].
77. See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *People* v. *Walker* (1967) 250 Cal.App.2d 214, 216, fn.1.
78. See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965.
79. *People* v. *Kraft* (2000) 23 Cal.4th 978, 1049.
80. See *People* v. *Schilling* (1987) 188 Cal.App.3d 1021, 1030-31.
81. See *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341.
82. See *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 76-77. ALSO SEE *People* v. *Lowery* (1983) 145 Cal.App.3d 902, 906 ["Synertek 2716 integrated circuits further described as rectangular objects approximately 1-¼" by ¾", having 24 gold colored pins extending downward . . . "].
83. See *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 78.
84. See *Lockridge* v. *Superior Court* (1969) 275 Cal.App.2d 612, 625; *Thompson* v. *Superior Court* (1977) 70 Cal.App.3d 101, 108; *People* v. *Superior Court (Williams)* (1978) 77 Cal.App.3d 69, 77 ["Without a specific means of identification, the police had no means of distinguishing legitimate goods from stolen goods."].
85. See *People* v. *Smith* (1986) 180 Cal.App.3d 72, 89.
86. See *Cassady* v. *Goering* (10th Cir. 2009) 567 F.3d 628, 635

87. See *People* v. *Mayen* (1922) 188 Cal. 237, 242.
88. See *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 795-96.
89. See *Stern* v. *Superior Court* (1946) 76 Cal.App.2d 772, 784.
90. See *People* v. *McNabb* (1991) 228 Cal.App.3d 462, 469; *In re Search Warrant Dated July 4, 1977* (D.C. Cir. 1978) 572 F.2d 321, 324.COMPARE *U.S.* v. *Kow* (9th Cir. 1995) 58 F.3d 423, 427 [the affidavit summarized in detail the various locations within the business where the evidence was located, "this information was excluded from the warrant"].
91. (Fla. App. 1989) 544 So.2d 1028, 1030. ALSO SEE *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 440 ["[A]ll of the courts of appeals (save the Federal Circuit) have permitted warrants to cross-reference supporting affidavits and to satisfy the particularity requirement through an incorporated and attached document—at least when it comes to the validity of the warrant at the time of issuance."].
92. See *People* v. *Egan* (1983) 141 Cal.App.3d 798, 803 ["It is necessary that the incorporated document be clearly identified."].
93. *Groh* v. *Ramirez* (2004) 540 U.S. 551, 557-58 ["Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant." Citations omitted.]. ALSO SEE *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699 ["A warrant expressly incorporates an affidavit when it uses suitable words of reference."]; *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1121 ["Our case law requires only suitable words of incorporation"].
94. See *U.S.* v. *Tracey* (3rd Cir. 2010) 597 F.3d 140, 148 ["our Court requires clear words of incorporation"].
95. See *Groh* v. *Ramirez* (2004) 540 U.S. 551, 557 ["most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant."]; *People* v. *Egan* (1983) 141 Cal.App.3d 798, 803 ["Incorporation by reference occurs when one complete document expressly refers to and embodies another document."].
96. (3rd Cir. 2010) 597 F.3d 140, 149.
97. *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1121.
98. BUT ALSO SEE *U.S.* v. *Tracey* (3rd Cir. 2010) 597 F.3d 140, 148 ["Other Courts of Appeals have accepted phrases such as 'attached affidavit which is incorporated herein,' 'see attached affidavit,' and 'described in the affidavit,' as suitable words of incorporation." Citations omitted.]; *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 933 [sufficient notice was given when the warrant authorized a search for "stolen property as indicated in the Affidavit and attached Police report"]; *Marks* v. *Clarke* (9th Cir. 1996) 102 F.3d 1012, 1030-331 ["see attached lists"]; *U.S.* v. *Waker* (2nd Cir. 2008) 534 F.3d 168, 172, fn.2 ["see attached Affidavit as to Items to be Seized"]; *Rodriguez* v. *Beninato* (1st Cir. 2006) 469 F.3d 1, 5 ["See attached affidavit"]; *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 439-40 ["See Attached Affidavit"].
99. See *Baranski* v. *Fifteen Unknown ATF Agents* (6th Cir. 2006) 452 F.3d 433, 444.
100. (2004) 540 U.S. 551, 560. ALSO SEE *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1026 [the affidavit must be either "attached physically to the warrant or at least accompan[y] the warrant"]; *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 699 ["We consider an affidavit to be part of a warrant, and therefore potentially curative of any defects the affidavit either is attached physically to the warrant or at least accompanies the warrant while agents execute the search."]; *Baranski* v. *U.S.* (8th Cir. 2008) 515 F.3d 857, 861 [there is no "bright line rule that an incorporated affidavit must accompany the warrant"]; *U.S.* v. *Towne* (9th Cir. 1993) 997 F.2d 537, 547 ["[I]n no case have we ever held that an affidavit that was expressly incorporated by reference and that did accompany the warrant when the search was authorized and carried out could not be treated as part of the warrant because it was not physically attached to it."].
101. See, for example, *People* v. *Tockgo* (1983) 145 Cal.App.3d 635, 643 ["Absent such physical and textual incorporation, the affidavit may not be used to narrow and sustain the terms of the warrant."]; *People* v. *MacAvoy* (1984) 162 Cal.App.3d 746, 755 ["The requirement that the affidavit be incorporated into and attached to the warrant insures that both the searchers and those threatened with search are informed of the scope of the searcher's authority."].
102. See *Kaylor* v. *Superior Court* (1980) 108 Cal.App.3d 451, 457.
103. See *Kaylor* v. *Superior Court* (1980) 108 Cal.App.3d 451, 457 ["[A]ll the writings offered in support [of the warrant] must be read."].
104. See *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1341 [warrant to search wrecking yard for stolen cars contained authorization to implement "procedures to differentiate stolen vehicles from those legally owned"]. COMPARE *U.S.* v. *Klein* (1st Cir. 1977) 565 F.2d 183, 188 ["[The government] failed to establish that there was a large collection of contraband in defendant's store and it failed to explain the method by which it intended to differentiate that contraband from the rest of

defendant's inventory."]; *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965 ["the warrant provides no basis for distinguishing [the stolen] diamonds from others the government could expect to find on the premises"].

105. *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094. ALSO SEE *U.S.* v. *Hill* (9th Cir. 2006) 459 F.3d 966, 978 ["[W]e look favorably upon the inclusion of a search protocol; but its absence is not fatal."]; *U.S.* v. *Cartier* (8th Cir. 2008) 543 F.3d 442, 447 [court notes "there may be times that a [computer] search methodology or strategy may be useful or necessary"].
106. (9th Cir. 2010) 620 F.3d 1016. ALSO SEE *Bay* v. *Superior Court* (1992) 7 Cal.App.4th 1022, 1027 [court notes that a warrant to search for "all chairs" on the premises would lack particularity if officers only had probable cause to search for a "brown leather-covered" one]; *Lockridge* v. *Superior Court* (1969) 275 Cal.App.2d 612.
107. (1983) 145 Cal.App.3d 635.
108. See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 480, fn.10; *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 964 [the affiant "could have narrowed most of the descriptions in the warrant" by "describing in greater detail the items one commonly expects to find on premises used for the criminal activities in question"]; *U.S.* v. *Gomez-Soto* (9th Cir. 1984) 723 F.2d 649, 654 [Since the DEA sought articles it claims are typically found in the possession of narcotics traffickers, the warrant could have named or described those particular articles."]; *U.S.* v. *Santarelli* (11th Cir. 1985) 778 F.2d 609 [the officers knew that loan sharks ordinarily kept business records such as loans outstanding, interest due, and payments received]; *U.S.* v. *Scharfman* (2nd Cir. 1971) 448 F.2d 1352, 1354 [reasonable to believe that "books and records would be utilized as instrumentalities in connection with the crime of disposing of hundreds of fur garments through a façade of legitimacy"].
109. (9th Cir. 1989) 871 F.2d 1496.
110. See *People* v. *Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 415; *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1091. ALSO SEE *U.S.* v. *Johnson* (8th Cir. 1976) 541 F.2d 1311, 1314 ["the term 'paraphernalia' is not unknown in criminal law having been used in several state gambling statutes, and as a result, having appeared frequently in search warrant descriptions"].
111. See *U.S.* v. *Meek* (9th Cir. 2004) 366 F.3d 705; *U.S.* v. *Gleich* (8th Cir. 2005) 397 F.3d 608.
112. See *U.S.* v. *Spilotro* (9th Cir. 1986) 800 F.2d 959, 965.
113. (1987) 188 Cal.App.3d 1021.
114. (1st Cir. 1967) 383 F.2d 121. ALSO SEE *U.S.* v. *Klein* (1st Cir. 1977) 565 F.2d 183, 188 ["the level of particularity required in a warrant may decline when there is reason to believe that a large collection of similar contraband is present on the premises"].
115. *U.S.* v. *Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1340. ALSO SEE *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1025 [a warrant for "classes of generic items" may be permissible "if the warrant establishes standards that are sufficiently specific"].
116. (1st Cir. 1977) 565 F.2d 183.
117. (9th Cir. 1982) 677 F.2d 1336.
118. See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 482 ["In searches for papers, it is certain that some innocuous documents will be examined"]; *People* v. *Alcala* (1992) 4 Cal.4th 742, 799 ["law enforcement officers would be unable to conduct a search for a rental receipt were they prohibited from reading papers"]; *U.S.* v. *Hunter* (D. Vt. 1998) 13 F.Supp.2d 574, 582 ["Records searches are vexing in their scope because invariably some irrelevant records will be scanned in locating the desired documents."].
119. *U.S.* v. *Leary* (10th Cir. 1988) 846 F.2d 592, 603, fn.18.
120. (4th Cir. 2009) 588 F.3d 218, 225. ALSO SEE *U.S.* v. *Reyes* (10th Cir. 1986) 798 F.2d 380. 383 ["[I]n the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take."].
121. See *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249-50 [the warrant "permitted the seizure of all of petitioner's financial records without regard to the persons with whom the transactions had occurred or the date of transactions"]; *U.S.* v. *Rude* (9th Cir. 1996) 88 F.3d 1538, 1551 ["post-May 1992 documents"]. COMPARE *U.S.* v. *Kow* (9th Cir. 1995) 58 F.3d 423, 427 ["The government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place, even though [the affidavit] indicates that the alleged criminal activity began relatively late in HK Video's existence."]; *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 543, 545 [although officers were aware that the relevant records pertained to certain dates, "there is no limitation as to time"].
122. See *Bay* v. *Superior Court* (1992) 7 Cal.App.4th 1022, 1027 [reference to a certain crime "would have provided the executing officer with meaningful limits on the nature of the items to be seized in order to ensure there was probable cause for all the items seized"].

123. *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1350.
124. *U.S.* v. *Reyes* (10th Cir. 1986) 798 F.2d 380, 382.
125. *U.S.* v. *Federbush* (9th Cir. 1980) 625 F.2d 246, 251.
126. *U.S.* v. *Santarelli* (11th Cir. 1985) 778 F.2d 609.
127. *U.S.* v. *Scharfman* (2nd Cir. 1971) 448 F.2d 1352.
128. *Andresen* v. *Maryland* (1976) 427 U.S. 463, 479-82.
129. See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973; *Davis* v. *Gracey* (10th Cir. 1997) 111 F.3d 1472, 1479 ["pornographic material"]; *US* v. *Burke* (10th Cir. 2011) F.3d [2011 WL 310520].
130. *U.S.* v. *Williams* (4th Cir. 2010) 592 F.3d 511, 520.
131. *U.S.* v. *Wong* (9th Cir. 2003) 334 F.3d 831, 838.
132. *Burrows* v. *Superior Court* (1974) 13 Cal.3d 238, 249.
133. *U.S.* v. *Abrams* (1st Cir. 1980) 615 F.2d 541, 545.
134. *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 795-96.
135. See *U.S.* v. *Leary* (10th Cir. 1988) 846 F.2d 592, 602 ["unadorned reference to a broad federal statute" was unsufficient].
136. *U.S.* v. *SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 691-92.
137. *U.S.* v. *Adjani* (9th Cir. 2006) 452 F.3d 1140, 1145.
138. See *U.S.* v. *Rude* (9th Cir. 1996) 88 F.3d 1538, 1551 ["it is clear that NPI's central purpose was to serve as a front for defrauding prime bank note investors"]; *U.S.* v. *Smith* (9th Cir. 2005) 424 F.3d 992, 1006 [a "warrant authorizing the seizure of essentially all business records may be justified when there is probable cause to believe that fraud permeated the entire business operation"]; *U.S.* v. *Falon* (1st Cir. 1992) 959 F.2d 1143, 1147 ["no indications of legitimate business"].
139. (9th Cir. 1995) 58 F.3d 423, 427. ALSO SEE *Solid State Devices, Inc.* v. *U.S.* (9th Cir. 1997) 130 F.3d 853, 856.
140. (1994) 21 Cal.App.4th 761, 776-77.
141. (7th Cir. 1987) 825 F.2d 1104, 1110. ALSO SEE *People* v. *Farley* (2009) 46 Cal.4th 1053, 1101 [personnel records for "any and all documents and correspondence relating to" defendant was not overbroad because he had killed and wounded several people at his workplace].
142. See *U.S.* v. *Stubbs* (9th Cir. 1989) 873 F.2d 210, 211 ["The affidavit fails to provide probable cause for a reasonable belief that tax evasion permeated Stubbs's entire real estate business."]; *U.S.* v. *Bentley* (7th Cir. 1987) 825 F.2d 1104, 1110 ["[I]f the fraud infects only one part of the business, the warrant must be so limited"].
143. (9th Cir. 1997) 130 F.3d 853, 857. Edited.
144. 144 See *U.S.* v. *Falon* (1st Cir. 1992) 959 F.2d 1143; *U.S.* v. *Humphrey* (5th Cir. 1997) 104 F.3d 65, 69, fn.2 ["only in extreme cases" will an "all documents" search of a residence be upheld].
145. *See Andresen* v. *Maryland* (1976) 427 U.S. 463, 482, fn.10; *U.S.* v. *Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1349 ["complex financial transactions and widespread allegations of various types of fraud" necessitate "practical flexibility"]; *Kitty's East* v. *U.S.* (10th Cir. 1990) 905 F.2d 1367, 1374 ["Evidence of conspiracy is often hidden in the day-to-day business transactions"].
146. *People* v. *Farley* (2009) 46 Cal.4th 1053, 1102. ALSO SEE *U.S.* v. *Phillips*(4th Cir. 2009) 588 F.3d 218, 225 ["Indeed, especially in cases such as this one—involving complex crime schemes, with interwoven frauds—courts have routinely upheld the search of items described under a warrant's broad and inclusive language."].
147. (1976) 427 U.S. 463, 482, fn.10. Edited. ALSO SEE *U.S.* v. *Phillips* (4th Cir. 2009) 588 F.3d 218, 226 ["We thus decline to allow Phillips to create a safe harbor from the complexity of his schemes."].
148. See *People* v. *Balint* (2006) 138 Cal.App.4th 200, 209 [search of an open laptop computer was authorized by a dominion and control clause]; *U.S.* v. *Bruce* (6th Cir. 2005) 396 F.3d 697, 710 ["To be sure, this authorization necessarily entailed a cursory review of any papers found in the hotel rooms to determine whether they reflected ownership or control of illegal drugs."].
149. See *People* v. *Varghese* (2008) 162 Cal.App.4th 1084, 1102 ["establishing dominion and control of a place where incriminating evidence is found is reasonable and appropriate"]; *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1009 ["We cannot believe the Fourth Amendment prohibits officers with ample probable cause to believe those in a residence have committed a felony from searching the residence to discover ordinary indicia of the identities of the perpetrators."]; *People* v. *Balint* (2006) 138 Cal.App.4th 200, 206 ["The dominion and control clause at issue here is a standard feature in search warrant practice."].
150. See *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1009 ["[C]ommon experience tells us that houses and vehicles ordinarily contain evidence establishing the identities of those occupying or using them."].

151. *People* v. *Balint* (2006) 138 Cal.App.4th 200, 204, fn.1. ALSO SEE *People* v. *Alcala* (1992) 4 Cal.4th 742, 799 [“rent receipts, cancelled mail envelopes, and keys”]; *People* v. *Nicolaus* (1991) 54 Cal.3d 551, 574-75 [“letters, papers, bills tending to show the occupants of [address of house to be searched”]; *Millender* v. *County of Los Angeles* (9th Cir. 2010) 620 F.3d 1016, 1030 [indicia “usually refers to such items as ‘utility company receipts, rent receipts, cancelled mail envelopes, and keys”]; *U.S.* v. *Riley* (2nd Cir. 1990) 906 F.2d 841, 844 [in discussing warrants to search for indicia, the court noted that “[i]n upholding broadly worded categories of items available for seizure, we have noted that the language of a warrant is to be construed in light of an illustrative list of seizable items.”]. **NOTE**: The court in *People* v. *Frank* (1985) 38 Cal.3d 711, 726 summarily invalidated a warrant to search for indicia consisting of “credit card receipts, records of telephone toll calls, cancelled checks, and personal diary notations,” claiming these categories were “impermissibly general.” Because the court neglected to provide any analysis of its position, *Frank* seems to have been relegated to the pile of “misguided” opinions that the court had been issuing at the time. See *People* v. *Rogers* (1986) 187 Cal.App.3d 1001, 1006 [“It is difficult to discern from *Frank* a principled basis to distinguish between the generic categories found insufficiently particular and those not declared so.”].

Contributors and Attributions

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13.2: Search Warrants and Special Procedures

Adapt yourself to changing circumstances.

— Chinese proverb

There is perhaps no profession that is more susceptible to changing circumstances than law enforcement. Which means that law enforcement officers must know how to adapt. One task in which adaptability is especially important (although frequently overlooked) is the writing of search warrants and affidavits. That is because every search warrant must be customized to fit the unique circumstances of the crime under investigation, the place being searched, the people who live or work in the location, the nature of the evidence being sought, and any difficulties that the search team might encounter.

For instance, officers may have well-founded concerns about their safety or evidence destruction that make it necessary to execute the warrant late at night, or to make a no-knock entry. Officers might also need to keep the contents of the affidavit secret to protect the identity of an informant or to prevent the disclosure of confidential information. Although less common, it is sometimes necessary to obtain a covert warrant or an anticipatory warrant, or a warrant to search something in another county or state, or a warrant to search the confidential files of a lawyer or physician.

All of these things are doable. But because they add to the intrusiveness of the search, they must be authorized by the judge who issues the warrant. And to obtain authorization, officers must know exactly what information judges require and how it must be presented.

Before we discuss these requirements, it should be noted that we have incorporated these and other special procedures into new search warrant forms that officers and prosecutors can download from our website. The address is: a link to the Alameda County District Attorney's website for law enforcement officers and prosecutors. (click on Publications). To receive copies via email in Microsoft Word format, send a request from a departmental email address to POV@acgov.org.

Night Service

Officers are ordinarily prohibited from executing warrants between the hours of 10 P.M. and 7 A.M. That is because late night entries are "particularly intrusive," 1 especially since officers may need to make a forcible entry if, as is often the case, the occupants are asleep and are thus unable to promptly respond to the officers' announcement. Still, the courts understand there are situations in which the added intrusiveness of night service is offset by other circumstances, usually the need to prevent the destruction of evidence or to protect the search team from violence by catching the occupants by surprise. For this reason, California law permits judges to authorize an entry at any hour of the day or night if there is "good cause." 2

WHAT IS "GOOD CAUSE"? Good cause exists if there is reason to believe that (1) some or all of the evidence on the premises would be destroyed or removed before 7 A.M., (2) night service is necessary for the safety of the search team or others,3 or (3) there is some other "factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified."4 Like probable cause, good cause must be based on facts contained in the affidavit, or at least reasonable inferences from the facts.5 "[T]he test to be applied," said the Court of Appeal, "is whether the affidavit read as a whole in a common sense manner reasonably supports a finding that such service will best serve the interests of justice." 6

Because specific facts are required, good cause to believe that evidence would be destroyed or removed cannot be based on generalizations or unsupported allegations. For example, the courts have rejected arguments that good cause existed merely because the affiant said "the property sought will be disposed of or become nonexistent through sale or transfer to other persons,"7 or because "drug distributors often utilize the cover of darkness to conceal their transportation and handling of contraband,"8 or because the warrant authorized a search for evidence (such as drugs) that can be quickly sold or consumed.9 Accordingly, the court in *People* v. *Mardian* ruled that "an affiant's averment that in his experience (generally) particular types of contraband are easily disposed of does not, in itself, constitute a sufficient showing for the necessity of a nighttime search."10 The question, then, is what types of circumstances will suffice? In the case of evidence destruction, the following have been deemed sufficient:

- The suspects were selling drugs or stolen property from the residence at night.11
- The suspect had become aware that he was about to be arrested or that a search of his home was imminent, and it was therefore reasonably likely that he would immediately try to move or destroy the evidence.12
- The suspect was planning to vacate the premises early the next morning.13

- Stolen food, liquor, and cigarettes were consumed at a party in the residence the night before the warrant was executed.14
- The suspect had been released on bail in the early evening, the evidence in his house was "small in size and easily disposed of," and the only way to keep him from destroying it would have been to assign "police resources in an all night vigil."15
- The warrant authorized a search for valuable stolen property which the suspects had the ability and motive to quickly sell or abandon.16

As for officer safety, good cause must also be based on facts, not unsupported assertions. As the Court of Appeal explained, "[A]llegations in an affidavit with respect to safety of officers must inform the magistrate of specific facts showing why nighttime service would lessen a possibility of violent confrontation, e.g., that the particular defendant is prepared to use deadly force against officers executing the warrant."17 Thus, in *Rodriguez* v. *Superior Court* the court ruled that good cause was not shown based merely on a statement that "any time you got people dealing in drugs there's always a danger of being shot or hurt."18

One other thing about night service: If officers enter before 10 P.M. they do not need authorization to continue the search after 10 P.M.19

HOW TO OBTAIN AUTHORIZATION: There are essentially four things the affiant must do to obtain authorization for night service:

1. STATE THE FACTS: The affiant must set forth the facts upon which "good cause" is based. Although the affidavit need not contain a separate section for this purpose, it is usually helpful to the judge; e.g., *For the following reasons, I hereby request authorization to execute this warrant at any hour of the day or night . . .*20
2. NOTIFY JUDGE: When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting night service authorization based on facts contained in the affidavit.
3. JUDGE REVIEWS: As the judge reads the affidavit looking for probable cause, he or she will also look for facts that tend to establish good cause for night service.
4. AUTHORIZATION GIVEN: If the judge finds that good cause exists, he or she will authorize night service on the face of the warrant,21 usually by checking an authorization box or by inserting words such as the following: *Good cause having been demonstrated, this warrant may be executed at any hour of the day or night.*

No-Knock Warrants

> *[Violent knocks on the front door]*
>
> *"Police with a search warrant! Open the door or we'll kick it in."*
>
> *Blanca ran into the bathroom and emptied a glassine envelope containing cocaine into the swirling bowl.*
>
> *"Is that everything?" he said. "I think so," she said.*

That was fiction. It was a scene from the novel *To Live and Die in L.A.* But similar scenes are played out every day in real life when officers knock, give notice, and wait for a "reasonable" amount of time before making a forcible entry. Because this delay provides the occupants with the time they need to destroy evidence or arm themselves, the knocknotice requirement has been a continuing source of friction between the courts and law enforcement. As the Court of Appeal observed:

[A]lthough one purpose of the [knock-notice] requirement is to prevent startled occupants from using violence against unannounced intruders, the delay caused by the statute might give a forewarned occupant exactly the opportunity necessary to arm himself, causing injury to officers and bystanders. . . . Since one has no right to deny entry to the holder of a search warrant in any event, critics ask, what public policy requires that entry be delayed while police engage in meaningless formalities?22

While it is debatable whether the knock-notice requirements are "meaningless," we are concerned here with explaining how officers can, when necessary, obtain authorization to enter without giving notice.23

A judge who issues a search warrant may authorize a no-knock entry if there was "sufficient cause"24 or "reasonable grounds". As the United States Supreme Court explained:

> When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a "no-knock" entry.25

WHAT ARE "REASONABLE GROUNDS"?

Reasonable grounds for a no-knock warrant exist if the affidavit establishes reasonable suspicion to believe that giving notice would (1) be used by the occupants to arm themselves or otherwise engage in violent resistance, (2) be used by the occupants to destroy evidence, or (3) be futile.[26]

Like good cause for night service, grounds for noknock authorization must be based on facts, not unsupported conclusions or vague generalizations. Thus, in *Richards* v. *Wisconsin* [27] the United States Supreme Court ruled that an affidavit for a warrant to search a drug house was insufficient because it was based solely on the generalization that drugs can be easily destroyed. In contrast, the following circumstances have been deemed adequate:

- The suspect had a history of attempting to destroy evidence, including a "penchant for flushing toilets even when nature did not call."[28]
- The suspect told an informant that, if he knew the police "were around," he would destroy the drugs he was selling and that "he would not get caught again with the evidence."[29]
- The premises, which contained a "large amount" of crack, were protected by a steel door.[30]
- The house was a "virtual fortress."[31]
- The house "was equipped with security cameras and flood lights.[32]
- The suspect displayed a firearm during previous drug sales and had "exhibited abnormal and unpredictable behavior—specifically, answering the door wearing only a pair of socks— while wielding a chambered semi-automatic pistol in a threatening manner."[33]
- The suspect's rap sheet showed "assaultive" behavior in the past, possession of guns, and a prior altercation with an officer.[34]

PROCEDURE FOR OBTAINING AUTHORIZATION

The usual procedure for obtaining a no-knock warrant is as follows:

1. SET FORTH THE FACTS: The affidavit must include the facts upon which the request is made. Although it need not contain a separate section for this purpose, it will be helpful to the judge; e.g., *I hereby request authorization for a noknock entry for the following reasons . . .*
2. NOTIFY JUDGE: When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting no-knock authorization.
3. JUDGE REVIEWS: As the judge reads the affidavit looking for probable cause, he or she will also look for facts establishing grounds for a noknock entry.
4. AUTHORIZATION GIVEN: If the judge determines that grounds for a no-knock warrant exist, he or she will authorize a no-knock entry on the face of the warrant; e.g., *Good cause having been demonstrated in the affidavit herein, the officers who execute this warrant are authorized to make a forcible entry without giving notice unless* a change in circumstances negates the need for non-compliance.

Two other things should be noted about no-knock warrants. First, although officers are not required to re-evaluate the circumstances before entering, they are not permitted to make a no-knock entry if, before entering, they become aware of circumstances that eliminated the need for it.[35] Second, if the judge refused to issue a no-knock warrant, officers may nevertheless make an unannounced entry if, upon arrival, they become aware of circumstances that constituted grounds to do so.[36]

Sealing Orders

Search warrants, including their supporting affidavits and any incorporated documents, become a public record when they are returned to the court or, if not executed, ten days after they were issued.[37] But because public disclosure may have serious adverse consequences, the affiant may apply for a sealing order which would require that all or part of the affidavit be kept confidential until further order of the court.[38]

GROUNDS FOR SEALING ORDERS

In most cases, sealing orders are issued for either of the following reasons:

1. PROTECT INFORMANT'S IDENTITY: If the warrant is based wholly or in part on information from a confidential informant, the judge may seal the parts of the affidavit that would reveal or tend to reveal his identity.[39]

2. PROTECT "OFFICIAL INFORMATION": An affidavit may be sealed if it tends to disclose "official information," which is defined as confidential information whose disclosure would not be in the public interest; e.g., information obtained in the course of an ongoing criminal investigation; information that would tend to reveal the identity of an undercover officer, a citizen informant, a confidential surveillance site, or the secret location of VIN numbers.40

PROCEDURE

To obtain a sealing order, the affiant must do the following:

1. DETERMINE SCOPE OF ORDER: The first step is to determine whether it is necessary to request the sealing of only certain information, certain documents, or everything.41
2. SEGREGATE CONFIDENTIAL INFORMATION: If the affiant is requesting that only part of the affidavit be sealed, he will present the judge with two affidavits for review: one containing information that may be disclosed; the other containing information that would be subject to the sealing order.42 The latter affidavit should be clearly identified by assigning it an exhibit number or letter, then writing that number or letter in a conspicuous place at the top of the document; e.g., Exhibit A.
3. REQUEST ORDER: The affiant should state in the affidavit that he is seeking a sealing order; e.g., *For the following reasons, I am hereby requesting that Exhibit A be sealed pending further order of the court . . .*
4. PROVING CONFIDENTIALITY: The affiant must explain why the sealing is reasonably necessary. To prove that the sealed information would tend to disclose the identity of a confidential informant, the affiant should explain why the informant or his family would be in danger if his identity was revealed. To prove that sealed information is covered under the "official information" privilege, the affiant should set forth facts demonstrating that the information was "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."43
5. JUDGE ISSUES ORDER: If the affiant's request is granted, the judge will sign the sealing order. Although the order may be included in the warrant, it is better to incorporate it into a separate document so that it is not disclosed to the people who are served with the warrant. A sealing order is available on our website.
6. WHERE SEALED DOCUMENTS MUST BE KEPT: All sealed documents must be retained by the court, unless the judge determines that court security is inadequate.44 In such cases, the documents may be retained by the affiant if he submits proof that the security precautions within his agency are sufficient, and that his agency has established procedures to ensure that the sealed affidavit is retained for ten years after final disposition of noncapital cases, and permanently in capital cases.45

Nondisclosure Orders

Officers will frequently utilize a search warrant to obtain the records of a customer of a financial institution, phone company, or provider of an email or internet service. If, as in most cases, they do not want the customer to learn about it, they may ask the issuing judge for a temporary nondisclosure order. Such an order may ordinarily be issued if the affiant demonstrates that disclosure would seriously jeopardize an ongoing investigation or endanger the life of any person.46

A nondisclosure order should appear on the warrant to help ensure that the people who are served with the warrant will be aware of it. The following is an example of such an order: *Pending further order of this court, the employees and agents of the entity served with the warrant are hereby ordered not to disclose information to any person that would reveal, or tend to reveal, the contents of this warrant or the fact that it was issued.*

Out-of-Jurisdiction Warrants

It is not unusual for officers to develop probable cause to believe that evidence of the crime they are investigating is located in another county or state. If they need a warrant to obtain it, the question arises: Can the warrant be issued by a judge in the officers' county? Or must it be issued by a judge in the county or state in which the evidence is located? The rules pertaining to out-of-jurisdiction warrants are as follows.

OUT-OF-COUNTY WARRANTS: A judge in California may issue a warrant to search a person, place, or thing located in any county in the state if the affidavit establishes probable cause to believe that the evidence listed in the warrant pertains to a crime that was committed in the county in which the judge sits. As the California Supreme Court explained, "[A] magistrate has jurisdiction to issue an out-of-county warrant when he has probable cause to believe that the evidence sought relates to a crime committed within his county and thus pertains to a present or future prosecution in that county."47

For example, in *People* v. *Easley* 48 officers who were investigating a double murder in Modesto (Stanislaus County) obtained a warrant from a local judge to search for evidence of the crimes in Easley's homes and cars in Fresno County. In ruling that the judge had the authority to issue the warrant, the California Supreme Court said:

> [T]he search warrant sought evidence relating to two homicides committed in Stanislaus County. The magistrate had probable cause to believe that evidence relevant to those crimes might be found in defendant's residences and automobiles. He therefore had jurisdiction to issue a warrant for an out-of-county search for that evidence.

Not surprisingly, out-of-county search warrants are especially common in drug trafficking cases because sellers seldom restrict their operations to a single county. Thus, in such cases a warrant may be issued by a judge in any country in which some illegal act pertaining to the enterprise was committed. For example in *People* v. *Fleming* 49 an undercover Santa Barbara County sheriff 's deputy bought cocaine from Bryn Martin in Santa Barbara. The deputy later learned that Martin's supplier was Scott Fleming, who lived in Los Angeles County. The deputy then obtained a warrant from a Santa Barbara judge to search Fleming's house, and the search netted drugs and sales paraphernalia.

Fleming, who was tried and convicted in Santa Barbara County, argued that the evidence should have been suppressed, claiming that the judge lacked the authority to issue the warrant. But the California Supreme Court disagreed, pointing out that because both sales were negotiated in Santa Barbara County, and because a person can be prosecuted in any county in which "some act of a continuing crime occurs," the judge "acted within his jurisdiction in issuing the warrant in question."

Two procedural matters. First, an out-of-county warrant must be directed to peace officers employed in the issuing judge's county.50 For example, a warrant to conduct a search in Santa Clara County issued by a judge in Alameda County should be headed, *The People of the State of California to any peace officer in Alameda County.* Second, although the warrant may be executed by officers in the issuing judge's county, it is standard practice to notify and request assistance from officers in whose jurisdiction the search will occur.51

OUT-OF-STATE WARRANTS

California judges do not have the authority to issue warrants to search a person, place, or thing located in another state.52 Consequently, officers who need an out-of-state warrant must either travel to the other state and apply for it themselves or, more commonly, request assistance from an officer in that state. Because the officers who are requesting assistance should complete as much of the paperwork as possible, they should ordinarily do the following:

1. Write an affidavit establishing probable cause for the search and sign it under penalty of perjury. (As discussed below, this affidavit will become an attachment to the affidavit signed by the out-of-state officer.)
2. Write an affidavit for the out-of-state officer's signature in which the out-of-state officer simply states that he is incorporating the California officer's affidavit, and that it was submitted to him by a California officer; e.g., *Attached hereto and incorporated by reference is the affidavit of [name of California officer] who is a law enforcement officer employed by the [name of California officer's agency] in the State of California. I declare under penalty of perjury that the foregoing is true.* (The reason the out-of-state officer must not sign the affidavit establishing probable cause is that will have no personal knowledge of the facts upon which probable cause was based.)
3. Attach the California officer's probable-cause affidavit to the out-of-state officer's unsigned affidavit.
4. In a separate document, write the following:
    1. Descriptions of the person, place, or thing to be searched.
    2. Descriptions of the evidence to be seized.
    3. A suggested court order pertaining to the disposition of seized evidence; e.g., *All evidence seized pursuant to this warrant shall be retained by [name of California officer] of the [name of California officer's agency] in California. Such evidence may thereafter be transferred to the possession of a court of competent jurisdiction in California if it is found to be admissible in a court proceeding.*
5. Email, fax, or mail all of these documents to the out-of-state officer.

Upon receipt of these documents, the out-of-state officer should do the following:

1. Prepare a search warrant in accordance with local rules and procedures using the descriptions provided by the California officer, and incorporating the order that all seized evidence be transferred to the California officer.

2. Take the search warrant and affidavit (to which the California officer's affidavit has been attached) to a local judge.
3. In the judge's presence, sign the affidavit in which he swears that the incorporated and attached affidavit was submitted to him by a California law enforcement officer.

If the judge issues the warrant, it will be executed by officers in whose jurisdiction the search will occur. Those officers will then give or send the evidence to the California authorities.

Special Master Procedure

A search for documents in the office of a lawyer, physician, or psychotherapist (hereinafter "professional") is touchy because these papers often contain information that is privileged under the law. Still, officers can obtain a warrant to search for them if the search is conducted in accordance with a protocol—known as the "special master procedure"—that was designed to ensure that privileged communications remain confidential.53

Before going further, it should be noted that the law in this area has changed. In the past, officers in California were required to implement this procedure only if the suspect was a client or patient of the professional; i.e., the professional was *not* the suspect. In 2001, however, the California Supreme Court essentially ruled that this procedure must be employed in all searches of patient or client files because, even if the professional was the suspect, he or his custodian of records is ethically obligated to assert the confidentiality privilege as to all files that officers intend to read.54

As we will now discuss, under the mandated procedure the files must be searched by an independent attorney, called a "special master," who is trained in determining what materials are privileged. Accordingly, officers will ordinarily utilize the following protocol:

1. **AFFIANT REQUESTS SPECIAL MASTER**: The affiant will state in the affidavit that he believes the search will require the appointment of a special master; e.g., *It appears that the requested search will implicate the confidentially of privileged communications. Accordingly, pursuant to Penal Code section 1524(c) I request that a special master be appointed to conduct the search.*
2. **SPECIAL MASTER APPOINTED**: If the warrant is issued, the judge will appoint a special master whom the judge will select from a list of qualified attorneys compiled by the State Bar.
3. **SPECIAL MASTER EXECUTES WARRANT**: Officers will accompany the special master to the place to be searched. When practical, the warrant must be executed during regular business hours. Upon arrival, the special master will provide the professional (or custodian of records) with a copy of the warrant so that the professional will know exactly what documents the special master is authorized to seize. The special master must then give the professional an opportunity to voluntarily furnish the described documents. If he fails or refuses, the special master—not the officers—will conduct the search while the officers stand by.
4. **PRIVILEGED DOCUMENTS SEALED**: If the special master finds or is given documents that are described in the warrant, he will determine whether they are confidential. If not confidential, he may give them to the officers. But if they appear to be confidential, or if the professional claims they are, he must (a) seal them (e.g., put them in a sealed container); (b) contact the clerk for the issuing judge and obtain a date and time for a hearing to determine whether any sealed documents are privileged; and (c) notify the professional and the officers of the date, time, and location of the hearing.55

Note that if a hearing is scheduled, officers should immediately notify their district attorney's office or city attorney's office so that a prosecutor can, if necessary, attend and represent the officers and their interests.

Search Conducted By An Expert

While most searches are conducted by officers, there are situations in which it is impossible or extremely difficult for officers to do so because the evidence is such that it can best be identified by a person with certain expertise. When this happens the affiant may seek authorization to have an expert in such matters accompany the officers and conduct the search himself.56 For example, in *People* v. *Superior Court (Moore)* 57 officers were investigating an attempted theft of trade secrets from Intel and, in the course of the investigation, they sought a warrant to search a suspect's business for several items that were highly technical in nature; e.g., "magnetic data base tape containing Intel Mask data or facsimile for product No. 2147 4K Ram." The affiant realized that "he could not identify the property due to its technical nature without expert assistance," so he requested such assistance in the affidavit. The request was granted.

As the Court of Appeal explained, when the warrant was executed "none of the officers present actually did any searching, since none of them knew what the items described in the warrant looked like. Rather, at the direction of the officer in charge, they stood and watched while the experts searched"; and when an expert found any of the listed evidence, he would notify the officers who would then seize it. The court summarily ruled that such a procedure was proper.

Note that if the search will be conducted by *officers*, they do not need authorization to have an expert or other civilian accompany them and watch. And if the civilian sees any seizable property, he will notify the officers who will take it; e.g., burglary victim identifies stolen property.58

Anticipatory Search Warrants

Most search warrants are issued because officers have probable cause to believe that evidence of a crime is presently located in the place to be searched. There is, however, another type of warrant—known as an "anticipatory" or "contingent" warrant—that is issued *before* the evidence has arrived there. Specifically, an anticipatory search warrant may be issued when officers have probable cause to believe that the evidence—although not currently on the premises— will be there when a "triggering event" occurs.59 In other words, the occurrence of the triggering event demonstrates that the evidence has arrived and, thus, probable cause now exists. As the Fourth Circuit put it, the triggering event "becomes the final piece of evidence needed to establish probable cause."60

The courts permit anticipatory warrants because, as the court noted in *U.S.* v. *Hugoboom*, without them officers "would have to wait until the triggering event occurred; then, if time did not permit a warrant application, they would have to forego a legitimate search, or, more likely, simply conduct the search (justified by exigent circumstances) without any warrant at all."61

Although there are no restrictions on the types of evidence that may be sought by means of an anticipatory warrant, most are used in conjunction with controlled deliveries of drugs or other contraband.62 As the First Circuit observed:

> Anticipatory search warrants are peculiar to property in transit. Such warrants provide a solution to a dilemma that has long vexed law enforcement agencies: whether, on the one hand, to allow the delivery of contraband to be completed before obtaining a search warrant, thus risking the destruction or disbursement of evidence in the ensuring interval, or, on the other hand, seizing the contraband on its arrival without a warrant, thus risking suppression.63

Procedure

The procedure for obtaining an anticipatory warrant is essentially the same as that for a conventional warrant, except that the affidavit must also contain the following:

1. DESCRIPTION OF TRIGGERING EVENT: The affidavit must contain an "explicit, clear, and narrowly drawn" description of the triggering event;64 i.e., the description should be "both ascertainable and preordained" so as to "restrict the officers' discretion in detecting the occurrence of the event to almost ministerial proportions."65
2. TRIGGERING EVENT WILL OCCUR: The affidavit must establish probable cause to believe the triggering event will, in fact, occur; and that it will occur before the warrant expires.66
3. PROBABLE CAUSE WILL EXIST: Finally, it must appear from the affidavit that the occurrence of the triggering event will give rise to probable cause to search the premises.67

WHERE THE DESCRIPTION MUST APPEAR

Although the United States Supreme Court has ruled that the triggering event need not be described on the face of the warrant,68 the warrant should at least indicate that the judge determined that it may be executed when the triggering event occurs, and not, as in conventional warrants, on any day before the warrant expires. Consequently, language such as the following should be added to the warrant: *Having determined that probable cause for this search will result when the triggering event described in the supporting affidavit occurs; and, furthermore, that there is probable cause to believe that this triggering event will occur; it is ordered that this warrant shall be executed without undue delay when the triggering event occurs.*

CONTROLLED DELIVERIES

As noted, most of the cases in which anticipatory warrants have been utilized involved controlled deliveries of drugs or other contraband, usually to the suspect's home. In these situations, the triggering event will commonly consist of a delivery of the evidence directly to the suspect's residence by the Postal Service, a delivery company such as UPS or FedEx, an undercover officer, or an informant under the supervision of officers.69 Probable cause may also be found when there was strong

circumstantial evidence that the contraband would be delivered to the premises; e.g., undercover officers had previously purchased drugs there,70 or if intercepted contraband consisted of a quantity of drugs that was "too great an amount to be sent on a whim."71

THE "SURE AND IRREVERSIBLE COURSE" RULE

There is one other issue that must be addressed. Some courts have ruled that, when the triggering event is a controlled delivery, it is not sufficient that there is probable cause to believe the triggering event will occur; i.e., that there is a fair probability that the contraband will be taken to the place to be searched. Instead, it must appear that the contraband was on a "sure and irreversible course" to the location. The theoretical justification for this "requirement" is, according to the Seventh Circuit, "to prevent law enforcement authorities or third parties from delivering or causing to be delivered contraband to a residence to create probable cause to search the premises where it otherwise would not exist."72

Based on the complete absence of any proof (or even a suggestion) that anyone had actually engaged in such blatantly illegal conduct, it appears the court's concern was based on nothing more than its overwrought imagination. Moreover, the "sure course" requirement is plainly contrary to the Supreme Court's ruling that only probable cause is required; i.e., that grounds for an anticipatory warrant will exist if "it is now probable that contraband, evidence of a crime, or a fugitive will be on the described premises when the warrant is executed."73 It is therefore likely that, because the "sure and irreversible course" requirement establishes a standard higher than probable cause, it is a nullity.74

Furthermore, there has never been a need for a "sure course" requirement because the cases in which it has been applied to invalidate a search could have been decided without it on grounds that the affidavit simply failed to establish probable cause to believe the evidence would be taken to the place to be searched. In fact, almost all cases in which the courts have invalidated searches based on a "sure course" transgression have involved controlled deliveries in which (1) the evidence was initially delivered to a location other than the suspect's home (e.g., a post office box), or was intercepted before it reached the suspect's home; (2) the affidavit failed to establish probable cause to believe it would be taken to the suspect's home; and (3) there was no independent probable cause linking the suspect's home to the criminal activity under investigation.75 Thus, in these cases the affidavits would have failed irrespective of the "sure course" deficiency because they did not establish probable cause to believe the evidence would be taken to the place to be searched. The case of *U.S.* v. *Rowland* 76 demonstrates the uselessness of the "sure course" concoction. In *Rowland*, postal inspectors intercepted child pornography that had been mailed to Rowland's post office box. So they obtained an anticipatory warrant that authorized a search of Rowland's home when the package was picked up and brought inside. The court ruled, however, that the warrant was invalid, not because of a "sure course" violation, but because the affidavit simply lacked facts that established a fair probability that the evidence would, in fact, be taken to Rowland's house. As the court pointed out, "The affidavit stated: 'It is anticipated that [Rowland], after picking up the tapes from the post office box, will go to his place of employment and after work to his residence.' The affidavit contained no information suggesting that Rowland had previously transported contraband from his private post office box to his home or that he had previously stored contraband at his home. Nor, did the affidavit provide any facts linking Rowland's residence to suspected illegal activity."

Warrants to Search Computers

Although computer searches are notoriously complex, the procedure for obtaining a warrant to search a computer is not much different than any other warrant. In fact, there are only three significant differences: (1) the manner of describing the hardware to be searched and the data to be seized (we covered those subjects in the Spring 2011 edition), (2) obtaining authorization for an off-site search, and (3) incorporating search protocols.

IS AN OFF-SITE SEARCH NECESSARY?

As a practical matter, it will almost always be necessary to conduct a computer search off-site unless officers plan to conduct only a superficial examination; e.g., they will be trying to locate the listed information by conducting a simple word search or merely looking at the names of directories and files. As the federal courts have observed, because it is "no easy task to search a well-laden hard drive,"77 the "practical realities of computer investigations preclude on-site searches." 78

IS OFF-SITE AUTHORIZATION NECESSARY? Although

some courts have ruled that officers do not need express authorization to conduct the search off site,79 the better practice is to seek it. This is especially so when, as is usually the case, officers know when they apply for the warrant that an off-site search may be necessary.

HOW TO OBTAIN AUTHORIZATION: To obtain authorization for an off-site search, the affiant must explain why it is necessary.[80] Here's an example:

> *Request for Off-Site Search Authorization: For the following reasons, I request authorization to remove the listed computers and computer-related equipment from the premises and search them at a secure location:*
>
> 1. *The amount of data that may be stored digitally is enormous, and I do not know the number or size of the hard drives and removable storage devices on the premises that will have to be searched pursuant to this warrant.*
> 2. *The listed data may be located anywhere on the hard drives and removable storage devices, including hidden files, program files, and "deleted" files that have not been overwritten.*
> 3. *The data may have been encrypted, it may be inaccessible without a password, and it may be protected by self-destruct programming, all of which will take time to detect and bypass.*
> 4. *Because data stored on computers can be easily destroyed or altered, either intentionally or accidentally, the search must be conducted carefully and in a secure environment.*
> 5. *To prevent alteration of data and to ensure the integrity of the search, we plan to make clones of all drives and devices, then search the clones; this, too, will take time and special equipment.*
> 6. *A lengthy search at the scene may pose a severe hardship on all people who [live][work] there, as it would require the presence of law enforcement officers to secure the premises while the search is being conducted.*

The affiant should then add some language to the proposed search warrant that would authorize an off-site search; e.g., *Good cause having been established in the affidavit filed herein, the officers who execute this warrant are authorized to remove the computers and computer-related equipment listed in this warrant and search them at a secure location.*

One other thing: If the warrant was executed within ten days after it was issued, officers do not need specific authorization to continue searching after the warrant expires.[81] Officers must, however, conduct the search diligently.

UTILIZING PROTOCOLS: If officers expect to find seizable files intermingled with non-seizable files, they may—but are not required to [82] —seek authorization to conduct the search pursuant to a protocol. Generally speaking, a protocol sets forth the manner in which the search must be conducted so as to minimize examinations and seizures of files that do not constitute evidence. For example, a protocol might require "an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches."[83]

Covert Search Warrants

Covert search warrants, commonly known as "sneak and peek" warrants, authorize officers to enter a home or business when no one is present, search for the listed evidence, then depart—taking nothing and, if all goes well, leaving no clue that they were there. Covert warrants are rarely necessary, but they may be useful if officers need to know whether evidence or some other items are on the premises, but the investigation is continuing and they do not want to alert the suspects that investigators are closing in. Covert warrants may also be helpful to identify the co-conspirators in a criminal enterprise before officers start making arrests.[84]

THE "NOTICE" REQUIREMENT: The main objection to covert warrants is that the people whose homes and offices are searched are not immediately notified that a search has occurred. But the United States Supreme Court has described this objection as "frivolous," pointing out that instant notification is not a constitutional requirement, as demonstrated by the delayed-notice provisions in the federal wiretap law.[85] Still, because notice must be given eventually, some federal courts have required that the occupants of the premise be given notice of the search within seven days of its execution, although extensions may be granted.[86] Note that the Ninth Circuit has ruled that a judge may authorize a delay of over seven days if the affiant makes a "strong showing of necessity."[87] While California courts have not yet ruled on the legality of this procedure, it seems to provide a reasonable solution to the notification concerns.

TO OBTAIN AUTHORIZATION

The following procedure, adapted by the federal courts, should suffice to obtain a covert entry warrant in California:

1. DEMONSTRATE REASONABLE NECESSITY: In addition to establishing probable cause to search, the affidavit must demonstrate that a covert search is reasonably necessary.[88] Note that reasonable necessity does not exist merely because a covert search would facilitate the investigation or would otherwise be helpful to officers.[89]

2. ADD SPECIAL INSTRUCTIONS: Instructions, such as the following, should be added to the warrant: *The evidence described in this warrant shall not be removed from the premises. An inventory of all evidence on the premises shall be prepared showing its location when discovered. Said evidence shall also be photographed or videotaped to show its location. Compliance with the receipt requirement of Penal Code § 1535 is excused until unless an extension is granted by this court. Within two days after this warrant is executed, the following shall be filed with this court: (a) the inventory, and (b) the original or copy of all photographs and/or videotapes.*

Steagald Search Warrants

A *Steagald* warrant is a search warrant that authorizes officers to enter a home, business office, or other structure for the purpose of locating and arresting a person who (1) is the subject of an outstanding arrest warrant, and (2) does not live on the premises. For example, officers would need a *Steagald* warrant to search for the arrestee in the home of a friend or relative.90 In contrast, only an arrest warrant (a conventional warrant or a *Ramey* warrant) would be necessary to enter the arrestee's home to make the arrest.

The reason that officers need a *Steagald* warrant (or consent or exigent circumstances) to enter a third person's home is that, otherwise, the homes of virtually everyone who knows the arrestee would be subject to search at any time until the arrestee was taken into custody.

As we will now discuss, a judge may issue a *Steagald* warrant if the affidavit demonstrates both probable cause to arrest and search.

PROBABLE CAUSE TO ARREST: There are two ways to establish probable cause to arrest:

1. WARRANT OUTSTANDING: If a conventional or *Ramey* arrest warrant is outstanding, the affiant can simply attach a copy to the affidavit and incorporate it by reference; e.g., *Attached hereto and incorporated by reference is a copy of the warrant for the arrest of [name of arrestee]. It is marked Exhibit A.*
2. PROBABLE CAUSE: If an arrest warrant has not yet been issued, the affidavit for the *Steagald* warrant must establish probable cause to arrest, as well as probable cause to search. (In such cases, the *Steagald* warrant serves as both an arrest and search warrant.)

PROBABLE CAUSE TO SEARCH

There are two ways to establish probable cause to search.

1. ARRESTEE IS INSIDE: Establish probable cause to believe that the arrestee was inside the residence when the warrant was issued and would still be there when the warrant was executed.
2. ANTICIPATORY SEARCH WARRANT: Establish a fair probability that the arrestee would be inside the residence when a "triggering event" occurs (e.g., when officers see the arrestee enter), and that there is probable cause to believe the triggering event will occur; e.g., the arrestee has been staying in the house for a few days.91 The subject of anticipatory search warrants was covered earlier in this article.

Email Search Warrants

While most warrant applications are made by submitting hard copies of the affidavit and warrant to the issuing judge, California law has long permitted officers to seek warrants via telephone and fax. More recently, however, officers were given the added option of obtaining search warrants by email. And because the email procedure is so easy (and the others are so cumbersome), phone and fax warrants are now virtually obsolete.

Before setting forth the email procedure, it is necessary to define two terms that have been added to this area of the law:

Digital signature: The term "digital signature" means "an electronic identifier, created by computer, intended by the party using it to have the same force and effect as the use of a manual signature." 92

Electronic signature: The term "electronic signature" means "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."93

The following is the procedure established by California statute that officers must implement to obtain a warrant by email:

1. **PREPARE AFFIDAVIT AND WARRANT**: Complete the affidavit and search warrant as an email message or in a word processing file that can be attached to an email message.

2. **PHONE JUDGE**: Notify the on-call judge that an affidavit and search warrant have been prepared for immediate transmission by email.
3. **OATH**: Before the documents are transmitted, the judge administers the oath to the affiant over the telephone.
4. **AFFIANT SIGNS**: Having been sworn, the affiant signs the affidavit via digital or electronic signature.
5. **AFFIANT TRANSMITS DOCUMENTS**: After confirming the judge's email address, the affiant sends the following by email: (a) the affidavit (including any attachments), and (b) the warrant.
6. **CONFIRMATION**: The judge confirms that all documents were received and are legible. Missing or illegible documents must be re-transmitted. Affiant confirms that the digital or electronic signature on the affidavit is his.
7. **JUDGE READS AFFIDAVIT**: The judge determines whether the facts contained in the affidavit and any attachments constitute probable cause.
8. **JUDGE ISSUES WARRANT**: If the judge determines that probable cause to search exists, he or she will do the following: (a) Sign the warrant digitally or electronically; (b) note the following on the warrant: (i) the date and time it was signed, and (ii) that the affiant's oath was administered over the telephone; and (c) email the signed warrant to the affiant.
9. **AFFIANT ACKNOWLEDGES RECEIPT**: The affiant acknowledges that he received the warrant.
10. **AFFIANT PRINTS HARD COPY**: The affiant prints a hard copy of the warrant.
11. **DUPLICATE ORIGINAL CREATED**: The judge instructs the affiant over the telephone to write the words "duplicate original" on the hard copy.
12. **PROCESS COMPLETE**: The duplicate original is a lawful search warrant.94

Warrant Reissuance

A warrant is void if not executed within ten days after it was issued.95 If the warrant becomes void, a judge cannot simply authorize an extension; instead, the affiant must apply for a new warrant, which includes submitting a new affidavit.96 The required procedure is, however, relatively simple.

Specifically, if the information in the original affidavit is still accurate, the affiant can incorporate the original affidavit by reference into the new one—but he must explain why he believes the information is still correct;97 e.g., *Affidavit for Reissuance of Search Warrant: On* [insert date of first warrant] *a warrant (hereinafter Warrant Number One) was issued by* [insert name of judge who issued it] *authorizing a search of* [insert place to be searched]. *A copy of the affidavit upon which Warrant Number One was based is attached hereto, incorporated by reference, and marked "Exhibit A". For the following reasons, Warrant Number One was not executed within 10 days of issuance:* [Explain reasons]. *I am not aware of any information contained in Exhibit A that is no longer accurate or current. Consequently, I believe that the evidence listed in Warrant Number One is still located at the place to be searched, and I am hereby applying for a second search warrant identical in all material respects to Warrant Number One. I declare under penalty of perjury that the foregoing is true and correct.*

If any information in the original affidavit is no longer accurate, it must be deleted. If there have been new developments or circumstances that may have undermined the existence of probable cause, the additional information must be included in the new affidavit.98 If new developments have strengthened probable cause, officers should ordinarily include them in the new affidavit.

Other Special Procedures

RELEASING SEIZED EVIDENCE: When officers seize evidence pursuant to a search warrant, the evidence is technically in the custody and control of the judge who issued the warrant.99 Consequently, the officers cannot transfer possession of the evidence to officers from another agency or any other person unless they have obtained a court order to do so. (We have posted such a court order on our website.) If, however, the property was seized by mistake, officers do not need court authorization to return it to the owner.100

INSPECTION OF DOCUMENTS BY OTHER AGENCY: If officers from another agency want to make copies of documents seized pursuant to a warrant, they should seek an "Order to Examine and Copy Documents Seized by Search Warrant."101 (We have also posted a form for this purpose on our website.) This order should be supported by an affidavit establishing probable cause to believe the documents are evidence of a crime that the outside agency is investigating. The order should, if possible, be issued by the judge who issued the warrant.102

SUBPOENA DUCES TECUM: Officers have occasionally asked whether they can obtain evidence by means of a subpoena duces tecum instead of a search warrant. Although the subpoena procedure may be quicker, a subpoena duces tecum is not a practical

alternative for the following reasons. First, unless the subpoena is issued in conjunction with a criminal investigation conducted by a grand jury,103 it may be issued only if (1) the defendant had already been charged with the crime under investigation, and (2) the officers are seeking evidence pertaining to that crime. Second, a person who is served with a subpoena must deliver the documents to the court— not to officers.104

References

1. *Rogers* v. *Superior Court* (1973) 35 Cal.App.3d 716, 720.
2. See Pen. Code § 1533; *People* v. *Kimble* (1988) 44 Cal.3d 480, 494 [“a magistrate may authorize nighttime service of a warrant in a particular case for ‘good cause’”].
3. See Pen. Code § 1533; *Tuttle* v. *Superior Court* (1981) 120 Cal.App.3d 320, 329-30 [“Safety of police officers is of extreme importance and is a factor which may be considered in determining cause for night service.”]; *People* v. *Kimble* (1988) 44 Cal.3d 480, 495 [“in view of the nature of the homicides that were under investigation, the magistrate could reasonably conclude that there was an exceptionally compelling interest in permitting the police to expedite their investigation”].
4. *People* v. *Kimble* (1988) 44 Cal.3d 480, 494.
5. See *People* v. *Watson* (1977) 75 Cal.App.3d 592, 598 [“the affidavit furnished the magistrate must set forth specific facts which show a necessity for [night] service”].
6. *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234. ALSO SEE *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 906-907.
7. *People* v. *Lopez* (1985) 173 Cal.App.3d 125, 136. ALSO SEE *In re Donald R.* (1978) 85 Cal.App.3d 23, 25-26 [generalized statement that the stolen property being sought was “primarily perishable items and easily disposed of ”].
8. *Tuttle* v. *Superior Court* (1981) 120 Cal.App.3d 320, 328.
9. See *People* v. *Watson* (1977) 75 Cal.App.3d 592, 597 [night service “cannot be based solely on the nature of the contraband to be seized or the type of crime involved”]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234 [“mere assertion of suspected unlawful drug activities in the place to be searched is insufficient to justify night service”].
10. (1975) 47 Cal.App.3d 16, 34.
11. See *People* v. *Watson* (1977) 75 Cal.App.3d 592, 598; *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 938; *People* v. *Grant* (1969) 1 Cal.App.3d 563, 567-68; *People* v. *Govea* (1965) 235 Cal.App.2d 285, 299.
12. See *People* v. *Siripongs* (1988) 45 Cal.3d 548, 569-70 [following his arrest, the arrestee made a phone call from jail (speaking in Thai) to the residence in which stolen property was stored]; *People* v. *Cletcher* (1982) 132 Cal.App.3d 878, 883 [there was reason to believe the suspect was aware that artwork he had stolen had just been observed in his home by the victim]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234 [warrant to search suspect’s motel room was issued after the suspect was arrested in the lobby at 8:30 P.M.]; *Galena* v. *Municipal Court* (1965) 237 Cal.App.2d 581, 592 [“It is common knowledge that those in the possession of contraband or stolen goods make every effort to effectuate its immediate disposition when they learn that persons connected with it have been apprehended by the authorities.”].
13. See *People* v. *Mardian* (1975) 47 Cal.App.3d 16, 35 [the occupants were planning to leave the residence at 6 A.M.].
14. See *In re Donald R.* (1978) 85 Cal.App.3d 23, 26.
15. See *People* v. *Lowery* (1983) 145 Cal.App.3d 902, 909-10 [“This is not a question of convenience to the police, but acknowledges the interest of the entire community in efficient use of police personnel.”]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234.
16. See *People* v. *Kimble* (1988) 44 Cal.3d 480, 494-95; *People* v. *Lopez* (1985) 173 Cal.App.3d 125, 138 [“The affidavit disclosed that four persons committed the robbery, all of whom, it appeared, had continuing access to the property.”].
17. *Tuttle* v. *Superior Court* (1981) 120 Cal.App.3d 320, 329.
18. (1988) 199 Cal.App.3d 1453, 1468.
19. See *People* v. *Zepeda* (1980) 102 Cal.App.3d 1, 7 [“Once that execution began, it was unreasonable to require its cessation merely because the hour reached 10 P.M.”]; *People* v. *Maita* (1984) 157 Cal.App.3d 309, 322.
20. See *People* v. *Cletcher* (1982) 132 Cal.App.3d 878, 882 [“[Pen. Code § 1533] does not require a separate statement of good cause for nighttime service.”].
21. See Pen. Code § 1533 [“Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night.”].
22. *People* v. *Gonzalez* (1989) 211 Cal.App.3d 1043, 1048.

23. **NOTE**: While the United States Supreme Court ruled in 1995 that knock-notice is not an absolute requirement—that the Fourth Amendment requires only that officers enter in a reasonable manner*(Wilson* v. *Arkansas* (1995) 514 U.S. 927, 934)—an unannounced entry is such a serious and dangerous intrusion that knock-notice will ordinarily be required unless there were exigent circumstances. See *United States* v. *Banks* (2003) 540 U.S. 31, 43 ["Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one."].
24. *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 399, fn.7. **NOTE**: If a no-knock entry is authorized, officers may, if reasonably necessary, make a forcible entry. *United States* v. *Ramirez* (1998) 523 U.S. 65, 71.
25. *United States* v. *Banks* (2003) 540 U.S. 31, 36.
26. See *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 394; *United States* v. *Banks* (2003) 540 U.S. 31, 37, fn.3 ["The standard for a noknock entry stated in *Richards* applies on reasonable suspicion of exigency or futility."].
27. (1997) 520 U.S. 385.
28. *People* v. *Alaniz* (1986) 182 Cal.App.3d 903, 906.
29. *People* v. *Gonzales* (1971) 14 Cal.App.3d 881.
30. *U.S.* v. *Stowe* (7th Cir. 1996) 100 F.3d 494, 499.
31. *People* v. *Thompson* (1979) 89 Cal.App.3d 425.
32. *U.S.* v. *Combs* (9th Cir. 2005) 394 F.3d 739, 745.
33. *U.S.* v. *Bynum* (9th Cir. 2004) 362 F.3d 574, 581.
34. *People* v. *Henderson* (1976) 58 Cal.App.3d 349, 356.
35. See *U.S.* v. *Spry* (7th Cir. 1999) 190 F.3d 829, 833.
36. See *United States* v. *Banks* (2003) 540 U.S. 31, 36-37 ["even when executing a warrant silent about [no-knock authorization], if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in"]; *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 395-96, fn.7 ["[A] magistrate's decision not to authorize no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."]. **NOTE RE MOTORIZED BATTERING RAMS**: The following are the requirements for utilizing a motorized battering ram to make entry: (1) the issuing judge must have authorized the procedure; *and* (2) when the ram was utilized, officers reasonably believed that evidence inside the premises was presently being destroyed, or there was an immediate threat of resistance from the occupants which posed a serious danger to officers. *Langford* v. *Superior Court* (1987) 43 Cal.3d 21, 29-32.
37. See Pen. Code § 1534; *Oziel* v. *Superior Court* (1990) 223 Cal.App.3d 1284, 1295.
38. **NOTE**: Although a court may later lift the sealing order, officers and prosecutors retain control over the sealed information because they have the option of incurring sanctions rather than releasing it. See *People* v. *Hobbs* (1994) 7 Cal.4th 948, 959.
39. See Evid. Code § 1041; *People* v. *Hobbs* (1994) 7 Cal.4th 948, 962 ["[I]f disclosure of the contents of the informant's statement would *tend to disclose* the identity of the informer, the communication itself should come within the privilege."].
40. See Evid. Code § 1040(a); *County of Orange* v. *Superior Court (Feilong Wu)* (2000) 79 Cal.App.4th 759, 764 ["Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential."]; *Torres* v. *Superior Court* (2000) 80 Cal.App.4th 867, 872-73 [a person's name may constitute official information; e.g., name of undercover officer]; *PSC Geothermal Services Co.* v. *Superior Court* (1994) 25 Cal.App.4th 1697, 1714 [the "official information" privilege covers "information obtained by a public employee and which, if disclosed, is against the public interest."]; *In re Sergio M.* (1993) 13 Cal.App.4th 809 [nondisclosure of surveillance site]; *In re David W.* (1976) 62 Cal.App.3d 840, 847-48 [confidentiality of secret VIN location].
41. See *People* v. *Hobbs* (1994) 7 Cal.4th 948, 971 ["all or any part of a search warrant affidavit may be sealed if necessary to . . . protect the identity of a confidential informant"].
42. See *People* v. *Hobbs* (1994) 7 Cal.4th 948, 962-63 ["the courts have sanctioned a procedure whereby those portions of a search warrant affidavit which, if disclosed to the defense, would effectively reveal the identity of an informant, are redacted, and the resulting 'edited' affidavit furnished to the defendant"].
43. Evid. Code § 1040(a).
44. See *People* v. *Galland* (2008) 45 Cal.4th 354, 368 [sealed search warrant affidavits "should ordinarily be part of the court record that is maintained at the court"].
45. *People* v. *Galland* (2008) 45 Cal.4th 354, 359.

46. See, for example, Gov. Code § 7475 [financial institutions]; 12 U.S.C. 3409 [financial records]; 18 U.S.C. 3123(b) [phone records].
47. *People* v. *Fleming* (1981) 29 Cal.3d 698, 707. ALSO SEE *People* v. *Galvan* (1992) 5 Cal.App.4th 866, 870; *People* v. *Redman*(1981) 125 Cal.App.3d 317; *People* v. *Dantzler* (1988) 206 Cal.App.3d 289, 293. **NOTE**: In identity theft cases, the warrant may also be issued by a judge in the county in which the victim lives. Pen. Code § 1524(j).
48. (1983) 34 Cal.3d 858.
49. (1981) 29 Cal.3d 698.
50. See Pen. Code § 1528(a); *People* v. *Fleming* (1981) 29 Cal.3d 698, 703; *People* v. *Galvan* (1992) 5 Cal.App.4th 866, 870.
51. See *People* v. *Fleming* (1981) 29 Cal.3d 698, 704, fn. 4.
52. See *Calpin* v. *Page* (1873) 85 U.S. 366 [“The tribunals of one State . . . cannot extend their process into other States”].
53. See Pen. Code § 1524(c); *Fenwick & West* v. *Superior Court* (1996) 43 Cal.App.4th 1272, 1279. ALSO SEE Evid. Code § 952 [“As used in this article, ‘confidential communication between client and lawyer’ means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.”]; Evid. Code § 992 [sets forth the physician-patient privilege, essentially the same as Evid. Code § 952].
54. *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 713 [“Even if the custodian is suspected of a crime, when privileged materials in the custodian’s possession are seized pursuant to a search warrant, he or she still owes a duty to take appropriate steps to protect the interest of the privilege holders in not disclosing the materials to law enforcement authorities or others.”]. ALSO SEE *People* v. *Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1766 [“the attorney is professionally obligated to claim [the privilege] on his client’s behalf whenever the opportunity arises unless he has been instructed otherwise by the client”].
55. See Pen. Code § 1524(i); *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 720; *People* v. *Superior Court (Bauman and Rose)* (1995) 37 Cal.App.4th 1757, 1765 [“In essence, the special master procedure . . . requires (1) that a search of premises owned or controlled by a nonsuspect privilege holder must be overseen by a special master; (2) that any item as to which the privilege holder asserts the privilege, or gives some other reason precluding disclosure, must be sealed on the spot; and (3) that a hearing must be held within three days of the service of the warrant, or as expeditiously as otherwise possible, on the privilege holder’s assertion of the privilege or any issues which may be raised pursuant to [Pen. Code] Section 1538.5.”].
56. **NOTE**: Such authorization is not required under the Fourth Amendment, and may also be unnecessary under California law. See Pen. Code § 1530; *U.S.* v. *Bach* (8th Cir. 2002) 310 F.3d 1063, 1066. It is, however, a good practice if officers know ahead of time that it will be necessary for an expert to conduct the search.
57. (1980) 104 Cal.App.3d 1001.
58. See *Wilson* v. *Layne* (1999) 526 U.S. 603, 611-12 [“the presence of third parties for the purpose of identifying the stolen property has long been approved by the Court”]; Pen. Code § 1530 [the search may be conducted by a civilian “in aid of the officer”].
59. See *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 557 [“An anticipatory or contingent search warrant is one based on an adequate showing that all the requisites for a valid search will ripen at a specified future time or upon the occurrence of a specified event.”].
60. *U.S.* v. *Andrews* (4th Cir. 2009) 577 F.3d 231, 237.
61. (10th Cir. 1997) 112 F.3d 1081, 1086. ALSO SEE *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 557 [anticipatory warrants “recognize that the police often must act quickly, especially when dealing with the furtive and transitory activities of persons who traffic in narcotics”]; *U.S.* v. *Garcia* (2nd Cir. 1989) 882 F.2d 699, 703 [without anticipatory warrants, officers might be forced “to go to the scene without a warrant, and, if necessary, proceed under the constraints of the exigent circumstances exception”].
62. See *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 558 [“It is true that most anticipatory warrant cases involve controlled deliveries of packages containing contraband. None of them, however, holds that anticipatory warrants are improper in other contexts.”].
63. *U.S.* v. *Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 10.

64. See *U.S.* v. *Gendron* (1st Cir. 1994) 18 F.3d 955, 965; *U.S.* v. *Penney* (6th Cir. 2009) 576 F.3d 297, 310.
65. *U.S.* v. *Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 12. ALSO SEE *U.S.* v. *Brack* (7th Cir. 1999) 188 F.3d 748, 757.
66. See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96 [there must be "probable cause to believe the triggering condition *will occur*"]. **NOTE**: The triggering event must also occur before the warrant expires; i.e., within ten days after the warrant was issued. See Pen. Code § 1534(a); *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581 ["This time period, of course, would be subject to the 10day limitation which is set out in Penal Code section 1534."].
67. See *United States* v. *Grubbs* (2006) 547 U.S. 90, 94 ["It must be true [that] *if* the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place"]; *U.S.* v. *Elst* (7th Cir. 2009) 579 F.3d 740, 744 [there must be "a fair probability that contraband or evidence of a crime will be found in the place to be searched if the triggering condition occurs"].
68. *United States* v. *Grubbs* (2006) 547 U.S. 90, 98 ["[T]he Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself "].
69. See *United States* v. *Grubbs* (2006) 547 U.S. 90, 97 [delivery by USPS]; *U.S.* v. *Hugoboom* (10th Cir. 1997) 112 F.3d 1081, 1087 [delivery by undercover postal inspector]; *U.S.* v. *Ruddell* (9th Cir. 1995) 71 F.3d 331, 333 [delivery by undercover postal inspector]; *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1122 [delivery by police agent posing as a commercial package carrier]; *U.S.* v. *Dennis* (7th Cir. 1997) 115 F.3d 524, 531 ["simply discovering the package in the mail stream and placing it back into the mail stream to effect a controlled delivery should satisfy the sure course requirement"]; *U.S.* v. *Leidner* (7th Cir. 1996) 99 F.3d 1423, 1429 ["the informant would personally deliver the marijuana to Leidner's residence, under the direction and supervision of the government"].
70. See *U.S.* v. *Brack* (7th Cir. 1999) 188 F.3d 748, 757 ["Brack had been selling drugs out of Room 109"].
71. See *U.S.* v. *Lawson* (6th Cir. 1993) 999 F.2d 985, 988 [six ounces of cocaine "was too large an amount to be sent on a whim"]; *U.S.* v. *Dennis* (7th Cir. 1997) 115 F.3d 524, 530 [16 ounces of cocaine].
72. *U.S.* v. *Elst* (7th Cir. 2009) 579 F.3d 740, 745.
73. *United States* v. *Grubbs* (2006) 547 U.S. 90, 96.
74. **NOTE**: The "sure course" rule was announced in *U.S.* v. *Ricciardelli* (1st Cir. 1993) 998 F.2d 8. But just one year later, the court explained that, while its earlier opinion might be read as instituting a higher standard than probable cause, that was not the court's intention. Said the court, "But we know of no justification for a *stricter* standard in respect to specificity of time [when probable cause can be said to exist] than in respect to the other two (constitutionally referenced) search parameters. *Ricciardelli*, while stating that contraband must be on a 'sure and irreversible course' to the place to be searched, did not purport to set forth any *special* new rule requiring more specificity where time, rather than, say, place, is at issue." *U.S.* v. *Gendron* (1st Cir. 1994) 18 F.3d 955, 966.
75. See, for example, *U.S.* v. *Hendricks* (9th Cir. 1984) 743 F.2d 653, 655; *U.S.* v. *Leidner* (7th Cir. 1996) 99 F.3d 1423, 1428; *U.S.* v. *Loy* (3d Cir. 1999) 191 F.3d 360, 365.
76. (10th Cir. 1998) 145 F.3d 1194.
77. *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535. ALSO SEE *U.S.* v. *Brooks* (10th Cir. 2005) 427 F.3d 1246, 1251-52 ["Given the numerous ways information is stored on a computer, openly and surreptitiously, a search can be as much an art as a science."].
78. *U.S.* v. *Stabile* (3d Cir. 2011) 633 F.3d 219, 234.
79. See, for example, *U.S.* v. *Horn* (8th Cir. 1999) 187 F.3d 781, 788; *U.S.* v. *Lamb* (N.D.N.Y. 1996) 945 F.Supp. 441, 462.
80. See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973 ["[T]he affidavit explained why it was necessary to seize the entire computer system"]; *U.S.* v. *Hill* (9th Cir. 2006) 459 F.3d 966, 976 ["We do not approve of issuing warrants authorizing blanket removal of all computer storage media for later examination when there is no affidavit giving a reasonable explanation . . . as to why a wholesale seizure is necessary."]; *U.S.* v. *Hay* (9th Cir. 2000) 231 F.3d 630, 637 [the affidavit "justified taking the entire system off site because of the time, expertise, and controlled environment required for a proper analysis"].
81. See *People* v. *Zepeda* (1980) 102 Cal.App.3d 1, 7 ["the warrant was actually served when the search began"]; *People* v. *Schroeder* (1979) 96 Cal.App.3d 730, 734 ["When the responding banks immediately indicated that it would take time for them to assemble the voluminous material called for in the warrants, the purpose of the [time limit] was met."]; *People* v. *Superior Court (Nasmeth)* (2007) 151 Cal.App.4th 85, 99.
82. See *Dalia* v. *United States* (1979) 441 U.S. 238, 257 ["[T]he specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed."]; *U.S.* v. *Hill* (9th Cir. 2006) 459 F.3d 966, 978 ["[W]e look favorably

upon the inclusion of a search protocol; but its absence is not fatal."]; *U.S.* v. *Cartier* (8th Cir. 2008) 543 F.3d 442, 447 ["the warrant need not include a search protocol to satisfy the particularity requirement"].

83. *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094.
84. See, for example, *U.S.* v. *Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1330; *U.S.* v. *Pangburn* (2nd Cir. 1993) 983 F.2d 449.
85. *Dalia* v. *United States* (1979) 441 U.S. 238, 247-48.
86. See *U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456.
87. *U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456.
88. See *U.S.* v. *Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1337 ["[T]he court should not allow the officers to dispense with advance or contemporaneous notice of the search unless they have made a showing of reasonable necessity for the delay."]. **NOTE**: Although the Ninth Circuit has indicated that a showing of necessity is not a requirement under the Fourth Amendment (*U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456 ["we do not hold that a showing of necessity is constitutionally required") it would seem that the overall reasonableness of the search may depend on whether the delayed notice was necessary. *Wilson* v. *Arkansas* (1995) 514 U.S. 927 982.
89. See *U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456 [the record "merely demonstrates that the search and seizure would facilitate the investigation of Freitas, not that it was necessary"].
90. See *Steagald* v. *United States* (1981) 451 U.S. 204.
91. *See United States* v. *Grubbs* (2006) 547 U.S. 90, 96 [grounds for an anticipatory warrant will exist if "it is now probable that ... a fugitive will be on the described premises when the warrant is executed"].
92. See Gov. Code § 16.5(d).
93. See Civ. Code § 1633.2(h).
94. See Pen. Code § 1526(b)(2).
95. See Pen. Code § 1534(a).
96. See *Srgo* v. *United States* (1932) 287 U.S. 206, 211; *People* v. *Sanchez* (1972) 24 Cal.App.3d 664, 682 ["[T]here is no statutory authority for the revalidation and reissuance of a search warrant."].
97. See *Srgo* v. *United States* (1932) 287 U.S. 206, 211.
98. See *People* v. *Sanchez* (1972) 24 Cal.App.3d 664, 681-82.
99. See Pen. Code § 1536; *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.
100. See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 482, fn.11.
101. See *Oziel* v. *Superior Court* (1990) 223 Cal.App.3d 1284, 1293, 1302.
102. See Pen. Code § 1536.
103. Pen. Code § 939.2; *M.B.* v. *Superior Court* (2002) 103 Cal.App.4th 1384, 1388.
104. Pen. Code §§ 1326 *et seq.*; Evid. Code § 1560.

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13.3: Executing Search Warrants

"An officer's conduct in executing a search [warrant] is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure." 1

The execution of a warrant to search a home is, from start to finish, a frightening display of police power. After all, it is nothing less than an armed invasion into the sanctity of the home. And although most people can avoid such unpleasantness by simply not committing any crimes (or at least stop committing them), it is such an extreme intrusion that it is closely and scrupulously regulated by the courts.

These regulations fall into two broad categories. First, there is the basic Fourth Amendment requirement that warrants may be issued only if officers have demonstrated probable cause and have adequately described the place to be searched and the evidence to be seized.

The second requirement, while also based on the Fourth Amendment, is not as well known but it's just as important: Officers who are executing a warrant must carry out their duties in a reasonable manner.2 As the court said in *Hells Angels v. City of San Jose*, "The test of what is necessary to execute a warrant effectively is *reasonableness*."3

This does not mean there are no absolute rules. On the contrary, as we will discuss, there are lots of them. But because the business of executing search warrants is so unpredictable and dangerous, the courts recognize that officers must be allowed some flexibility in interpreting and applying these rules. Thus, the Supreme Court noted that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant."4

Before we begin, it should be noted that, although many of the legal issues we will discuss pertain to most types of warranted searches, we will focus on the most common and problematic variety: searches of homes, especially searches for illegal drugs and weapons, and also searches for information contained in documents and computers.

When Warrants May Be Executed

While most of the rules on executing search warrants restrict the *manner* in which officers enter the premises and carry out the search, there are certain rules on *when* warrants may be executed. By the way, a warrant is "executed" at the point officers enter the premises.5

TIME OF EXECUTION: A search warrant must be executed between the hours of 7 A.M. and 10 P.M. unless the judge authorizes night service, in which case it may be executed at any hour of the day or night.6 Because a warrant is "executed" when officers entered, it is immaterial that they remained on the premises after 10 P.M. to complete the search.7

ENTRY WITHOUT PHYSICAL WARRANT: Officers may execute the warrant when they have been notified that the warrant had been signed by a judge. Thus, they need not wait for the warrant to be brought to the premises.8 However, if the judge made any changes to the warrant that altered the scope or intensity of the search, the officers on the scene must be notified of the changes before they begin the search.9

ENTERING UNOCCUPIED PREMISES: Officers may execute a warrant to search a home even though they knew the residents were not inside.10

WHEN WARRANTS EXPIRE: A search warrant must be executed within 10 days after it was issued. After that, it is void.11 In calculating the 10-day period, do not count the day on which the warrant was issued, although it may be executed on that day.12 Again, because a warrant is "executed" when entry is made, officers who enter within the 10-day window do not need a new warrant if the warrant expires while they were conducting the search.13

This rule also applies if officers mailed or faxed the warrant to a bank or other third-party business. Consequently, the warrant remains valid despite any reasonable delay by employees in assembling the documents and sending them to officers.14

IF PROBABLE CAUSE DISAPPEARS: Even if the warrant had not expired, it automatically becomes void if officers learned that probable cause no longer existed. As the Tenth Circuit explained, "The Fourth Amendment requires probable cause to persist from the issuance of a search warrant to its execution."15

Entry Procedure

From the perspective of the officers and the occupants of the premises, the initial entry is the most uncertain, stressful, and dangerous operation in the entire process. For that reason, the courts have imposed certain restrictions that are intended to minimize the danger and provide an orderly and efficient transfer of control of the premises from the residents to the officers.16

Knock-notice

To fully comply with the knock-notice rule, officers must do the following before forcibly entering the premises:

1. KNOCK: Knock or otherwise alert the occupants that someone is at the door. This also provides some assurance that the occupants will hear the officers' announcement.
2. ANNOUNCE AUTHORITY: Announce their authority; e.g. "Police officers!"
3. ANNOUNCE PURPOSE: Announce their purpose; e.g., "Search warrant!"
4. WAIT FOR REFUSAL: Before breaking in, officers must give the occupants an opportunity to admit them peacefully. Thus, officers must not enter until it reasonably appears that the occupants are refusing to admit them.17

Although these requirements (or versions of them) are over 400 years old, 18 they are still generally viewed by officers as a perversion. Particularly, they question why, having a legal right to enter, they must engage in what is arguably a "meaningless formality" that provides the occupants with an opportunity to destroy evidence or arm themselves?19

But there is another view: Without an announcement, the occupants might conclude that their home is being invaded by a burglar, a robber, or a persistent door-to-door salesman—and start shooting. As the California Supreme Court pointed out, "[F]ew actions are as likely to evoke violent response from a householder as unannounced entry by a person whose identity and purpose are unknown to the householder."20

In an attempt to accommodate these competing interests, the courts have given officers a great deal of leeway in determining if they must comply with the knock-notice requirements and, if so, when and how they must do so.

NO-KNOCK WARRANTS: When officers apply for a search warrant, they can also seek authorization to enter without knocking or making an announcement. As the Supreme Court observed, "The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time."21 What is "sufficient cause"? It exists if the affidavit demonstrates reasonable suspicion to believe that compliance with the knock-notice requirements would (1) result in violent resistance from the occupants, (2) result in the destruction of evidence, or (3) be futile.22 Note that, even if the judge authorized a no-knock entry, such authorization terminates automatically if, before entering, the officers became aware of circumstances that eliminated the need for it.23

EXCUSED NONCOMPLIANCE: Even in the judge refused to issue a no-knock warrant, officers may dispense with the knock-and-announce procedure if, upon arrival, they reasonably believed there were circumstances that would have justified a non-knock entry; e.g., destruction of evidence.24

SUBSTANTIAL COMPLIANCE: In some cases the courts have ruled that compliance was unnecessary if it reasonably appeared that someone inside the residence was aware that officers were about to enter, and that their purpose was to execute a search warrant.25

AFFIRMATIVE REFUSALS: Officers may enter without waiting to be refused entry if the occupants said or did something that reasonably indicated they would not admit the officers peacefully, or that they were actually trying to prevent or delay the officers' entry; e.g., the occupants started running away from the front door,26 an occupant "slammed the door closed,"27 officers heard sounds that suggested "surreptitious movement."28

IMPLIED REFUSALS: In the absence of an affirmative refusal, a refusal will be implied if the officers were not admitted into the premises within a reasonable time after they announced their authority and purpose.29 In fact, the Ninth Circuit observed that "[t]he refusal of admittance contemplated by the [knocknotice] statute will rarely be affirmative, but will oftentimes be present only by implication."30

There is, however, no minimum amount of time that must pass before a refusal may be inferred.31 Instead, it depends on the totality of circumstances,32 especially the following:

SIZE AND LAYOUT: Size and layout are important because they may affect the amount of time it will take the residents to answer the door.33

TIME OF DAY: A delay late at night might be expected if it reasonably appeared that the occupants had been asleep; e.g., the lights were out. Conversely, a delay might be more suspicious in the daytime or early evening.[34]

NO REASON FOR DELAY: Even a short delay may constitute a refusal if officers reasonably believed an occupant had heard their announcement but did not respond.[35] As the court observed in *People v. Elder*, "Silence for 20 seconds where it is known that someone is within the residence suggests that no one intends to answer the door."[36] In contrast, in *People v. Gonzales* the court ruled that a delay of five seconds was insufficient because the officers knew that the resident was a woman who was home alone with two children, and they also knew the woman could not see them from the door.[37]

TRICKS AND RUSES: Officers need not comply with the knock-notice requirements if an occupant consented to their entry—even if the officers lied about who they were or their purpose. As the Court of Appeal explained, "Officers who reasonably employ a ruse to obtain consent to enter a dwelling do not violate [the knock-notice requirement], even if they fail to announce their identity and purpose before entering."[38] Some examples:

- Wearing a U.S. Post Office uniform, an officer obtained consent to enter for the purpose of delivering a letter.[39]
- An officer was admitted after he said, "It's Jim, and I want to talk to Gail." (Gail was an occupant and suspect.)[40]
- The suspect's wife admitted an officer who claimed to be a carpet salesman sent by the welfare office to re-carpet the house.[41]
- A drug dealer told an officer to come in after the officer claimed that "Pete" had sent him to buy drugs.[42]

Flashbangs

If there is a high threat of violent resistance or destruction of evidence, and if officers comply with certain requirements, they may employ "flashbangs" before entering the premises. A flashbang is an explosive device that is tossed inside and which, upon ignition, emits a brilliant burst of light and a thunderous sound. This usually has the effect of temporarily disorienting and confusing the occupants, thereby giving officers a better chance of making a quick and safe entry.

Although officers are not required to obtain authorization from the judge to utilize flashbangs, the California Supreme Court has ruled their use may render an entry unreasonable unless the following circumstances existed:

1. **REDUCED EXPLOSIVE POWER**: The explosive power of the flashbang must have been limited to minimize the risk of injury to the occupants.
2. **ADMINISTRATIVE APPROVAL**: Before the warrant was executed, a police administrative panel must have determined that the use of flashbangs was the safest means of making a forced entry under the circumstances.
3. **LOOK INSIDE**: To help ensure that the flashbang did not land on or near a person or on flammable material, officers must have looked inside the targeted room before deploying the device.[43]

In addition to the above, officers should consider whether there are children in the home who might be traumatized by such a violent entry.[44]

Motorized battering rams

Breaking down a door by means of a motorized battering ram (essentially a small, armored vehicle fitted with a steel protrusion) presents a high risk of danger to the occupants and may even cause a partial building collapse. For this reason, the California Supreme Court indicated that a motorized battering ram may be used only if the following circumstances existed: (1) a police administrative panel and the judge who issued the warrant expressly authorized its use based on facts that established probable cause to believe that its deployment was reasonably necessary; and (2), before utilizing the vehicle, officers saw nothing to indicate that such a violent entry was unnecessary.[45]

Note that in determining whether there was probable cause, and whether the use of the vehicle was reasonably necessary, judges and officers must consider "the reliability of the ram under the specific circumstances as a rapid and safe means of entry, the seriousness of the underlying criminal offense and society's consequent interest in obtaining a conviction, the strength of law enforcement suspicions that evidence of the crime will be destroyed, the importance of the evidence sought" and the possibility that the evidence could be recovered by less dangerous means.[46]

Securing the Premises

The first step after entering the home is to take complete control of the premises.[47] As the United States Supreme Court observed, "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the

situation."[48] The Court also noted that, by assuming command, officers may reduce the risk that the occupants "will become disruptive" or otherwise "frustrate the search."[49]

Detentions

In most cases, the most effective means of securing the premises is to detain everyone on the premises. But, as we discuss, the length and intrusiveness of a detention will vary, as some people may be detained until the search is completed, while others may be held only briefly to determine whether a full detention is warranted or whether they must be released.

DETENTION BASED ON REASONABLE SUSPICION: Officers may detain any person pending completion of the search—regardless of whether the person was inside or outside the residence—if they reasonably believed he was involved in the crime under investigation or constituted a threat to them.[50] For example, in *U.S. v. Bullock* the court ruled that the detention of the defendant pending completion of the search was permitted because the "officers had articulable basis for suspecting that Bullock was engaged in drug activity from that residence."[51]

DETENTION BASED ON RESIDENCY OR OCCUPANCY:

Even if officers lacked reasonable suspicion, they may, pending completion of the search, detain everyone who was inside the home when they arrived.[52] As the Court of Appeal explained, "[A] search warrant carries with it limited authority to detain occupants of a residence while a proper search is conducted."[53] As with any type of detention, however, the detention of an occupant must be reasonable in its length and intrusiveness.[54] For example, in *Muehler v. Mena* the Supreme Court ruled that the handcuffing of an occupant pending completion of the search was reasonable because the warrant authorized a search for weapons in the home of a gang member. Such a situation, said the Court, was "inherently dangerous" and the use of the handcuffs "minimizes the risk of harm to both officers and occupants."[55] On the other hand, the Ninth Circuit noted that "[a] detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy."[56]

Note that if officers are searching a business that is open to the public, they may detain an occupant only if there was reasonable suspicion to believe *that* person was criminally involved.[57] In other words, a person cannot be detained merely because he was present in a place where evidence is located if that place was open to the public.

ARRIVING UNDER SUSPICIOUS CIRCUMSTANCES: Officers may also detain a person pending completion of the search if (1) he arrived on the premises while the search was underway, and (2) he said or did something that reasonably indicated he was more than a casual visitor; e.g., the person entered the house without knocking, or he inserted a key into the lock, or he fled when he saw uniformed officers.[58]

BRIEF DETENTIONS TO DETERMINE STATUS: Under certain circumstances, officers may briefly detain people near the home for the limited purpose of determining whether there are grounds to detain them pending completion of the search, or whether they must be released.

DETAINING PEOPLE WITHIN THE CURTILAGE: Officers may ordinarily detain people who were in the front, back, or side yards.[59]

DETAINING PEOPLE WHO ARRIVE: A person may be detained if he arrived at the residence during the execution of the warrant, even though he did nothing to indicate he was a detainable resident or occupant.[60]

DETAINING PEOPLE WHO DEPART: A person who left the premises just before officers arrived may be detained if he was in the "immediate vicinity" of the premises when the detention occurred.[61] However, if officers reasonably believed that the person had become aware of their presence as he left the premises, a brief detention a short distance away should be upheld to prevent him from alerting the occupants of the impending search.[62]

Other security precautions

In addition to detaining occupants and others, officers may take the following precautions if reasonably necessary.

SEIZING WEAPONS IN PLAIN VIEW: While inside the premises, officers may temporarily seize any weapon in plain view, even if the weapon was not contraband or seizable under the warrant.[63]

PAT SEARCHES: Officers may pat search any person inside or outside the premises if they reasonably believed the person was armed or dangerous.64 In addition, officers who are executing a warrant to search for illegal drugs or weapons may pat search (1) all occupants of the premises,65 and (2) anyone who arrived while the search was underway if the person entered in a manner that reasonably indicated he lived there or was otherwise closely associated with the residence; e.g., the person entered without knocking.66

OFFICER-SAFETY QUESTIONING: Even if an occupant had been arrested or was otherwise "in custody" for *Miranda* purposes, officers do not need a waiver to ask questions that are reasonably necessary to locate and secure deadly weapons on the premises, or to determine if there was someone on the premises who presented a threat to the officers.67 Such a situation would exist, for example, if the officers were searching for evidence of drug trafficking. As the Court of Appeal aptly put it:

> Particularly where large quantities of illegal drugs are involved, an officer can be certain of the risk that individuals in possession of those drugs, which can be worth hundreds of thousands and even millions of dollars, may choose to defend their livelihood with their lives.68

SHOOTING DOGS: Shooting a dog on the premises is permitted only if officers can articulate a reasonable basis for such an extreme action.69 Furthermore, a court might find that such an action was unreasonable if officers knew there was a dangerous dog on the premises before they executed the warrant and failed to explore other options.70

Displaying the Warrant

After securing the premises, officers will ordinarily show the occupants a copy of the warrant. This is not, however, required under California law.71 In fact, as noted earlier, officers at the scene are not even required to possess a copy of the warrant. Still, displaying a copy is considered a "highly desirable" practice as it demonstrates to the occupant that "there is color of authority for the search, and that he is not entitled to oppose it by force."72

As for warrants issued by federal judges, the United States Supreme Court ruled that, although officers must leave a copy of the warrant and a receipt at the scene, they are not required to serve an occupant with a copy at the outset of the search.73

What May Be Searched

A warrant must, of course, identify the home that officers may search. But warrants seldom specify every area and thing inside or on the grounds that may be searched. As the First Circuit observed, "The warrant process is primarily concerned with identifying *what* may be searched or seized—not how."74 Thus, in *U.S. v. Aljabari* the court pointed out that the following:

The execution of a warrant will often require some interpretation of the warrant's terms. A warrant that seems unambiguous to a magistrate in the confines of the courthouse may not be so clear during the execution of the search, as officers encounter new information not available when they applied for the warrant.75

As a result, the officers who are executing a warrant will often be required to exercise judgment in determining what places and things they may search. It is therefore the responsibility of the lead investigators to make sure—usually by means of a pre-search briefing—that all members of the search team understand the terms of the warrant, the parameters of the search, and any special restrictions.76 As the Ninth Circuit pointed out, "Typically, of course, only one or a few officers plan and lead a search, but more—perhaps many more—help execute it. The officers who lead the team that executes a warrant are responsible for ensuring that [the others] have lawful authority for their actions."77 Along these same lines, the D.C. Circuit noted that search warrants "are not self-executing; they require agents to carry them out. In order for a warrant's limitations to be effective, those conducting the search must have read or been adequately apprised of its terms."78

As we will discuss in more detail as we go along, a basic requirement is that officers confine their search to places and things in which one or more of the listed items of evidence could reasonably be found.79 Thus, the United States Supreme Court explained that if a warrant authorizes a search for illegal weapons, it "provides authority to open closets, chests, drawers, and containers in which the weapon might be found."80 More colorfully, the Seventh Circuit observed that if officers are looking for a "canary's corpse," they may search "a cupboard, but not a locket"; and if they are looking for an "adolescent hippopotamus," they may search "the living room or garage but not the microwave oven."81

Officers are not, however, required to confine their search to places and things in which the evidence is *usually* or *commonly* found. Instead, a search of a certain place or thing will be invalidated only if there was no reasonable possibility that the evidence would

have been found inside.[82]

Before we begin, two other things should be noted. First, the descriptions of the places and things that may be searched "should be considered in a common sense manner," which means that the courts should not engage in "hypertechnical readings" of the warrant.[83] Second, *all* evidence obtained during the search will be suppressed if a court finds that the officers flagrantly disregarded the express or implied terms of the warrant as they conducted the search; i.e., if the officers conducted a "general search."[84] In the absence of flagrant disregard, a court will suppress only the evidence that was found in a place or thing that was not searchable under the warrant.[85]

Searching rooms and other interior spaces

If a warrant authorizes a search of a "single living unit"[86]—such as a single-family home, condominium, apartment, or motel room—it impliedly authorizes a search of the following:

COMMON AREAS: Unless the warrant says otherwise, officers may search all common areas, such as the living room, kitchen, bathrooms, hallways, recreation rooms, storage areas, basement, attic, and the yards.[87]

BEDROOMS: Officers may search all bedrooms, even bedrooms that are occupied by people who are not suspects in the crime under investigation.[88] As the Ninth Circuit observed, "A search warrant for the entire premises of a single family residence is valid, notwithstanding the fact that it was issued based on information regarding the alleged illegal activities of one of several occupants of the residence."[89]

For example, in *U.S. v. Kyles* [90] FBI agents obtained a warrant to search the apartment of Basil Kyles who was suspected of having robbed a bank the previous day. Basil's mother answered the door and, when asked about a locked bedroom, said it belonged to her other son, Geoffrey; and that Geoffrey had the only key. The agents forced open the door and found evidence that incriminated both brothers. On appeal, Geoffrey argued that the search of his bedroom was beyond the scope of the warrant because he was not a suspect in the robbery when the warrant was executed and his room constituted a "separate residence." The court disagreed, saying, "The FBI agents had no reason to believe that Geoffrey's room was a separate residence: it had neither its own access from the outside, its own doorbell, nor its own mailbox. Mrs. Klyes's statement that Geoffrey was the only person with a key to the room did not, by itself, elevate the bedroom to the status of a separate residential unit."

COMPARE MULTI-RESIDENTIAL STRUCTURES: In contrast to single living units are buildings that have been divided into two or more living units, each under the *exclusive* control of different occupants. The most common buildings that fall into this category are apartment buildings, condominium complexes, duplexes, motels, and hotels. Authorization to search all residences or units in a multi-residential structure will not be implied. Thus, officers who are executing a warrant to search such a building may search only the residences or units that are listed in the warrant; e.g., a certain apartment.[91]

Although it does not happen often, officers will sometimes enter a home to execute a warrant and discover that it is actually a multi-residential structure because it had been divided into separate apartments. This occurred in *Mena v. City of Simi Valley* [92] where officers obtained a warrant to search a house for a firearm that one of the residents, Romero, had used in a gang-related drive-by shooting. The officers knew that the residence was a single-family residence occupied by a large number of people, mostly unrelated. But when they entered, they saw that many of the rooms adjacent to the living room were locked, some with padlocks on the outside of the doors. Furthermore, when they started to force open some of the doors, they saw that the rooms "were set up as studio apartment type units, with their own refrigerators, cooking supplies, food, televisions, and stereos."

The owner of the house sued the officers, claiming the search was overbroad. The officers sought qualified immunity from the Ninth Circuit, but the court refused to grant it, saying, "the officers should have realized that the Menas' house was a multi-unit residential dwelling" and, thus, "the officers' search beyond Romero's room and the common areas was unreasonable."

Searching attached and detached structures Although it is preferable that warrants identify all searchable buildings on the property,[93] officers may search attached and unattached structures that are ancillary to the residence or otherwise appear to be controlled by the occupants, such as garages and sheds (attached or detached).[94] As the Ninth Circuit explained, "The curtilage is simply an extension of the resident's living area, and we have previously held that such extensions become part of the residence for purposes of a search warrant."[95]

The courts have also ruled that authorization to search outbuildings on the property will be implied if the warrant authorized a search of "premises" or "property" at a particular address.[96] For example, in *People v. Grossman* the court ruled that a warrant to

search “the premises located and described as 13328 Merkel Ave., Apt. A” impliedly authorized a search of a cabinet in the carport marked “A”.97

On the other hand, express authorization to search an outbuilding will be required if it reasonably appeared to be a rental property under the control of a third party.98

Also note that officers may search receptacles on the property (such as a mailbox or garbage can) if it reasonably appeared to be controlled by one or more of the occupants.99

Searching personal property

The term “personal property” essentially means items that people ordinarily carry with them, such as purses, backpacks, briefcases, luggage, satchels, and bags. Because it is usually impractical or impossible to include in a warrant a list of all searchable personal property on the premises, there is a general presumption that all such things belong to a resident and may therefore be searched.100 As the Court of Appeal explained, “The police may ordinarily assume that all personal property which they find while executing a search warrant is the property of a resident of the premises subject to a search.”101

This presumption does not apply, however, if the officers had reason to believe that the property belonged to a visitor. In that situation, they may search it only if one of the following circumstances existed: (1) there was reason to believe the visitor was an accomplice in the crime under investigation (e.g., a visitor’s purse was on a chair in a bedroom where a large quantity of methamphetamine had been found);102 (2) the item belonged to a person who was more than a casual visitor;103 or (3) there was reason to believe that “someone within the premises has had an opportunity to conceal contraband within the [item] immediately prior to the execution of the search warrant.”104

Searches for documents

If a warrant authorized a search for documents, officers may search any container on the premises in which such a document might reasonably be found.105 Thus, a warrant that authorizes a search for one or more documents necessarily authorizes a broad search. As noted in *People v. Gallegos*, “Documents may be stored in many areas of a home, car, motor home or garage. It is not unusual for documents to be stored in drawers or closets, on shelves, in containers, or even in duffle bags.”106

READING DOCUMENTS ON-SITE: If officers are authorized to search for documents, they may read any document they find to the extent necessary to determine if it is seizable.107

LABELS DON’T MATTER: Officers may search containers of documents (such as envelopes, CDs, files, and binders) even though the container displays a label indicating that it does not contain seizable documents.108 As the Second Circuit observed, “[F]ew people keep documents of their criminal transactions in a folder marked ‘drug records.’”109

SEEK OPINION OF LEAD INVESTIGATOR: Officers who are not sure whether a document is covered under the warrant, or whether an entire file, box, or other container of documents may be read or removed, should refer the matter to the lead investigator or other designated officer.110

REMOVING DOCUMENTS FOR OFF-SITE SEARCH: If officers know ahead of time that it will be necessary to read many documents to determine whether they are seizable under the warrant, they will ordinarily seek express authorization to remove the documents and read them elsewhere.111 This is not only more convenient for the officers, it will reduce the intrusiveness of the search because they will be able to vacate the premises sooner.

In the absence of express authorization, officers may be impliedly authorized to remove documents if they discovered so many documents on the premises that it was not feasible to read them there.112 Thus, when this issue arose in *U.S. v. Alexander*, the court responded, “[I]t would have been difficult, and possibly more intrusive to Alexander’s privacy, for law enforcement to conduct an on-site review of each of more than 600 photographs to determine whether they were evidence of illegal conduct.”113 Another option in such a case is to seize the documents and seek a warrant that expressly authorizes a search of them off site.

When officers are removing documents for an offsite search, they may ordinarily take the entire file, folder, or binder in which the documents were stored. This not only serves to facilitate the search, it will help keep the files intact.114 But massive seizures of documents for the sole purpose of establishing dominion and control (searches for indicia) would ordinarily be deemed excessive.115

TIME LIMITATIONS: Although search warrants become void 10 days after issuance, the clock stops when the warrant was executed. Thus, is doesn't matter that the off-site search took longer than 10 days to complete, so long as the officers were diligent. See "When Warrants May Be Executed," above.

Searching computers, cellphones . . .

By definition, any device with digital storage capability contains *information*. Consequently, if a warrant authorizes a search for information (such as financial documents, photos, indicia) officers may want to search for it in such devices. Apart from the various technical issues (and there are lots of them), there are some legal issues that officers must address. The following are fairly common.

IS EXPRESS AUTHORIZATION REQUIRED? To date, most courts have ruled that a warrant which includes authorization to search for information impliedly authorizes a search for the information in any digital storage devices on the premises.116 For example, in *People v. Balint* the court ruled that it could "perceive no reasonable basis to distinguish between records stored electronically on the laptop and documents placed in a filing cabinet or information stored in a microcassette."117 But because not all courts agree with this analysis, 118 and also because there is no downside, officers who are writing search warrants should almost always seek express authorization.

SEARCHING OFF SITE: Unless officers intend to conduct only a cursory search for information, they will usually seek express authority to seize digital storage devices on the premises and conduct the search at a location where they will have the time and tools for a thorough examination, such as a police station or forensic lab. As the First Circuit observed in a computer search case, "[I]t is no easy task to search a well-laden hard drive."119

If the warrant does not expressly authorize an offsite search but, upon executing the warrant, it become apparent that one will be necessary, there is authority for seizing the device without express authorization and searching it later.120 But the better practice is to seize the equipment, then seek a warrant to search it off-site.

Two other things: First, if officers seized the device within 10 days after the warrant was issued, they do not need express authorization to begin or continue the search after the warrant expired. Officers should, however, seek court authorization if the seizure will be prolonged, especially if a legitimate business would be adversely affected by the loss of the device.121 Second, if officers determine that a certain device or file was not covered under the warrant or was not otherwise seizable, they should return it promptly.122 This is especially important if it was needed for a legitimate business.123

Searching people on the premises

While evidence can often be found hidden in or under the clothing of people, officers are not permitted to search the occupants for evidence unless the warrant expressly authorized it and also identified each searchable person by name, description, or both.124 As the First Circuit observed, "A search of clothing currently worn is plainly within the ambit of a personal search and outside the scope of a warrant to search the premises."125 Or, as the U.S. Supreme Court put it, "[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place."126

Two other things should be noted. First, a warrant that authorizes only a search of a particular person does not impliedly authorize officers to enter a home for the purpose of locating the person.127 Again, the warrant must contain express authorization for such an entry and search. Second, a warrant to search a person does not impliedly authorize a bodily intrusion of any sort.128

Searching vehicles on the premises

It is settled that officers do not need a warrant to search a vehicle if they have probable cause to believe it contains evidence of a crime.129 But this rule generally applies only if the vehicle was located on a street or other public place. So, because criminals may be just as likely to store evidence in their cars as in their homes, officers who write warrants will normally insert language that expressly authorizes a search of any vehicles on the property which are registered to the suspect or are used by him.

IMPLIED AUTHORIZATION TO SEARCH: If officers neglect to seek express authorization, there are three circumstances in which such authorization may be implied. First, officers may search an unlisted vehicle on the property if (a) the vehicle was parked within the curtilage of the house (e.g., in the driveway or garage); and (b) it was owned by, registered to, or controlled by, one of the residents.130

Second, an unlisted vehicle may be searched if the warrant authorized a search of the "premises" at the address (e.g., "the premises at 123 Main St.") and the vehicle was in the driveway, a garage or other area within the curtilage of the residence. 131

Third, officers may search an unlisted vehicle if the warrant authorized a search of "storage areas" on the property, and the car was both inoperable and used solely for storage.132 It is also possible that officers may search an unlisted vehicle that belongs to a visitor if they had probable cause to believe the visitor was involved in the crime under investigation.133

ENTERING PRIVATE PROPERTY: A warrant that authorizes a search of a certain vehicle—and nothing more—does not constitute authorization to enter private property for the purpose of locating the vehicle or searching it.134 Thus, if probable cause is limited to a certain vehicle on private property, officers should seek a warrant that authorizes both a search of the vehicle and an entry onto the property.

OFF-SITE FORENSIC SEARCH: If officers have a warrant to search a vehicle for trace evidence or other evidence that can be detected only by means of special equipment, they may be impliedly authorized to remove the vehicle to a location where such a search can be carried out. As the court said in *People v. Superior Court (Nasmeh)*, "Discovery of blood on the automobile and other circumstances warranted transporting it for a later, more scientific examination."135 Still, if officers anticipate an off-site forensic search, they should seek express authorization for it.

Intensity of the Search

Not only must officers confine their search to places and things they were expressly or impliedly authorized to search, the search itself must have been reasonable in its intensity. In other words, it must not have been unreasonably probing, destructive, or lengthy —the key word being "unreasonably."

THOROUGHNESS: A search will not be deemed unreasonably intensive merely because it was thorough. In fact, one court pointed out that a search must necessarily be thorough, otherwise it is "of little value." 136 Similarly, the court in *U.S. v. Snow* noted that the word "search" has "a common meaning to the average person" which includes "to go over or look through for the purpose of finding something; explore, rummage; examine, to examine closely and carefully; test and try; probe, to find out or uncover by investigation."137

LENGTH OF THE SEARCH: A search will not be deemed unduly intensive merely because it took a long time. Instead, what matters is whether the officers were diligent and whether there were circumstances that necessitated a prolonged search.138 For example, in *People v. Gallegos* the court noted the following in rejecting an argument that a search took too long:

> [W]hile the search lasted approximately seven hours, this was not necessarily unreasonable given that officers searched the residence, truck, garage, and motor home. It goes without saying that the review of even a box of documents can take substantial time. . . . Moreover, the garage was cluttered, making a search more time consuming.139

DESTRUCTIVENESS: Because evidence is usually hidden, officers will sometimes need to damage property to find it. This is permitted so long as the intrusion was not "[e]xcessive or unnecessary."140 As the Ninth Circuit observed:

> [O]fficers executing a search warrant occasionally must damage property in order to perform their duty. Therefore, the destruction of property during a search does not necessarily violate the Fourth Amendment. Rather, only unnecessary destructive behavior, beyond that necessary to execute a warrant effectively violates the Fourth Amendment.141

For example, in *U.S. v. Becker* 142 the court ruled it was reasonable for officers to use a jackhammer to break up a slab of concrete in the suspect's backyard because the officers had "ample reason" to believe that methamphetamine was buried under it. As the court pointed out, the officers knew that the slab was poured shortly after an accomplice's home across the street had been searched, and that the slab was located next to a shop in the backyard in which officers had found evidence of methamphetamine production.

Note that officers may videotape the search to help protect themselves against false claims that they unnecessarily damaged or destroyed property.143

Seizing Evidence in Plain View

Officers may, of course, seize any items listed in the warrant and any items that were the "functional equivalent" of a listed item.144 In addition, under the "plain view" rule, they may seize an item that was not listed if both of the following circumstances existed:

1. the item was discovered while they were conducting a lawful search for listed evidence, and
2. they had probable cause to believe the item was evidence in the crime under investigation or some other crime.

Lawful search: **Scope of search**

The "lawful search" requirement is satisfied if officers discovered the unlisted evidence while they were searching places or things in which any of the listed evidence could reasonably have been found.145 It is "essential," said the U.S. Supreme Court, "that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed."146 This subject was covered above in the sections "What May Be Searched" and "Intensity of the Search."

Lawful search: **Pretext searches**

The question arises: Is a search "lawful" if it was conducted by an officer who was mainly interested in discovering unlisted evidence pertaining to some other crime? The answer is *yes* if both of the following circumstances existed: (1) the officer had been informed of the terms of the warrant, and (2) he restricted his search to places and things in which the listed evidence might reasonably be found. As the United States Supreme Court explained:

> The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of the warrant.147

Thus, regardless of the officer's motivation, if he observed evidence of another crime, he may seize it if he had probable cause to believe it was, in fact, evidence.

For example, in *People v. Carrington* 148 the defendant, Celeste Carrington, embarked on a one-woman crime spree along the San Francisco Peninsula, burglarizing businesses in which she had previously worked as a janitor. Because the crimes occurred in several cities, officers from these cities formed a task force and eventually developed probable cause to search Carrington's home for property that was taken in a burglary that occurred in Los Altos. Among the officers who took part in the search were two investigators from the Palo Alto Police Department who were primarily interested in finding evidence that linked Carrington to a murder in their city in which an employee of a company was shot and killed during the commercial burglary. In the course of their search, the Palo Alto investigators saw a pager that belonged to the murder victim and also a key to his workplace. So they froze the scene and obtained a second warrant that authorized the seizure of the pager and key, plus a search for additional evidence pertaining to the murder. During the search, they found the murder weapon.

On appeal, Carrington argued that the evidence should have been suppressed because it was apparent that the Palo Alto officers were using the warrant as a pretext to look for evidence in their murder case. The California Supreme Court ruled, however, that the legality of the search did not depend on the secret motivation of the officers, but on whether they had restricted their search to places and things in which some of the listed evidence could have been found. And, said the court, they had:

> In the present case, the police did not exceed the scope of the search authorized by the warrant, and they observed [the murder evidence] in plain view in defendant's home. These observations were lawful because the presence of the officers at the location where the observations were made was lawful, regardless of the officers' motivations.

Similarly, in *People v. Williams* 149 narcotics officers in Kern County obtained a warrant to search Williams' house for drugs. Before leaving, they called the burglary-theft detail and requested "two bodies" to assist with the search. It turned out that the "two bodies" who were assigned the job belonged to two detectives who had previously received a tip that Williams was dealing in stolen property. The tip paid off because, while searching for drugs, the detectives seized a "plethora of electronic equipment, silverware, clocks, and firearms." As a result, Williams was charged with possession of stolen property. On appeal, the court ruled the stolen property was discovered during a lawful search because "the officers did not move articles to get serial numbers or other indicia of ownership to any greater degree than one might expect in looking for hidden drugs pursuant to the warrant."

In contrast, in *People v. Albritton* 150 an auto theft investigator accompanied narcotics officers when they executed a warrant to search Albritton's home for drugs. The investigator knew that Albritton was a car thief, and when the search began he split off from the narcotics officers and went into Albritton's garage and backyard where he found 18 vehicles. He then searched for their VIN numbers and learned that eight of the cars were stolen. Albritton was subsequently convicted of possessing stolen vehicles, but the court ruled the evidence should have been suppressed because, by examining the VIN numbers, the officer was conducting "a general exploratory search for unlisted property."

Probable cause

As noted, officers may seize unlisted evidence under the plain view rule only if they had probable cause to believe it was, in fact, evidence of a crime.151 In discussing the nature of such probable cause, the U.S. Supreme Court said that it exists if "the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required."152

As we will now discuss, probable cause may be based on the knowledge of the officer who discovered the evidence, or the knowledge of civilians who have some special knowledge or expertise.

PROBABLE CAUSE ESTABLISHED BY OFFICERS: In most cases, probable cause to seize unlisted evidence will be based on the knowledge of the lead investigator or other officer who is familiar with the details of the crime. The following are some examples:

MURDER WARRANT: An investigator seized unlisted wire clippers because he knew that bailing wire had been used to bind the victims.153

MURDER WARRANT: An investigator seized unlisted "cut-off panty hose" because he knew that the murderers had worn masks and that cut-off panty hose are commonly used to make masks.154

BURGLARY WARRANT: An investigator seized unlisted bolt clippers because he knew that the burglars had used bolt cutters to gain entry.155

SOLICITATION OF MURDER WARRANT: While searching the home of a man who had solicited the murder of his estranged wife, an investigator seized an unlisted hand-drawn diagram of the wife's home.156

MURDER WARRANT: An investigator seized unlisted shoes with waffled soles because he knew that "waffled-like shoe prints" had been found at the crime scene.157

NARCOTICS WARRANT: An investigator seized unlisted guns because "they were in close proximity to a plethora of drugs and drug-related equipment."158

Note that, while all of the seized evidence in the above examples was relevant to the crime for which the warrant had been issued, officers may seize evidence pertaining to *any* crime if it was in plain view.159

PROBABLE CAUSE ESTABLISHED BY OWNER OF STOLEN

PROPERTY: In many burglaries and other theft-related crimes, the victim will be unable to provide a complete description of everything that was taken. So if officers obtain a warrant to search the suspect's home for the stolen property, they may arrange to have the victim accompany them and notify them if he sees any property that was not listed in the warrant; and if he does, they may seize it.

For example, in *People v. Superior Court (Meyers)* 160 deputies in Marinwood developed probable cause to believe that Meyers had burglarized the home of his neighbors, Mr. and Mrs. Lane. The Lanes reported that "well over a hundred" items were stolen and they "could not recall everything that was taken." While executing a warrant to search Meyers' home, deputies asked the Lanes to watch and notify them if they saw any of their property. During the search, the Lanes identified several dozen unlisted items which the deputies seized. In ruling that this procedure was lawful, the California Supreme Court said:

> To require the victims of a massive burglary to recall every missing facecloth and coffee pot is to require the impossible. The procedure which the police pursued in the present case reasonably accommodated the legitimate interests of effective law enforcement without seriously impinging upon defendant's right to be secure in his house and effects against indiscriminate governmental intrusion.

There are, however, two limitations on victimassisted searches. First, the victims may not search— they may only *watch* and notify officers if they see any of their property. Second, if the victim identifies an item, officers may not seize it until the victim has explained how he was able to identify it. Although the victim need not provide a lengthy or elaborate explanation, something more than "That's mine" is required. For example, in one case the victim's statement "I recognize it because of the design" was deemed sufficient.161

PROBABLE CAUSE ESTABLISHED BY EXPERT: If a warrant authorizes a search for property that cannot be identified without assistance from an expert in some field, officers may arrange to have such a person accompany them when they execute the warrant.

Furthermore, unlike victim-assisted searches, the expert may, if necessary, actually conduct the search. For example, in *People v. Superior Court (Moore)* 162 officers in Santa Clara County were investigating a theft of trade secrets from Intel. During the course of the investigation, they obtained a warrant to search the suspect's business for several technical items, such as a "Magnetic data base tape containing Intel Mask data or facsimile for product No. 2147 4K static Ram."

The affiant knew that he would need an expert to identify most of these items, so he obtained authorization to have Intel technicians assist in the search. Actually, the technicians did the searching while the officers watched. As the court pointed out:

> [N]one of the officers present did any searching, since none of them knew what items described in the warrant looked like. Rather, at the direction of the officer in charge, they stood and watched while the experts searched.

In addition to finding some of the listed evidence, the experts found several unlisted items that they set aside. Afterward, officers obtained a second warrant that authorized the seizure of these items.

On appeal, Moore argued that the search by the Intel experts violated the rule (discussed above) that crime victims cannot actually conduct the search. But the court ruled that this restriction does not apply where, as here, the complexity of the search would have made it impossible or impractical to do so. Among other things, the court said,:

> [T]here is no requirement that such experts, prior to stating their conclusions [that the property was stolen], engage in the futile task of attempting to educate accompanying police officers in the rudiments of computer science, or art forgery, or any other subject of scientific or artistic enterprise.

It should be noted that officers may also utilize a dog who had been trained to detect an item listed in the warrant, such as explosives or drugs. Although the United States Supreme Court recently placed restrictions on walking a drug-detecting dog onto a person's front yard to sniff for narcotics,163 that ruling pertained only to warrantless intrusions.

PROBABLE CAUSE TO "SEIZE" INCOMING PHONE CALLS:

Under certain circumstances, officers who are executing a warrant may "seize" incoming phone calls under the plain view rule if they had probable cause to believe the caller would provide incriminating information. By "seizing" incoming phone calls, the courts mean answering the phone, posing as the suspect or an accomplice, and engaging the caller in a conversation about the crime under investigation. This is especially useful if the premises are being used for illegal activities such as drug trafficking, prostitution, and sales of illegal weapons.164

When to Seek a Second Warrant

Officers are not ordinarily required to obtain a second warrant to search a place or thing they could have lawfully searched under the terms of the first warrant. Thus, in *People v. Rangel* the Court of Appeal observed, "Federal cases have recognized that a second warrant to search a properly seized computer it not necessary where the evidence obtained in the search did not exceed the probable cause articulated in the original warrant."165 As we will now discuss, however, there are three situations in which a second warrant may be required.

SEEKING EVIDENCE OF OTHER CRIMES: While conducting a search, officers will sometimes find evidence pertaining to a crime other than the one for which the warrant was issued. If, upon observing the evidence, the officers had probable cause to believe it was, in fact, evidence of a crime, they may seize it under the plain view rule (which we discussed earlier). But if the officers want to expand their search to look for more evidence of the new crime, they will need a second warrant that specifically authorizes it. For example, if officers are searching for evidence of drug trafficking, and if they open a container and find child pornography, that evidence will be admissible under the plain view rule. But they may not search for more evidence of child pornography unless they obtain a second warrant.166

WRONG DESCRIPTION: Upon arrival, officers may learn that the description in the warrant was incorrect. For example, the warrant might contain the wrong house number or the premises might consist of two separate residences instead of one. When this happens, the required procedure will depend on whether the error was discovered before officers made their presence known.

Specifically, if the officers had not alerted the occupants to the impending search, they will usually leave and seek a new warrant wi th a corrected description. Thus, when officers failed to do this in *U.S. v. Garcia*, the court said, "Obtaining a corrected warrant may have been the better choice, particularly since there was ample time to do so."167 But if the error was discovered after the suspects became aware of the impending search, officers cannot simply leave the premises to seek a new warrant because the evidence will likely be gone when they return. Consequently, they will usually secure the premises while they promptly seek a corrected warrant.

Post-Search Procedure

After they have completed the search, officers must comply with the following post-search requirements:

"ONE WARRANT, ONE SEARCH" RULE: A search warrant authorizes only a single search. This means that, once officers have departed the scene, they will need a new warrant to re-enter the premises to search for additional evidence.168

LEAVE RECEIPT: Officers must leave a receipt for the property they seized.169

"RETURN" OF WARRANT AND INVENTORY: Within 10 days after the warrant was issued, the original signed warrant must be filed with ("returned" to) the judge along with a sworn inventory of all seized property. 170

Note that in calculating the 10-day period, do not count the day on which the warrant was issued.171

Also note that, if reasonably necessary, officers may file a partial inventory, so long as they file a complete inventory when they are able to do so.172

OFFICERS MUST RETAIN THE EVIDENCE: Although Penal Code sections 1523 and 1529 say that the officers must bring the evidence to the judge, Penal Code sections 1528(a) and 1536 say the officers must retain the evidence pending further order of the court. Because judges do not want officers to deliver loads of drugs, stolen property, murder weapons and other sordid things to their chambers, the Court of Appeal has ruled the evidence must be retained by the officers unless the warrant directs otherwise.173

DISPOSITION OF EVIDENCE SEIZED BY MISTAKE: Officers who mistakenly seized property that was not listed in the warrant may release it to its owner without court authorization.174

INSPECTION OF DOCUMENTS BY OUTSIDE AGENCY: If officers from another agency want copies of seized documents, they should seek an order to examine and copy the documents. This order should be supported by an affidavit establishing probable cause to believe the documents are evidence of a crime they are investigating.

References

1. *Lawmaster v. Ward* (10th Cir. 1997) 125 F.3d 1341, 1349.
2. See *United States v. Ramirez* (1998) 523 U.S. 65, 71; *Wilson v. Arkansas* (1995) 514 U.S. 927, 934.
3. (9th Cir. 2005) 402 F.3d 962, 971. Emphasis added.
4. *Dalia v. United States* (1979) 441 U.S. 238, 257.
5. See *People v. Zepeda* (1980) 102 Cal.App.3d 1, 7; *People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 99.
6. See Pen. Code § 1533; *People v. Kimble* (1988) 44 Cal.3d 480, 494.
7. See *People v. Zepeda* (1980) 102 Cal.App.3d 1, 7; *People v. Maita* (1984) 157 Cal.App.3d 309, 322.
8. See *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 553-54; *U.S. v. Bonner* (1st Cir. 1986) 808 F.2d 864, 868-69 ["Courts have repeatedly upheld searches conducted by law enforcement officials notified by telephone or radio once the search warrant was issued."].
9. See *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 533; *Guerra v. Sutton* (9th Cir. 1986) 783 F.2d 1371, 1375.
10. See *Hart v. Superior Court* (1971) 21 Cal.App.3d 496, 502; *U.S. v. Sims* (7th Cir. 2009) 553 F.3d 580, 584.
11. See Pen. Code § 1534(a); *People v. Larkin* (1987) 194 Cal.App.3d 650, 656.
12. See *People v. Clayton* (1993) 18 Cal.App.4th 440. 445.
13. See *People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 99; *People v. Larkin* (1987) 194 Cal.App.3d 650, 657.
14. See *People v. Schroeder* (1979) 96 Cal.App.3d 730, 734.
15. *U.S. v. Garcia* (10th Cir. 2013) 707 F.3d 1190, 1195-96. ALSO SEE *People v. Hernandez* (1974) 43 Cal.App.3d 581, 591.
16. See *Wilson v. Arkansas* (1995) 514 U.S. 927, 934.
17. See Pen. Code § 1531; *People v. Mays* (1998) 67 Cal.App.4th 969, 973. BUT ALSO SEE *People v. Peterson* (1973) 9 Cal.3d 717, 723 ["When police procedures fail to conform to the precise demands of the [knock-notice] statute but nevertheless serve

its policies we have deemed that there has been such substantial compliance that technical and, in the particular circumstances, insignificant defaults may be ignored."]; *People v. Lopez* (1969) 269 Cal.App.2d 461, 469 [the argument that officers must announce their presence to people who already know they are officers is "patently frivolous"].

18. See *Semayne's Case* (1603) 77 Eng Rep 194 ["Before the Sheriff may break the party's house, he ought to signify the cause of his coming, and make request to open doors."].
19. See *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1049.
20. *Greven v. Superior Court* (1969) 71 Cal.2d 287, 293.
21. See *Richards v. Wisconsin* (1997) 520 U.S. 385, 394, 399, fn.7.
22. See *United States v. Banks* (2003) 540 U.S. 31, 36, 37, fn.3.
23. See *U.S. v. Spry* (7th Cir. 1999) 190 F.3d 829, 833.
24. See *United States v. Banks* (2003) 540 U.S. 31, 36-37 ["if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in"]; *Richards v. Wisconsin* (1997) 520 U.S. 385, 395-96, fn.7 ["[A] magistrate's decision not to authorize no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment"].
25. See *Miller v. United States* (1958) 357 U.S. 301, 310; *People v. Tacy* (1987) 195 Cal.App.3d 1402, 1406; *People v. Brownlee* (1977) 74 Cal.App.3d 921, 929; *People v. James* (1971) 17 Cal.App.3d 463, 468; *People v. Peterson* (1973) 9 Cal.3d 717, 723-4; *People v. Franco* (1986) 183 Cal.App.3d 1089, 1094; *People v. Bigham* (1975) 49 Cal.App.3d 73, 80.
26. See *People v. Pipitone* (1984) 152 Cal.App.3d 1112, 1116 ["I heard someone running, and I heard something—falling and rattling and saw a male through the doorway of the kitchen moving quickly."]; *People v. Stegman* (1985) 164 Cal.App.3d 936, 946 ["The people inside the house immediately began running away."]; *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1112 [officers saw two men running inside the house]; *People v. Temple* (1969) 276 Cal.App.2d 402, 413 [officers "heard very fast movements toward the rear of the apartment."]; *People v. Pacheco* (1972) 27 Cal.App.3d 70, 78 ["[D]efendant got off the couch and started toward the rear of the apartment."]; *People v. Negrete* (1978) 82 Cal.App.3d 328, 336 [an officer "saw defendant approach the door, look at him in apparent recognition, and then run back toward the easily flushable heroin."].
27. *Richards v. Wisconsin* (1997) 520 U.S. 385, 395.
28. *Kinsey v. Superior Court* (1968) 263 Cal.App.2d 188, 191.
29. See *People v. Elder* (1976) 63 Cal.App.3d 731, 739; *People v. Peterson* (1973) 9 Cal.3d 717, 723; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 964; *People v. Gallo* (1981) 127 Cal.App.3d 828, 838; *People v. Neer* (1986) 177 Cal.App.3d 991, 996.
30. *McClure v. U.S.* (9th Cir. 1964) 332 F.2d 19, 22.
31. See *People v. Hobbs* (1987) 192 Cal.App.3d 959, 964 ["There is no convenient test for measuring the length of time necessary for an implied refusal."]; *People v. Neer* (1986) 177 Cal.App.3d 991, 996; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1225.
32. See *United States v. Banks* (2003) 540 U.S. 31, 36.
33. See *United States v. Banks* (2003) 540 U.S. 40, fn.6 ["The apartment was 'small'"]; *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1212 [small house]; *People v. Drews* (1989) 208 Cal.App.3d 1317, 1328 [one-bedroom apartment]; *U.S. v. Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 980 [apartment 800 square feet or less].
34. See *United States v. Banks* (2003) 540 U.S. 31, 40 ["The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around"]; *Greven v. Superior Court* (1969) 71 Cal.2d 287, 295 [the house was large and the warrant was executed at 1 A.M. when most people are asleep].
35. See *People v. Gallo* (1981) 127 Cal.App.3d 828, 838-39 [officers saw four people seated at a table; for 30 seconds none of them responded to the officers' announcement]; *People v. McCarter* (1981) 117 Cal.App.3d 894, 906 [officers knew that someone was standing behind the closed door; for 20-30 seconds the person failed to respond]; *People v. Nealy* (1991) 228 Cal.App.3d 447, 45051 [a car described in the warrant was in the driveway; for 20-30 seconds no one responded to their knocking and announcement]; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 963-66 [officers saw a woman inside the house; the woman looked at the officers for five seconds but took no action to admit them]; *People v. Montenegro* (1985) 173 Cal.App.3d 983, 989 [an occupant looked out the window, officers announced "Parole," the suspect mouthed the words "Okay, okay," the doorknob moved but the door did not open; a second announcement, no response].
36. (1976) 63 Cal.App.3d 731, 739.
37. (1989) 211 Cal.App.3d 1043. ALSO SEE *People v. Abdon* (1972) 30 Cal.App.3d 972, 978; *Jeter v. Superior Court* (1983) 138 Cal.App.3d 934, 937 [five to 10 second delay not sufficient because the officers had no reason to believe the house was occupied].

38. *People v. Kasinger* (1976) 57 Cal.App.3d 975, 978. ALSO SEE *Lewis v. United States* (1966) 385 U.S. 206, 211.
39. *People v. Rudin* (1978) 77 Cal.App.3d 139.
40. *People v. Constancio* (1974) 42 Cal.App.3d 533, 546.
41. *People v. Veloz* (1971) 22 Cal.App.3d 499.
42. *People v. Evans* (1980) 108 Cal.App.3d 193, 196.
43. See *Langford v. Superior Court* (1987) 43 Cal.3d 21, 29. ALSO SEE *Boyd v. Benton County* (9th Cir. 2004) 374 F.3d 773, 779 [“given the inherently dangerous nature of the flash-bang device, it cannot be a reasonable use of force under the Fourth Amendment to throw it ‘blind’ into a room occupied by innocent bystanders absent a strong governmental interest, careful consideration of alternatives and appropriate measures to reduce the risk of injury”]; *U.S. v. Ankeny* (9th Cir. 2007) 501 F.3d 829, 836-37 [“the use of two flashbang devices, one of which seriously injured Defendant, weigh[s] in favor of a conclusion of unreasonableness”].
44. See *U.S. v. Myers* (10th Cir. 1997) 106 F.3d 936, 940 [“The use of a ‘flashbang’ device in a house where innocent and unsuspecting children sleep gives us great pause.”].
45. *Langford v. Superior Court* (1987) 43 Cal.3d 21, 31-32.
46. *Langford v. Superior Court* (1987) 43 Cal.3d 21, 31.
47. See *Bailey v. United States* (2013) U.S. [133 S.Ct. 1031, 1038] [“When law enforcement officers execute a search warrant, safety considerations require that they secure the premises”]; *Los Angeles County v. Rettele* (2007) 550 U.S. 609, 615 [“Deputies were not required to turn their backs to allow Rettele and Sadler to retrieve clothing or to cover themselves with the sheets”]; *U.S. v. Fountain* (6th Cir. 1993) 2 F.3d 656, 663 [“When police obtain a warrant to search the home of a citizen, they concomitantly receive certain limited rights to occupy and control the property.”].
48. *Michigan v. Summers* (1981) 452 U.S. 692, 702-3.
49. *Bailey v. United States* (2013) U.S. [133 S.Ct. 1031, 1038]. ALSO SEE *Michigan v. Summers* (1981) 452 U.S. 692, 702-3 [taking “unquestioned command” may be necessary to prevent “frantic efforts to conceal or destroy evidence”].
50. See *Bailey v. United States* (2013) U.S. [133 S.Ct. 1031, 1039] [“where there are grounds to believe the departing occupant is dangerous, or involved in criminal activity, police will generally not need *Summers* to detain him at least for brief questioning, as they can rely instead on *Terry*”]; *People v. Glaser* (1995) 11 Cal.4th 354, 368 [such a detention is permitted if “there is reason to suspect the person of involvement in the criminal activities on the premises”].
51. (7th Cir. 2011) 632 F.3d 1004, 1011.
52. See *Bailey v. United States* (2013) U.S. [133 S.Ct. 1031, 1042-43]; *Muehler v. Mena* (2005) 544 U.S. 93, 100 [“An officer’s authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.”]*; Michigan v. Summers* (1981) 452 U.S. 692, 705; *People v. Thurman* (1989) 209 Cal.App.3d 817, 823; *U.S. v. Davis* (9th Cir. 2008) 530 F.3d 1069, 1081 [because of the visitor’s apparent connection to the premises, his detention was justified “in preventing flight in the event that incriminating evidence is found”]; *U.S. v. Fountain* (6th Cir. 1993) 2 F.3d 656, 663 [the concerns that justify the detention of people inside a house being searched for drugs “are the same regardless of whether the individuals present in the home being searched are residents or visitors”]; *U.S. v. Sanchez* (10th Cir. 2009) 555 F.3d 910, 918 [“[T]he authority to detain relates to all persons present on the premises.”]; *U.S. v. Johnson* (8th Cir. 2008) 528 F.3d 575, 579 [“there is naturally an articulable and individualized suspicion of criminal activity that justifies the detention of the home’s occupants”].
53. *People v. Gabriel* (1986) 188 Cal.App.3d 1261, 1264.
54. See *County of Los Angeles v. Rettele* (2007) 550 U.S. 609, 614-15; *People v. Gabriel* (1986) 188 Cal.App.3d 1261, 1265 [two hour detention not unreasonable considering there was no reason to believe the officers “in any way delayed the search”]; *People v. Glaser* (1995) 11 Cal.4th 354, 374 [“the officers may constitutionally detain him or her for the period of time required and in the manner necessary to make those determinations and to protect the safety of all present during the detention”]; *Meredith v. Erath* (9th Cir. 2003) 342 F.3d 1057, 1062 [handcuffing not justified because there was “no reason to believe that the occupants were dangerous”]; *Heitschmidt v. City of Houston* (5th Cir. 1998) 161 F.3d 834, 838 [“Heitschmidt was then detained in pain without a restroom break for more than four hours”]. ALSO SEE *Ganwich v. Knapp* (9th Cir. 2003) 319 F.3d 1115, 1120 [“it was not at all reasonable to condition the [detainee’s] release on their submission to interrogation”]; *Burchett v. Kiefer* (6th Cir. 2002) 310 F.3d 937, 945 [detainee was confined in a police car with the windows rolled up in ninety degree heat for three hours].
55. (2005) 544 U.S. 93, 100.

56. *Franklin v. Foxworth* (9th Cir. 1994) 31 F.3d 873, 876.
57. See *Ybarra v. Illinois* (1979) 444 U.S. 85, 91-93; *People v. Ingram* (1993) 16 Cal.App.4th 1745, 1752-53 ["[W]hen executing a search warrant at a business open to the public, law enforcement officers may detain those persons on the premises when the circumstances create a reasonable suspicion"].
58. See *People v. Huerta* (1990) 218 Cal.App.3d 744, 749; *People v. Fay* (1986) 184 Cal.App.3d 882, 892-93; *People v. Glaser* (1995) 11 Cal.4th 354, 372; *People v. Roach* (1971) 15 Cal.App.3d 628, 632; *People v. Tenney* (1972) 25 Cal.App.3d 16, 20; *U.S. v. Davis* (9th Cir. 2008) 530 F.3d 1069, 1081; *U.S. v. Hauk* (10th Cir. 2005) 412 F.3d 1179, 1192; *Burchett v. Kiefer* (6th Cir. 2002) 310 F.3d 937, 943-44; *U.S. v. Bohannon* (6th Cir. 2000) 225 F.3d 615, 617 ["James showed every intention of walking into the house"].
59. See *Bailey v. United States* (2013) U.S. [133 S.Ct. 1031, 1038][citing the transcript of oral argument in *Summers*, the Court noted that Summers "was detained on a walk leading down from the front steps of the house"].
60. See *People v. Glaser* (1995) 11 Cal.4th 354, 374; *Baker v. Monroe Township* (3rd Cir. 1995) 50 F.3d 1186, 1192; *U.S. v. Jennings* (7th Cir. 2008) 544 F.3d 815, 818-19; *U.S. v. Bohannon* (6th Cir. 2000) 225 F.3d 615, 616.
61. *Bailey v. United States* (2013) U.S. [133 S.Ct. 1031, 1042] ["A spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant."]. ALSO SEE *Croom v. Balkwill* (11th Cir. 2011) 645 F.3d 1240, 1250 [detainee was in the front yard after signing for a package addressed to the occupant]; *U.S. v. Sanchez* (10th Cir. 2009) 555 F.3d 910, 918 ["Although Mr. Sanchez may not have been inside the home, he was on the premises to be searched (which included the home's curtilage). He was clearly not just a passerby"].
62. See *Bailey v. United States* (2013) U.S. [133 S.Ct. 1031, 1039] [Bailey was "apparently without knowledge of the search"].
63. See *People v. Gallegos* (2002) 96 Cal.App.4th 612, 628, fn.13; *U.S. v. Humphrey* (9th Cir. 1985) 749 F.2d 743, 748; *U.S. v. Malachesen* (8th Cir. 1979) 597 F.2d 1232, 1234-35.
64. See *Arizona v. Johnson* (2009) 555 U.S. 323, 332; *New York v. Class* (1986) 475 U.S. 106, 117; *Terry v. Ohio* (1968) 392 U.S. 1, 21-22.
65. See *People v. Thurman* (1989) 209 Cal.App.3d 817, 822 ; *People v. Roach* (1971) 15 Cal.App.3d 628, 632; *People v. Valdez* (1987) 196 Cal.App.3d 799, 804. ALSO SEE *Michigan v. Summers* (1981) 452 U.S. 692, 702 ["[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence"].
66. See *People v. Glaser* (1995) 11 Cal.4th 354, 367; *People v. Huerta* (1990) 218 Cal.App.3d 744, 750.
67. See *New York v. Quarles* (1984) 467 U.S. 649; *People v. Simpson* (1998) 65 Cal.App.4th 854, 861; *U.S. v. Are* (7th Cir. 2009) 590 F.3d 499, 506 [after arresting a street gang member who had been previously arrested for drug and weapons offenses, an FBI agent asked if there were any weapons in the house].
68. *People v. Simpson* (1998) 65 Cal.App.4th 854, 862.
69. See *Hells Angels v. City of San Jose* (9th Cir. 2005) 402 F.3d 962. 975; *Robinson v. Solano County* (9th Cir. 2002) 278 F.3d 1007, 1013 ["The killing of [a] dog is a destruction recognized as a seizure under the Fourth Amendment"].
70. See *Hells Angels v. City of San Jose* (9th Cir. 2005) 402 F.3d 962. 976.
71. See *People v. Calabrese* (2002) 101 Cal.App.4th 79, 85 ["the officers were not required to display the warrant or give Calabrese a copy of it"]; *Nunes v. Superior Court* (1980) 100 Cal.App.3d 915, 936 ["But we search in vain for California law requiring either reading or leaving copies of the warrants with the householder."]; *People v. Rodrigues-Fernandez* (1991) 235 Cal.App.3d 543, 553 ["there is no statutory or constitutional requirement that a search warrant be exhibited as a prerequisite to execute it"].
72. *Nunes v. Superior Court* (1980) 100 Cal.App.3d 915, 935-36.
73. *United States v. Grubbs* (2006) 547 U.S. 90, 98-99.
74. *U.S. v. Upham* (1st Cir. 1999) 168 F.3d 532, 537.
75. (7th Cir. 2010) 626 F.3d 940, 947.
76. See *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1009-1010 ["Officers executing a search should read the warrant or otherwise become fully familiar with its contents, and should carefully review the list of items which may be seized."]; *U.S. v. Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1352-53 ["most of the agents conducting the search were provided with as much preparation and information as was reasonable under the circumstances to enable them to carry out the warrant's complicated terms"]. COMPARE *Guerra v. Sutton* (9th Cir. 1986) 783 F.3d 1371, 1375 [the agents "were not given an advance briefing as to the source and extent of their authority to enter, search, and arrest"].
77. *Motley v. Parks* (9th Cir. 2005) 432 F.3d 1072, 1081.
78. *U.S. v. Heldt* (D.C. Cir. 1981) 668 F.2d 1238, 1261.

79. See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 [“The scope of a search is generally defined by its expressed object.”]; *People v. Sanchez* (1972) 24 Cal.App.3d 664, 679 [“The authorization to search for heroin necessarily included an authorization for a search of any place in which peyote or barbiturates might be hidden.”]; *U.S. v. Neal* (8th Cir. 2008) 528 F.3d 1069, 1074 [“A lawful search extends to all areas and containers in which the object of the search may be found.”]; *U.S. v. Sawyer* (11th Cir. 1986) 799 F.2d 1494, 1509 [“the search may be as extensive as reasonably required to locate and seize items described in the warrant”].
80. (1982) 456 U.S. 798, 821.
81. *U.S. v. Evans* (7th Cir. 1996) 92 F.3d 540, 543.
82. See *People v. Kraft* (2000) 23 Cal.4th 978, 1043 [the officers “merely looked in a spot where the specified evidence of crime plausibly could be found, even if it was not a place where photographs normally are stored”]; *People v. Smith* (1994) 21 Cal.App.4th 942, 950 [drug dealers “usually attempt to secrete contraband where the police cannot find it”].
83. *U.S. v. Rogers* (1st Cir. 2008) 521 F.3d 5, 10. ALSO SEE *People v. Minder* (1996) 46 Cal.App.4th 1784, 1788 [warrants must be interpreted “in a commonsense and realistic fashion”]; *People v. Balint* (2006) 138 Cal.App.4th 200, 207 [“officers executing a search warrant are required to interpret it, and they are not obliged to interpret it narrowly”].
84. See *People v. Bradford* (1997) 15 Cal.4th 1229, 1306 [“Assuming that the remedy of total suppression is required when police conduct is in flagrant disregard of the limits of the warrant . . . the application of that extreme remedy was not warranted”]; *People v. Gallegos* (2002) 96 Cal.App.4th 612, 624 [suppression of all evidence is not required “unless the officers flagrantly disregard the scope of the warrant”].
85. See *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1010; *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 947.
86. **NOTE**: The term “single living unit” is loosely defined as a place that is occupied by relatives or roommates who generally have express or implied authority to enter most or all rooms in the building, at least temporarily. See *People v. Gorg* (1958) 157 Cal.App.2d 515, 523 [Here, the living unit was one distinct unit occupied by three persons.”]; *People v. Govea* (1965) 235 Cal.App.2d 285, 300 [court indicates that a house does not become a multi-occupant building merely because the owner has permitted a family to temporarily occupy a separate bedroom]; *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 433 [“The rule that a search warrant for one living unit cannot be used to justify a search of other units within a multiple dwelling area does not apply where all of the rooms in a residence constitute one living unit.”].
87. See *U.S. v. Ferreras* (1st Cir. 1999) 192 F.3d 5, 10-11 [attic]; *People v. Barbarick* (1985) 168 Cal.App.3d 731, 740-41 [garden area]; *U.S. v. Becker* (9th Cir. 1991) 929 F.2d 442, 446 [yard]; *U.S. v. Gorman* (9th Cir. 1996) 104 F.3d 272, 274 [yard].
88. See *People v. Gorg* (1958) 157 Cal.App.2d 515, 523 [after finding drugs in the named suspect’s bedroom, the officers “acted as reasonable and prudent men in searching the other two bedrooms”]; *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 433 [“At most, the evidence shows that three individuals lived in the residence, sharing the living room, bathroom, kitchen and hallways, and that defendant’s bedroom opened onto the other rooms and was not locked.”]; *U.S. v. Darr* (8th Cir. 2011) 661 F.3d 375, 379 [“officers did not exceed [the warrant’s] scope by searching Darr’s bedroom, even though the warrant was issued based on information about activities of Darr, Sr.”]; *U.S. v. Whitten* (9th Cir. 1983) 706 F.2d 1000, 1006 [“But a warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises if they are occupied in common rather than individually, if a multiunit building is used as a single entity, if the defendant was in control of the whole premises, or if the entire premises are suspect.”].
89. *U.S. v. Ayers* (9th Cir. 1990) 924 F.2d 1468, 1480.
90. (2nd Cir. 1994) 40 F.3d 519.
91. See *People v. MacAvoy* (1984) 162 Cal.App.3d 746, 754; *People v. Estrada* (1965) 234 Cal.App.2d 136, 146 [warrant for apartment house or building is void unless there is probable cause to search each unit]; *People v. Joubert* (1983) 140 Cal.App.3d 946, 949-52 [a warrant authorizing a search of several buildings on a 28-acre parcel was overbroad because, among other things, “[t]he existence of multiple roads going to and from each of the residences and the existence of multiple dwellings” indicated there were several separate parcels].
92. (9th Cir. 2000) 226 F.3d 1031.
93. See *People v. Smith* (1994) 21 Cal.App.4th 942, 949 [it would have “been preferable” for the officer to have expressly indicated that the premises included a certain outbuilding].
94. See *People v. Smith* (1994) 21 Cal.App.4th 942, 950 [shed]; *U.S. v. Cannon* (9th Cir. 2001) 264 F.3d 875, 880 [storage rooms]; *U.S. v. Frazin* (9th Cir. 1986) 780 F.2d 1461, 1467 [attached garage]; *U.S. v. Paull* (6th Cir. 2009) 551 F.3d 516, 523 [“a warrant for the search of a specified residence or premises authorizes the search of auxiliary and outbuildings within the

curtilage"]; *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940, 947 [loading dock]; *U.S. v. Asselin* (1st Cir. 1985) 775 F2 445, 447 [birdhouse]; *U.S. v. Principe* (1st Cir. 1974) 499 F.2d 1135 [storage cabinet located three to six feet from front door].

95. *U.S. v. Gorman* (9th Cir. 1996) 104 F.3d 272, 274.
96. See *People v. Dumas* (1973) 9 Cal.3d 871, 881, fn.5; *People v. Mack* (1977) 66 Cal.App.3d 839, 859; *People v. Weagley* (1990) 218 Cal.App.3d 569, 573; *People v. McNabb* (1991) 228 Cal.App.3d 462, 469; *People v. Minder* (1996) 46 Cal.App.4th 1784, 1788-89.
97. See *U.S. v. Cannon* (9th Cir. 2001) 264 F.3d 875, 879.
98. (1971) 19 Cal.App.3d 8, 12.
99. See *People v. Estrada* (1965) 234 Cal.App.2d 136 [garbage can outside the apartment building]; *People v. Weagley* (1990) 218 Cal.App.3d 569 [mailbox]; *U.S. v. Cannon* (9th Cir. 2001) 264 F.3d 875, 880 ["If a search warrant specifying only the residence permits the search of closets, chests, drawers, and containers therein where the object searched for might be found, so should it permit the search of similar receptacles located in the outdoor extension of the residence"].
100. See *People v. Saam* (1980) 106 Cal.App.3d 789, 794; *People v. Reyes* (1990) 223 Cal.App.3d 1218, 1224; *U.S. v. Gray* (1st Cir. 1987) 814 F.2d 49, 51; *U.S. v. Evans* (7th Cir. 1996) 92 F.3d 540, 543.
101. *People v. McCabe* (1983) 144 Cal.App.3d 827, 830; *People v. Frederick* (2006) 142 Cal.App.4th 400, 411.
102. *People v. Berry* (1990) 224 Cal.App.3d 162, 169. Also see *U.S. v. Gray* (1st Cir. 1987) 814 F.2d 49, 51 [defendant "was discovered in a private residence, outside of which a drug deal had just 'gone down' at the unusual hour of 3:35 A.M."].
103. See *People v. Frederick* (2006) 142 Cal.App.4th 400, 411; *U.S. v. Giwa* (5th Cir. 1987) 831 F.2d 538, 544-45 [visitor was an overnight guest who was alone in the residence when officers arrived].
104. *People v. McCabe* (1983) 144 Cal.App.3d 827, 830.
105. See *People v. Eubanks* (2011) 53 Cal.4th 110, 135 [officers who were searching for indicia "were entitled to search through trash cans and to look at any paper items inside the home"]; *U.S. v. Romo-Corrales* (8th Cir. 2010) 592 F.3d 915, 920 ["[Indicia] can obviously fit into small spaces and containers and, therefore, could be hidden in numerous locations in a residence."].
106. (2002) 96 Cal.App.4th 612, 626 [edited].
107. See *Andresen v. Maryland* (1976) 427 U.S. 463, 482, fn.11 ["In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized."]; *People v. Alcala* (1992) 4 Cal.4th 742, 799; *U.S. v. Bruce* (6th Cir. 2005) 396 F.3d 697, 710.
108. See *U.S. v. Tamura* (9th Cir. 1982) 694 F.2d 591, 595.
109. *U.S. v. Riley* (2nd Cir. 1990) 906 F.2d 841, 845.
110. See *U.S. v. Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1352.
111. See *U.S. v. Tamura* (9th Cir. 1982) 694 F.2d 591, 596.
112. See *U.S. v. Santarelli* (11th Cir. 1985) 778 F.2d 609, 616 ["The district court estimated that a brief examination of each document would have taken several days. Under these circumstances, we believe that the agents acted reasonably when they removed the documents to another location for subsequent examination."]; *U.S. v. Horn* (8th Cir. 1999) 187 F.3d 781, 788 ["Since we think [the officers] could not practically view more than 300 videos at the search site, we hold that the officers did not exceed the scope of the warrant by seizing Mr. Horn's video collection in its entirety for examination elsewhere."].
113. (8th Cir. 2009) 574 F.3d 484, 490.
114. See *People v. Kraft* (2000) 23 Cal.4th 978, 1045; *U.S. v. Beusch* (9th Cir. 1979) 596 F.2d 871, 876; *U.S. v. Hay* (9th Cir. 2000) 231 F.3d 630, 637; *U.S. v. Wuagneux* (11th Cir. 1982) 683 F.2d 1343, 1353 ["It was also reasonable for the agents to remove intact files, books and folders when a particular document within the file was identified as falling within the scope of the warrant. To require otherwise would substantially increase the time required to conduct the search . . . ."].
115. See *Hells Angels v. City of San Jose* (9th Cir. 2005) 402 F.3d 962. 972-74.
116. See *People v. Rangel* (2012) 206 Cal.App.4th 1310, 1316 [phone's memory was "the likely container of [gang indicia]"]; *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1103 ["it was reasonable to conclude the computer . . . might contain information relevant to [defendant's] control of the residence"]; *U.S. v. Giberson* (9th Cir. 2008) 527 F.3d 882, 888 ["While it is true that computers can store a large amount of material, there is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer."]; *U.S. v. Hager* (8th Cir. 2013) F.3d [2013 WL 1274564] [warrant to search for child pornography impliedly authorizes a search of VHS tapes"]; *U.S. v. Upham* (1st Cir. 1999) 168 F.3d 532, 536 [the images "were inside" the computer]; *U.S. v. Aguirre* (5th Cir. 2011) 664 F.3d 606, 614-15 ["the cellular text messages, directory and call logs of Aguirre's cell phone searched by law

enforcement officers can fairly be characterized as the functional equivalents of several items listed in Attachment A, including correspondence, address books and telephone directories"]; *U.S. v. Williams* (4th Cir. 2010) 592 F.3d 511, 523 ["the sheer amount of information contained on a computer does not distinguish the authorized search of the computer from an analogous search of a file cabinet containing a large number of documents"]; *U.S. v. Adjani* (9th Cir. 2006) 452 F.3d 1140, 1152, fn.9 ["The fear that agents searching a computer may come across such personal information cannot alone serve as the basis for excluding evidence of criminal acts."]; *U.S. v. Reyes* (10th Cir. 1986) 798 F.2d 380, 383 ["in the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take"].

117. (2006) 138 Cal.App.4th 200, 209.
118. **NOTE**: For example, in *U.S. v. Payton* (9th Cir. 2009) 573 F.3d 859, 864 the court refused to rule that "whenever a computer is found in a search for other items, if any of those items were *capable* of being stored in a computer, a search of the computer would be permissible." Said the court, "Such a ruling would eliminate any incentive for officers to seek explicit judicial authorization for searches of computers."
119. *U.S. v. Upham* (1st Cir. 1999) 168 F.3d 532, 535.
120. See *Guest v. Leis* (6th Cir. 2001) 255 F.3d 325, 334-37 ["[A] seizure of the whole computer system was not unreasonable, so long as there was probable cause to conclude that evidence of a crime would be found on the computer."]; *U.S. v. Alexander* (8th Cir. 2009) 574 F.3d 484, 490 ["it would have been difficult, and possibly more intrusive to Alexander's privacy, for law enforcement to conduct an on-site review of each of more than 600 photographs to determine whether they were evidence of illegal conduct"].
121. See *U.S. v. Mutschelknaus* (8th Cir. 2010) 592 F.3d 826, 830.
122. See *U.S. v. Tamura* (9th Cir. 1982) 694 F.2d 591, 597 ["it was highly improper for the Government to retain the master volumes as a means of coercing Marubeni employees to stipulate to the authenticity of the relevant documents"]; *Davis v. Gracey* (10th Cir. 1997) 111 F.3d 1472, 1477 ["A failure timely to return seized material . . . may state a constitutional or statutory claim."].
123. See *U.S. v. Hunter* (D. Vt. 1998) 13 F.Supp.2d 574, 583.
124. See Pen. Code § 1525.
125. *U.S. v. Micheli* (1st Cir. 1973) 487 F.2d 429, 431. ALSO SEE *People v. Reyes* (1980) 223 Cal.App.3d 1218, 1225-26.
126. *Ybarra v. Illinois* (1979) 444 U.S. 85, 92, fn.4. ALSO SEE *Wyoming v. Houghton* (1999) 526 U.S. 295, 303.
127. See *Lohman v. Superior Court* (1977) 69 Cal.App.3d 894, 905.
128. See *People v. Bracamonte* (1975) 15 Cal.3d 394, 401; *Jauregui v. Superior Court* (1986) 179 Cal.App.3d 1160, 1164.
129. See *United States v. Ross* (1982) 456 U.S. 798, 809; *People v. Carpenter* (1997) 15 Cal.4th 312, 365.
130. See *U.S. v. Pennington* (8th Cir. 2002) 287 F.3d 739, 745; *U.S. v. Patterson* (4th Cir. 2002) 278 F.3d 315, 318.
131. See *People v. Gallegos* (2002) 96 Cal.App.4th 612, 626; *People v. Elliott* (1978) 77 Cal.App.3d 673, 688-89.
132. See *People v. Childress* (1979) 99 Cal.App.3d 36, 42-43. COMPARE *People v. Dumas* (1973) 9 Cal.3d 871, 880.
133. See *U.S. v. Evans* (7th Cir. 1996) 92 F.3d 540, 543-44.
134. See *Lohman v. Superior Court* (1977) 69 Cal.App.3d 894, 903-905.
135. (2007) 151 Cal.App.4th 85, 97. ALSO SEE *People v. Kibblewhite* (1986) 178 Cal.App.3d 783, 785-86 [impounding locked safe].
136. *U.S. v. Torres* (10th Cir. 1981) 663 F.2d 1019, 1027. ALSO SEE *People v. James* (1990) 219 Cal.App.3d 414, 421 ["it was not unreasonable to double check the thoroughness of the earlier work"]; *Florida v. Jimeno* (1991) 500 U.S. 248, 251 ["Contraband goods rarely are strewn across the trunk or floor of a car."].
137. (2nd Cir. 1995) 44 F.3d 133, 135.
138. See *People v. Gabriel* (1986) 188 Cal.App.3d 1261, 1265; *People v. Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 98-99; *U.S. v. Squillacote* (4th Cir. 2000) 221 F.3d 542, 557; *U.S. v. Bach* (8th Cir. 2002) 310 F.3d 1063, 1067.
139. (2002) 96 Cal.App.4th 612, 625.
140. *United States v. Ramirez* (1998) 523 U.S. 65, 71. ALSO SEE *Dalia v. United States* (1979) 441 U.S. 238, 258 ["[O]fficers executing search warrants on occasion must damage property in order to perform their duty."]; *United States v. Ross* (1982) 456 U.S. 798, 818 [noting that in *Carroll v. United States* (1924) 267 U.S. 132 the Court ruled that prohibition agents did not violate the Fourth Amendment by ripping open the upholstery of Carroll's car because they had probable cause to believe contraband was hidden under the upholstery]; *United States v. Banks* (2003) 540 U.S. 31, 37 ["Since most people keep their doors locked, entering without knocking will normally do some damage"]; *People v. Kibblewhite* (1986) 178 Cal.App.3d 783, 786 [OK to

damage safe to get it open]; *Liston v. County of Riverside* (9th Cir. 1997) 120 F.3d 965, 979 [“unnecessarily destructive behavior, beyond that necessary to execute a warrant, effectively violates the Fourth Amendment”].

141. *Mena v. City of Simi Valley* (9th Cir. 2000) 226 F.3d 1031, 1041.
142. (9th Cir. 1991) 929 F.2d 442.
143. See *Wilson v. Layne* (1999) 526 U.S. 603, 613; *People v. Smith* (1994) 21 Cal.App.4th 942, 951, fn.3; *People v. Hines* (1997) 15 Cal.4th 997, 1041-42; *Marks v. Clarke* (9th Cir. 1996) 102 F.3d 1012, 1032, fn.37.
144. See *People v. Balint* (2006) 138 Cal.App.4th 200, 208 [“In determining whether seizure of particular items exceeds the scope of the warrant, courts examine whether the items are similar to, or the functional equivalent of, items enumerated in the warrant, as well as containers in which they are reasonably likely to be found.”]; *U.S. v. Aguirre* (5th Cir. 2011) 664 F.3d 606, 614 [“We have upheld searches as valid under the particularity requirement where a searched or seized item was not named in the warrant, either specifically or by type, but was the functional equivalent of other items that were adequately described.”].
145. See *Texas v. Brown* (1983) 460 U.S. 730, 737; *People v. Williams* (1988) 198 Cal.App.3d 873, 887; *Guidi v. Superior Court* (1973) 10 Cal.3d 1, 6 [“the legality of the seizure of an object falling within the plain view of an officer is dependent upon that officer’s right to be in the position from which he gained his view of the seized object”]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1295 [“The officers lawfully must be in a position from which they can view a particular area”].
146. *Horton v. California* (1990) 496 U.S. 128, 136.
147. *Horton v. California* (1990) 496 U.S. 128, 138. ALSO SEE Pen. Code § 1530 [“A search warrant may in all cases be served by any of the officers mentioned in its directors, but by no other person, *except in aid of the officer on his requiring it*, he being present and acting in its execution.” Emphasis added.]. COMPARE *People v. McGraw* (1981) 119 Cal.App.3d 582, 602 [“It is clear that [the officer] was not on the premises to help execute the search warrant. . . . In fact, [he] never even read the warrant.”].
148. (2009) 47 Cal.4th 145.
149. (1988) 198 Cal.App.3d 873.
150. (1982) 138 Cal.App. 3d 79.
151. See *Arizona v. Hicks* (1987) 480 U.S. 321, 326-28; *People v. Eubanks* (2011) 53 Cal.4th 110, 136; *People v. Kraft* (2000) 23 Cal.4th 978, 1050.
152. *Texas v. Brown* (1983) 460 U.S. 730, 742. ALSO SEE *People v. Rios* (1988) 205 Cal.App.3d 833, 840-41; *People v. Stokes* (1990) 224 Cal.App.3d 715, 719; *People v. Holt* (1989) 212 Cal.App.3d 1200, 1204.
153. *People v. Easley* (1983) 34 Cal.3d 858, 872.
154. *People v. Hill* (1974) 12 Cal.3d 731, 763.
155. *People v. Mack* (1977) 66 Cal.App.3d 839, 859.
156. *People v. Miley* (1984) 158 Cal.App.3d 25, 35-36.
157. *People v. Gillebeau* (1980) 107 Cal.App.3d 531, 553-54.
158. *U.S. v. Rodriguez* (8th Cir. 2013) F.3d [2013 WL 1338116].
159. See *Arizona v. Hicks* (1987) 480 U.S. 321, 325; *People v. Kraft* (2000) 23 Cal.4th 978, 1043; *People v. Gallegos* (2002) 96 Cal.App.4th 612, 623.
160. (1979) 25 Cal.3d 67. ALSO SEE *U.S. v. Gregoire* (8th Cir. 2011) 638 F.3d 962, 967 [“It was objectively reasonable for the officers to turn to the Arnolds, owners and managers of Reed’s, a theft victim, for help in confirming which items there was probable cause to believe had been stolen.”].
161. *People v. Superior Court (Meyers)* (1979) 25 Cal.3d 67, 75, fn.6.
162. (1980) 104 Cal.App.3d 1001. ALSO SEE *Forro Precision, Inc. v. IBM Corp.* (9th Cir. 1982) 673 F.2d 1045, 1054 [“A layman would not have had the expertise to identify the drawings containing IBM product specifications. Teams composed of police officers and IBM employees conducted the search. The IBM employees were accompanied by an officer at all times and acted under direct police supervision.”].
163. *Florida v. Jardines* (2013) U.S. [133 S.Ct. 1409].
164. See *People v. Sandoval* (1966) 65 Cal.2d 303, 308; *People v. Ledesma* (2006) 39 Cal.4th 641, 704 [officers “had reason to believe that the incoming call would be from defendant and that, by answering it, they would obtain information leading to his imminent capture.”]; *People v. Drieslein* (1985) 170 Cal.App.3d 591, 599-602; *People v. Vanvalkenburgh* (1983) 145 Cal.App.3d 163, 167.

165. (2012) 206 Cal.App.4th 1310, 1317 [citations omitted]. ALSO SEE *People v. Superior Court* (*Nasmeh)* (2007) 151 Cal.App.4th 85, 97 [“taking Nasmeh’s seized vehicle to the crime laboratory to search for and conduct a scientific analysis of trace items did not offend the Fourth Amendment”].
166. See *U.S. v. Galpin* (2nd Cir. 2013) F.3d [2013 WL 3185299]; *U.S. v. Giberson* (9th Cir. 2008) 527 F.3d 882, 88.
167. (10th Cir. 2013) 707 F.3d 1190, 1197.
168. See *People v. James* (1990) 219 Cal.App.3d 414, 418-20.
169. See Pen. Code § 1535.
170. See Pen. Code §§ 1534, 1537.
171. See *People v. Clayton* (1993) 18 Cal.App.4th 440, 445.
172. See *People v. James* (1990) 219 Cal.App.3d 414, 420; *People v. Schroeder* (1979) 96 Cal.App.3d 730, 733.
173. See *People v. Superior Court (Loar)* (1972) 28 Cal.App.3d 600, 607, fn.3 [Pen. Code §§ 1528(a) and 1536 prevail over conflicting language in Pen. Code §§ 1523 and 1529]; *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.
174. See *Andresen v. Maryland* (1976) 427 U.S. 463, 482, fn.11; *U.S. v. Tamura* (9th Cir. 1982) 694 F.2d 591, 597.

Contributors and Attributions

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13.4: Knock-Notice

Before the Sheriff may break the party's house, he ought to signify the cause of his coming, and make request to open doors. Semayne's Case (1604)[1]

The knock-notice rule has been irritating law enforcement officers for over 400 years. And their complaint is well-founded: If officers have a legal right to enter a house to execute a search warrant or arrest someone, why must they engage in what is arguably a "meaningless formality?"[2] And a dangerous one, too. As the Court of Appeal observed, "[T]he delay caused by [knocknotice] might give a forewarned occupant exactly the opportunity necessary to arm himself, causing injury to officers and bystanders."[3] Knock-notice is also notorious for giving suspects an opportunity to destroy evidence, especially drugs.

But there is another side to the argument; specifically, knock-notice may help prevent a violent response by the occupants. As the California Supreme Court pointed out, "[F]ew actions are as likely to evoke violent response from a householder as unannounced entry by a person whose identity and purpose are unknown to the householder."[4] Thus, the Court of Appeal noted that while "[o]ne particular officer may be willing to risk the chance of sudden violence," the rule "is also directed toward the protection of his fellow officers."[5]

So it appears that the people on both sides of the door have valid concerns and vital interests at stake. How can they be resolved? In the past, many courts ignored the problem and simply ruled that knock-notice was strictly required under the Fourth Amendment.[6] In 1995, however, the Supreme Court rejected this idea, concluding that the Fourth Amendment requires only that officers enter in a "reasonable" manner, which may or may not require an announcement.[7] Thus, in addition to knocknotice, the reasonableness of a forcible entry might also depend on the manner in which officers entered, the time of day or night they entered, whether they damaged the premises, and whether they saw or heard anything before entering that reasonably indicated that full compliance with the knocknotice rule would be counterproductive. Other circumstances include the seriousness of the crime under investigation, the nature and destructibility of the evidence being sought, how the occupants responded to searches and police encounters in the past, the size and layout of the premises, and the existence of any extraordinary security measures. We will discuss these circumstances later in this article, plus the controversial rule that officers may not enter unless they are refused entry. But first, it is necessary to explain what officers must do to comply with the knock-notice procedure.

Knock-Notice Procedure

If knock-notice is required, officers may comply fully or substantially with the procedure we will now discuss. Substantial compliance occurs when officers take action that achieves the objective of the rule but does not constitute full compliance.[8]

1. KNOCK: Although it is called the "knocknotice" rule, there is no requirement that officers actually knock on the door or ring the doorbell. Instead, they must take action that is reasonably likely to alert the occupants of their presence, which also provides some assurance that the occupants will hear the officers' announcement.[9] Substantial compliance also results when it is apparent that one or more of the occupants saw the officers arrive.[10] As the Ninth Circuit observed, "[O]ne cannot 'announce' a presence that is already known."[11]
2. ANNOUNCE AUTHORITY: Officers must also announce their authority by, for example, yelling "Police officers."[12] But this requirement may also be satisfied if at least one of the officers was in uniform and was visible to the occupants.[13]
3. ANNOUNCE PURPOSE: Officers are not required to engage in an explanation of their purpose. Instead, they are simply required to declare it; e.g., "search warrant," "parole search," "probation search," "arrest warrant."[14] This requirement may also be excused altogether if the officers' purpose was reasonably apparent.[15] As the Court of Appeal explained in *People v. Mayer*, "[S]trict compliance with [the knock-notice statute] is excused where the entering officers reasonably believe the purpose of entry is already known to the occupants."[16] For example, it would seem to be reasonable to infer that the occupants were aware that the officers intended to conduct a search or make an arrest if, immediately after they announced their authority, they heard an occupant running, or if an occupant attempted to shut the door on them.[17]
4. WAIT FOR REFUSAL: In the absence of exigent circumstances, officers must do one more thing before entering: wait until they were admitted or until it reasonably appeared that the occupants did not intend to admit them.[18] This is an especially controversial requirement because the occupants have no legal right to refuse entry. In addition, it is notoriously difficult for officers to determine the point at which a "refusal" had actually occurred. In any event, the courts have attempted to resolve these issues by ruling that a refusal can occur by either affirmative conduct or inaction.

Refusals by affirmative conduct

An immediate entry will ordinarily be permitted if it reasonably appeared that an occupant saw the officers and heard their announcement yet did not respond immediately or if he started to escape.[19] The most common types of refusal by affirmative conduct are when officers hear sounds from inside the house that indicate the occupants are attempting to destroy evidence or flee. See "When Compliance Is Not Required" (Destruction of evidence, and Flight, below).

Refusals by inaction

The most common type of refusal is a refusal by inaction, which occurs when officers are not admitted into the premises within a reasonable time after they announced their authority and purpose.[20] As the Ninth Circuit observed, "The refusal of admittance contemplated by the [knock-notice] statute will rarely be affirmative, but will oftentimes be present only by implication."[21] For example, in *People v. Montenegro* [22] the defendant looked out a window, saw the officers at the front door, then mouthed the words, "Okay, okay." When he did not promptly open the door, the officers demanded entry. Still no response, so "within seconds" the officers broke in. The court ruled that Montenegro's "failure to comply in these circumstances justified entry," adding that "the amount of time [the officers waited] is irrelevant because Montenegro acknowledged their presence" but did nothing. On the other hand, a delay will not justify an expedited entry if officers were aware of circumstances that justified the delay; e.g., officers saw that the occupant was asleep on a sofa.[23]

What's a "reasonable" time? As would be expected, there is no minimum wait time.[24] Instead, it all depends on the totality of circumstances.[25] Thus, the Supreme Court acknowledged that "[w]hen the knock-and-announce rule does apply, it is not easy to determine precisely what officers must do. How many seconds' wait are too few?"[26] In making this determination, the following circumstances are frequently noted.

SIZE AND LAYOUT: The larger the structure, the longer it might take the occupants to answer the door (and vice versa).[27] As the Supreme Court explained, the required wait time "will vary with the size of the establishment, perhaps five seconds to open a motel room door, or several minutes to move through a townhouse."[28]

TIME OF DAY: A delay late at night should be expected if it reasonably appeared the occupants had been asleep. Conversely, a delay might be more suspicious in the daytime or early evening.[29]

DESTRUCTIBLE EVIDENCE INSIDE: In determining whether a delay constituted an implied refusal, officers may consider the nature of the evidence they are authorized to search for and seize. For example, if a warrant authorizes a search for drugs, documents, or anything else that could be disposed of quickly, a short delay might be viewed with more concern than if officers were searching for, say, a stolen piano. Furthermore, in cases where officers are looking for destructible evidence, they need only wait for the amount of time they estimate it would take an occupant to dispose of the evidence; i.e., they do not need to wait for the amount of time it would take to reach the front door. As the Supreme Court explained in *United States v. Banks*, "[W]hat matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink."[30]

When Compliance is Not Required

There are several situations in which officers are not required to comply fully or even partially with the knock-notice procedure. This does not mean that officers should never attempt to comply under these circumstances. It just means that if these circumstances existed and officers concluded that, under the existing circumstances, they need to make an immediate entry, they may do so.

No-knock warrants

When executing a search or arrest warrant, officers may make a no-knock entry if it was authorized by the judge who issued the warrant. Consequently, if the affiant reasonably believed that a no-knock entry was necessary, he may request the judge to authorize it on the warrant if the affidavit contained facts constituting "reasonable suspicion"[31] that (1) compliance would provide the occupants with time to arm themselves or otherwise engage in violent resistance, (2) compliance would provide the occupants with time to destroy evidence, or (3) compliance would serve no useful purpose; e.g., the premises were abandoned.[32] But even if the judge grants no-knock authorization, officers must not make an unannounced entry if they become aware that circumstances had changed and, as the result, there was no need for an immediate entry.[33] On the other hand, if the judge refuses to grant the officers' request, they may nevertheless make a no-knock entry if, as the result of changed circumstances, they reasonably believed it was necessary. As the Supreme Court explained, "[A] magistrate's decision not to authorize no-knock entry should not be

interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."[34]

Exigent circumstances

Officers may also dispense with the knock-notice procedure if, upon arrival, they became aware of facts that constituted "reasonable suspicion" that compliance would be dangerous or would result in the destruction of evidence. As the Supreme Court explained, there are "many situations in which it is not necessary to knock and announce," such as "when circumstances present 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."[35] Specifically, there are three types of exigent circumstances that will justify noncompliance: (1) imminent danger to officers or others, (2) imminent destruction of evidence, and (3) futility. DANGER: Compliance with the knock-notice requirements is excused if officers reasonably believed they or someone else would be harmed unless they made an immediate entry.[36] In the words of the Supreme Court, "[I]f circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in."[37] The following are some examples:

- Entry to arrest an armed prison escapee who vowed he would "not do federal time."[38]
- Entry to arrest a suspect in the murder of a police officer.[39]
- Search warrant for drugs; suspect had previously "expressed his willingness to use firearms against the police" and was known to have access to firearms.[40]
- Search warrant for drugs; suspect's apartment was protected by a steel door; officers knew there was a loaded handgun and a "large amount" of crack cocaine inside the apartment.[41]
- Search warrant on meth lab; the house "was equipped with security cameras and flood lights. Windows were papered over, suggesting that the occupants of the home were concerned with protecting their illegal methamphetamine laboratory."[42]
- There was probable cause that the house contained explosives; as the uniformed SWAT team was assembling outside, one of the occupants opened the door, saw them, and immediately closed the door.[43]
- Officers went to the suspect's home to arrest him for rape; the rapist had been armed with a knife. As officers arrived, they saw a gun in a car parked nearby. When they got to the door they "heard what sounded like running footsteps."[44]

DESTRUCTION OF EVIDENCE: If officers were executing a search warrant or were securing the premises pending issuance of a warrant, an expedited entry would be permitted if they reasonably believed there was destructible evidence on the premises that would be destroyed if they delayed making entry. This is especially likely to occur in drug cases.[45] Nevertheless, officers must have been aware of circumstances indicating an imminent threat to the evidence; i.e. they cannot assume that all entries into drug houses will automatically warrant a no-knock entry.[46]

The following are some examples of no-knock entries in drug cases have been deemed reasonably necessary:

- When officers knocked, the defendant "cracked" open the door, saw a uniformed officer, then slammed the door shut.[47]
- When an officer announced his authority and purpose, two people inside a "heavily barricaded" drug house started running through the house.[48]
- Upon announcing, officers heard "very fast movements toward the rear of the apartment."[49]
- The suspect was a felon operating under an alias, his apartment had been fortified by a steel door, there was a loaded handgun and a "large amount" of cocaine inside the apartment.[50]
- Officers knew that the defendant had "an extensive arrest record including arrests for possession and sale of heroin"; his house was a "virtual fortress"; when officers arrived and identified themselves, the defendant attempted to close a gate to prevent their entry.[51]

FLIGHT: Compliance with the knock-notice procedure would not be required if officers reasonably believed that the occupants had started to flee. Here are two examples:

- FBI agents had probable cause to believe a fugitive who was wanted for several violent offenses involving guns was inside a motel room; before they entered, a friend of the fugitive who was arrested outside the room yelled "Run!" [52]
- Officers in hot pursuit of a burglary suspect chased him into a house.[53]

FUTILITY: Finally, compliance is not required if doing so would be futile or otherwise serve no useful purpose.[54] For example, knocking and announcing would be excused if officers reasonably believed that no one was inside the premises.[55] "Where no one

is present," said the Court of Appeal, "officers executing a search warrant . . . may make forcible entry without giving notice of their authority or purpose."[56]

Tricks and ruses

Officers who have a warrant need not comply with the knock-notice procedure if an occupant consented to their entry—even if the officers lied about who they were or what they wanted. This is because the objective of giving notice of an imminent entry would have been achieved when the occupant consented to their entry. Thus, the Court of Appeal said, "Officers who reasonably employ a ruse to obtain consent to enter a dwelling do not violate [the knock-notice statutes], even if they fail to announce their [true] identity and purposes before entering."[57] The following are examples:

- An officer wearing a Post Office uniform went to the suspect's house to execute a search warrant (the other officers hid outside). When one of the suspects answered the door, the officer said he had a special delivery letter for the other suspect and was told, "Sure, come on in."[58]
- Officers went to the suspect's house to conduct a probation search. An undercover officer knocked on the door and told the suspect's roommate, "It's Jim, and I want to talk to Gail" who was an occupant and suspect. When the officer saw Gail standing behind her roommate, he identified himself and entered.[59]
- The suspect's wife admitted an undercover officer after he said he was a carpet salesman sent by the welfare office to recarpet the house.[60]
- A drug dealer admitted an undercover officer after the office told him that "Pete" had sent him to buy drugs.[61]

Suppression of Evidence

As noted earlier, the Supreme Court has ruled that a failure to comply with the knock-notice procedure does not constitute a violation of the Fourth Amendment. Consequently, a failure to comply will not result in the suppression of evidence if the officers' entry was otherwise reasonable. Suppression is also inappropriate if officers had a legal right to enter, in which case the evidence would have been discovered inevitably. As the Supreme Court explained in a search warrant case, regardless whether or not the officers complied with the knock-notice requirements, "the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house."[62]

This does not mean, however, that officers should not attempt to comply when feasible. Remember that one of the main objectives of the knock-notice rule is to reduce the chances of a violent confrontation when the occupants of a home do not know the identity and intentions of the people who are demanding admittance.

References

1. Court of King's Bench (1604) 5 Coke Rep 91. Paraphrased.
2. See *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1049; *People v. Tacy* (1987) 195 Cal.App.3d 1402, 1421.
3. *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1049.
4. *Greven v. Superior Court* (1969) 71 Cal.2d 287, 293.
5. *People v. Webb* (1973) Cal.App.3d 460, 466.
6. See, for example, *People v. Abdon* (1972) 30 Cal.App.3d 972, 977.
7. See *Wilson v. Arkansas* (1995) 514 U.S. 927, 934; *People v. Mays* (1998) 67 Cal.App.4th 969, 973.
8. See *People v. Peterson* (1973) 9 Cal.3d 717, 723. NOTE: For some reason, Penal Code §§ 844 and 1531 specify somewhat different procedures. Specifically, if the objective was to make an arrest, officers must demand admittance but they need not wait for a refusal. Because the Supreme Court has ruled that the constitutionality of forced entries no longer depends on technical compliance but on overall reasonableness, the fact that officers demanded or failed to demand admittance and the fact that they waited or failed to wait for a refusal would be relevant but not necessarily mandatory.
9. See *Duke v. Superior Court* (1969) 1 Cal.3d 314, 319; *People v. Mays* (1998) 67 Cal.App.4th 969, 973.
10. See *People v. Brownlee* (1977) 74 Cal.App.3d 921, 929; *People v. Franco* (1986) 183 Cal.App.3d 1089, 1094, fn.5.
11. *U.S. v. Peterson* (9th Cir. 2003) 353 F.3d 1045, 1049.
12. See Pen. Code §§ 844, 1531; *People v. Maita* (1984) 157 Cal.App.3d 309, 322.
13. See *Richards v. Wisconsin* (1997) 520 U.S. 385, 395-96; *People v. Lopez* (1969) 269 Cal.App.2d 461, 469.
14. See *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1115.
15. See: *Miller v. United States* (1958) 357 U.S. 301, 310; *People v. Franco* (1986) 183 Cal.App.3d 1089, 1094.

16. (1987) 188 Cal.App.3d 1101, 1112.
17. See *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1112; *People v. Vasquez* (1969) 1 Cal.App.3d 769, 775.
18. See Pen. Code §§ 844, 1531; *People v. Alaniz* (1986) 182 Cal.App.3d 903, 906, fn.2.
19. See *People v. Gallo* (1981) 127 Cal.App.3d 828, 838-39; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 963-66.
20. See *People v. Peterson* (1973) 9 Cal.3d 717, 723; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 964;
21. *McClure v. U.S.* (9th Cir. 1964) 332 F.2d 19, 22.
22. (1985) 173 Cal.App.3d 983, 989.
23. See *People v. Abdon* (1972) 30 Cal.App.3d 972, 978; *People v. Gonzales* (1989) 211 Cal.App.3d 1043.
24. See *People v. Hobbs* (1987) 192 Cal.App.3d 959, 964; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1225.
25. See *United States v. Banks* (2003) 540 U.S. 31, 36; *People v. Neer* (1986) 177 Cal.App.3d 991, 996; *U.S. v. Chavez-Miranda* (9th Cir. 2002) 306 F.3d 973, 980 ["There is no established time that the police must wait; instead, the time lapse must be reasonable considering the particular circumstances of the situation."].
26. *Hudson v. Michigan* (2006) 547 U.S. 586, 590. Also see *People v. Byers* (2017) Cal.App.5th [2017 WL 7238923].
27. See *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1212; *People v. Drews* (1989) 208 Cal.App.3d 1317, 1328; *U.S. v. Chavez- Miranda* (9th Cir. 2002) 306 F.3d 973, 980.
28. *United States v. Banks* (2003) 540 U.S. 31, 40.
29. See *Greven v. Superior Court* (1969) 71 Cal.3d 287, 295 [although officers waited ten to 15 seconds before forcing entry, the house was large and the warrant was executed at 1 A.M. when most people are asleep].
30. *United States v. Banks* (2003) 540 U.S. 31, 40. Also see *Richards v. Wisconsin* (1997) 520 U.S. 385, 396; *People v. Martinez* (2005) 132 Cal.App.4th 233 ["15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine"].
31. See *United States v. Ramirez* (1998) 523 U.S. 65, 73; *Richards v. Wisconsin* (1997) 520 U.S. 385, 394 ["This showing [for reasonable suspicion] is not high"].
32. See *Richards v. Wisconsin* (1997) 520 U.S. 385, 394; *United States v. Banks* (2003) 540 U.S. 31, 37, fn.3.
33. See *U.S. v. Spry* (7th Cir. 1999) 190 F.3d 829, 833.
34. *Richards v. Wisconsin* (1997) 520 U.S. 385, 395-96, fn.7. Also see *United States v. Banks* (2003) 540 U.S. 31, 36-37
35. *Hudson v. Michigan* (2006) 547 U.S. 586, 589-90 [quoting from *Richards v. Wisconsin* (1997) 520 U.S. 385, 394].
36. See *Brigham City v. Stuart* (2006) 547 U.S. 398, 406-7; *People v. Galan* (1985) 163 Cal.App.3d 786, 795.
37. *United States v. Banks* (2003) 540 U.S. 31, 37.
38. *United States v. Ramirez* (1998) 523 U.S. 65, 71.
39. *People v. Gilbert* (1965) 63 Cal.2d 690, 707.
40. *U.S. v. Turner* (9th Cir. 1991) 926 F.2d 883, 887.
41. *U.S. v. Stowe* (7th Cir. 1996) 100 F.3d 494, 499.
42. *U.S. v. Combs* (9th Cir. 2005) 394 F.3d 739, 745.
43. *U.S. v. Peterson* (9th Cir. 2003) 353 F.3d 1045, 1049-50.
44. *People v. Tribble* (1971) 4 Cal.3d 826, 833.
45. See *United States v. Banks* (2003) 540 U.S. 31, 40 ["[W]hat matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink."]; *Richards v. Wisconsin* (1997) 520 U.S. 385, 394.
46. See *Richards v. Wisconsin* (1997) 520 U.S. 385, 388; *People v. Neer* (1986) 177 Cal.App.3d 991, 995.
47. *Richards v. Wisconsin* (1997) 520 U.S. 385, 395. Also see *People v. Martinez* (2005) 132 Cal.App.4th 233 ["15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine"].
48. *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1112.
49. *People v. Temple* (1969) 276 Cal.App.2d 402, 413. Also see *People v. Pacheco* (1972) 27 Cal.App.3d 70, 78 ["[D]efendant got off the couch and started toward the rear of the apartment."]; *McClure v. U.S.* (9th Cir. 1964) 332 F.2d 19, 22 ["footsteps running in the wrong direction"].
50. *U.S. v. Stowe* (7th Cir. 1996) 100 F.3d 494, 499.
51. *People v. Thompson* (1979) 89 Cal.App.3d 425.
52. *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986. Also see *People v. Tribble* (1971) 4 Cal.3d 826, 833.
53. *People v. Patino* (1979) 95 Cal.App.3d 11, 21.
54. See *Richards v. Wisconsin* (1997) 520 U.S. 385, 394; *United States v. Banks* (2003) 540 U.S. 31, 37, fn.3.

55. See *Wilson v. Arkansas* (1995) 514 U.S. 927, 935; *Hart v. Superior Court* (1971) 21 Cal.App.3d3 496, 504.
56. *People v. Ford* (1975) 54 Cal.App.3d 149, 154.
57. *People v. Kasinger* (1976) 57 Cal.App.3d 975, 978.
58. *People v. Rudin* (1978) 77 Cal.App.3d 139. Also see *People v. Thompson* (1979) 89 Cal.App.3d 425, 432.
59. *People v. Constancio* (1974) 42 Cal.App.3d 533, 546.
60. *People v. Veloz* (1971) 22 Cal.App.3d 499.
61. *People v. Evans* (1980) 108 Cal.App.3d 193, 196.
62. *Hudson v. Michigan* (2006) 547 U.S. 586, 592. Also see *People v. Byers* (2016) 6 Cal.App.5th 856.

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13.5: Protective Sweeps

Protective sweeps are a necessary fact of life in the violent society in which our law enforcement officers must perform the duties of their office.[1]

While homes are places in which people ordinarily feel safe, they can be dangerous places for officers who have entered to make an arrest. "[A]n in-home arrest," said the Supreme Court, "puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." [2] For this reason, the Court ruled that officers who have entered a residence may, under certain circumstances, conduct a type of search commonly known as a "protective sweep" or "walk through."

It should be noted that protective sweeps are only one of five types of protective searches that officers may be permitted to conduct in the course of detaining or arresting suspects. The other four are:

- **Pat searches**: Outside-the-clothing searches to locate weapons in the possession of a suspect who is believed to be armed or dangerous.
- **Protective vehicle searches**: Searches of a detainee's vehicle when officers have reason to believe there is a weapon inside.
- ***Chimel* searches**: Searches of a residence incident to the arrest of an occupant. (This subject is covered in the article on searches incident to arrest beginning on page one.)
- **Vicinity sweeps**: A search of areas in a home that are "immediately adjoining" the place in which an arrest occurred. (This subject is also covered in the article on searches incident to arrest.)

There is one other type of sweep that should be noted. Officers who have lawfully entered a home to arrest an occupant may, if necessary, search the premises for the arrestee.[3] While these searches are not "protective" in nature (because their objective is apprehension, not protection), they constitute "sweeps" because they are limited to a cursory inspection of places in which the arrestee might be hiding. Consequently, they must be conducted in accordance with the scope and intensity rules applicable to protective sweeps.

One other thing: The United States Supreme Court's decision in *Arizona* v. *Gant*, which we discussed in the previous article, will not result in additional limitations on protective sweeps. That is because the restrictions on protective searches imposed by *Gant* were intended to limit them to situations in which there existed a demonstrable threat. But, as we will discuss in this article, protective sweeps are already subject to this restriction.[4]

Requirements

The following are the requirements for conducting a protective sweep of a residence, business, or other structure:

1. **Lawful entry**: Officers must have had a legal right to enter; e.g., arrest warrant, consent, hot or fresh pursuit.
2. **Person on premises**: Officers must have had reason to believe there was a person on the premises (other than the arrestee) who was hiding or had otherwise not made himself known.
3. **Danger**: Officers must have had reason to believe that that person posed a threat to them.

Proof requirements

Because suppression motions pertaining to sweeps are often lost because officers or prosecutors failed to satisfy the various proof requirements, we will begin by discussing this subject.

LEVEL OF PROOF: The United States Supreme Court has ruled that officers who have lawfully entered a residence to make an arrest must have reasonable suspicion to believe that a dangerous person is on the premises.[5] "In order to justify the protective sweep," said the Sixth Circuit, "the government bore the burden of providing sufficient facts to support a reasonable belief that a third party was present who posed a danger to those on the arrest scene." [6]

SPECIFIC FACTS: While reasonable suspicion is a lower level of proof than probable cause, it can exist only if officers were able to articulate one or more circumstances that reasonably indicated there was, in fact, someone on the premises who posed a threat.[7] Thus, in *U.S.* v. *Moran Vargas* the Second Circuit ruled that a sweep of a bathroom was unlawful because "the DEA agents' testimony did not provide sufficient articulable facts that would warrant a reasonably prudent officer to believe that an

individual posing a danger to the agents was hiding [there].”[8] Similarly, a sweep will not be upheld merely because a threat was theoretically possible,[9] although it may be based on an officer’s reasonable inferences from the surrounding circumstances.[10]

SWEEP BASED ON NO INFORMATION: A sweep cannot be justified on grounds that officers did not know whether a threat existed and, therefore, could not rule out the possibility.[11] As the California Supreme Court pointed out, while “[t]here is always the possibility that some additional person may be found,” such a “mere possibility” is “not enough.”[12] For example, in *U.S.* v. *Ford* the court ruled that a sweep was unlawful because its only justification was the following testimony from an officer: “I did not know if there was anybody back there. I wanted to make sure there was no one there to harm us.”[13]

“ROUTINE” SWEEPS: Because articulable facts are required, a sweep will not be upheld on grounds that it was conducted as a matter of routine or departmental policy. For example, in *U.S.* v. *Hauk* the following occurred during cross-examination of a police detective in Kansas City, Kansas:

DEFENSE ATTORNEY: So I take it then it is just a matter of routine when you are executing arrest warrants at a particular residence, that a protective sweep then is done, because in your experience there is at least some likelihood that some other person might be present, correct?

DETECTIVE: Absolutely.

The court responded by pointing out that “[t]he Fourth Amendment does not sanction automatic searches of an arrestee’s home, nor does the factintensive question of reasonable suspicion accommodate a policy of automatic protective sweeps.”[14]

In another case in which an officer testified that sweeps are “standard procedure,” the Ninth Circuit reminded readers that “the fourth amendment was adopted for the very purpose of protecting us from ‘routine’ intrusions by governmental agents into the privacy of our homes.” The court added, “It is dismaying that any trained police officer in the United States would believe otherwise.”[15]

Lawful entry

Having covered the proof requirements imposed on officers and prosecutors, we will now examine the prerequisites for conducting protective sweeps, the first of which is that the officers must have had a legal right to enter the premises. Although this requirement is typically satisfied when the entry was based on a valid search or arrest warrant, as mentioned earlier it may also be based on an exception to the warrant requirement, such as hot pursuit.[16]

CONSENSUAL ENTRIES: Officers may conduct a sweep if the threat materialized after they had made a consensual entry. But problems may arise if they knew of the threat before they entered, and if they intended to conduct a sweep if consent was granted. In such a situation a court might rule that the consent was not “knowing and intelligent” if the officers did not inform the consenting person that his consent to enter would automatically result in a sweep.[17]

THREAT DEVELOPS WHILE OFFICERS WERE OUTSIDE:

While most protective sweeps occur when the threat developed after officers had entered, sweeps are also permitted if the officers were outside the premises and suddenly became aware that a person in the residence constituted an immediate threat to them.[18] In such cases, however, the entry will be deemed lawful only if officers had *probable cause* to believe that such a threat existed.[19]

Person on premises

The second requirement is that officers must have had reasonable suspicion to believe there was someone on the premises who had not made himself known.[20] In some cases, this requirement may be established through direct evidence, as when officers see someone inside;[21] or when they hear a voice;[22] or when an accomplice, neighbor, or other person says there is someone inside.[23]

This requirement may also be met by means of reasonable inference, which is typically based on one or more of the following circumstances:

WARNING TO OTHERS: A person who was contacted or detained suddenly shouted a warning apparently to unseen occupants of the premises.[24]

SOUNDS: Officers heard a sound that could have been made by a person; e.g., “scuffling noises from inside,”[25] “footsteps.”[26]

MOVEMENT: Officers saw something move (e.g., a curtain or door) if the cause was not reasonably attributable to other factors, such as wind.[27]

CAR PARKED IN DRIVEWAY: Officers saw a car in the driveway, and they knew it belonged to someone who was unaccounted for; e.g., "[t]hree vehicles, not one, were parked in the driveway";28 a "red Camaro pulled into [the suspect's] driveway. The driver disappeared, perhaps into the house."29

CAR PARKED NEARBY: A car parked nearby may also help create suspicion; e.g., officer saw "two cars parked sufficiently close to the residence to create a reasonable possibility that former occupants of the vehicles might be inside."30

MULTIPLE OCCUPANTS: Officers had reason to believe that two or more people were in or about the premises when they arrived; and although some of these people had been contacted or detained, others were unaccounted for.31 In determining whether these circumstances justified a sweep, the courts have noted the following:

- "[N]umerous cars and individuals entered and exited, which meant that at any given time the officers might have lacked an accurate count of suspects present."32
- Officers saw an "undetermined number of participants" in a pot partly in a residence.33
- Officers "did not know whether the five men who had come out of the garage included all five of the accused burglars." 34
- Officers saw " additional occupants in the darkened living room" and "a person other than [the suspect] exiting and reentering the apartment."35
- Because five suspects entered and four exited, the officers had "very good reason" to believe that "at least one" suspect was hiding in the warehouse.36

MULTIPLE PERPETRATORS: The arrestee was wanted for a crime committed by two or more people, some of whom had not yet been apprehended. As the Third Circuit observed in *Sharrar* v. *Felsing*, "The reasonable possibility that an associate of the arrestees remains at large" is a "salient" concern "for which a warrantless protective sweep is justified."37 For example, the following circumstances were deemed relevant:

- The officers "had yet to encounter Paopao's suspected confederate."38
- "Prior to the entry, the officers reasonably believed that at least six men were involved in distribution of cocaine."39
- The officers knew that the occupants "served as enforcers for the drug trafficking operation."40
- "[T]he officers knew that the day prior [to his arrest], Richards had been seen with Moore, a suspect in the murder investigation. When Richards met them at the door, the officers did not know whether Moore was inside."41
- The suspect "habitually pursued his criminal activities with accomplices." 42

SITE OF CRIMINAL ACTIVITY: It is relevant that the house was the center of operations for a criminal conspiracy or other ongoing criminal enterprise (such as buying or selling stolen property, organized crime, terrorism) and that officers conducting surveillance had previously seen people entering and exiting; e.g., "the residence was the site of ongoing narcotics activity,"43 "the house was sometimes used as a place for gang members to gather and conduct illegal activities,"44 "over the years, [the officer] had routinely observed individuals coming and going from the house,"45 other people were commonly present when the arrestees sold drugs to undercover officers in their homes.46

EVASIVE ARRESTEE: Finally, it is highly suspicious that officers had contacted or detained a person who, when asked if anyone else was on the premises, did not respond or was evasive.47 Although officers must take into account the arrestee's assertion that no one else was on the premises, they are not required to believe him.48

A threat

In addition to having reasonable suspicion that an unaccounted for person was on the premises, officers must have had reason to believe that that person posed a threat to them. In the words of the Supreme Court, officers must be aware of "articulable facts" which "would warrant a reasonably prudent officer" in believing that the person posed "a danger to those on the arrest scene."49

The existence of such a threat may be based on direct or circumstantial evidence. A common example of direct evidence is a tip from a reliable informant who had reason to believe the occupants were armed or that they would resist arrest.50

As for circumstantial evidence, it appears to be sufficient that (1) the officers had identified themselves in such a manner that anyone on the premises would have known who they were, and (2) they reasonably believed that one or more of the people on the premises were involved in crimes involving weapons or violence.51 Other circumstances that are often noted include the following:

- FIREARM ON PREMISES: Officers saw a firearm or ammunition inside the house.52

- EVASIVE Answer ABOUT WEAPONS: An occupant gave an evasive answer when asked if there were any weapons on the premises.53
- DANGEROUS ASSOCIATES: The arrestee associated with people who were known to be armed or dangerous; e.g., drug dealers, gang members.54
- REFUSAL TO ADMIT: The occupants refused to admit the officers.55

Sweep Procedure

Because the only lawful objective of a sweep is to locate and secure "unseen third parties who may be lurking on the premises,"56 officers must limit their search to a "quick" and "cursory" inspection of places in which a person might be hiding.57 Said the Fifth Circuit, "The protective sweep must cover no more than those spaces where police reasonably suspect a person posing danger could be found, and must last no longer than the police are otherwise constitutionally justified in remaining on the premises."58

For example, while officers may look inside closets, behind large furniture, under beds, and under piles of clothing, they may not look under rugs, inside desk drawers or in small cabinets.59 Thus, in *U.S.* v. *Ford* 60 the court ruled that a sweep conducted by an FBI agent was excessive because he had lifted a mattress (finding cocaine) and had looked behind a window shade (finding a gun). In contrast, the court in *U.S.* v. *Arch* ruled the sweep was sufficiently limited because "[t]he evidence indicates that the officers did not dawdle in each room looking for clues, but proceeded quickly through the motel room and adjoining bathroom, leaving once they had determined that no one was present."61

PLAIN VIEW SEIZURES: If officers see evidence in plain view while conducting the sweep, they may seize it if they have probable cause to believe it is, in fact, evidence of a crime.62 They may also temporarily seize any weapons in plain view.63

MULTIPLE SWEEPS: Officers may sometimes need to make more than one pass through the premises. For example, they might initially look only in obvious places, such as closets, under beds, and behind doors. If no one is found, they might conduct a second pass, looking in less obvious places; e.g., behind furniture, behind curtains, in crawl spaces.

The courts have permitted multiple sweeps, but only when officers were able to explain why more than one pass was necessary. For example, in *U.S.* v. *Paradis* officers discovered a gun after they had arrested the suspect and after they had thoroughly swept the premises twice. In ruling that the third pass was unnecessary, the court said:

> There was no reason to think that there was another person besides Paradis in the small apartment. At the time the gun was found, the police had already been through the entire apartment. They had been through the living room at least twice (and one or two officers remained there doing paperwork). And they had been through the only bedroom of the unit twice, finding Paradis on the second hunt. Furthermore, by their own testimony the police established that the only logical place someone could hide in the bedroom was under the bed, where they had found Paradis.64

On the other hand, the court in *United States* v. *Boyd* upheld a second sweep based largely on testimony from a U.S. Marshal who said that he thought that a second sweep was necessary because, during the first one, his "primary attention was divided between keeping an eye on the two individuals downstairs on the floor and covering [another marshal]."65

NO "LEAST INTRUSIVE MEANS" REQUIREMENT: A protective sweep will not be invalidated on grounds that officers might have been able to eliminate the threat by some less intrusive means, such as quickly leaving the premises after making the arrest, or guarding the door to a room in which a person was reasonably believed to be hiding.66 Nor will a sweep be deemed unlawful on grounds that officers could have avoided the necessity of a search by waiting to make the arrest outside the premises.67

TERMINATING THE SWEEP: Officers must terminate the sweep after checking all the places in which a person might reasonably be found.68

References

1. *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017.
2. *Maryland* v. *Buie* (1990) 494 U.S. 325, 333. ALSO SEE *State* v. *Murdock* (Wisc. 1990) 455 N.W.2d 618, 624 ["[T]he danger to police may be heightened when the arrest is made in the arrestee's home because the police officer will rarely be familiar with the home he or she is entering. The arrestee, however, knows where items such as weapons and evidence are secreted."].

3. See *Maryland* v. *Buie* (1990) 494 U.S. 325, 330 ["[U]ntil the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found"]; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 897 ["Once the police possessed an arrest warrant and probable cause to believe David was in his home, the officers were entitled to search anywhere in the house in which he might be found."].
4. See *Maryland* v. *Buie* (1990) 494 U.S. 325, 336 ["[T]he justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house."
5. *Maryland* v. *Buie* (1990) 494 U.S. 325, 327, 334. ALSO SEE *People* v. *Celis* (2004) 33 Cal.4th 667, 678.
6. *U.S.* v. *Archibald* (6th Cir. 2009) 589 F.3d 289, 299. Edited.
7. See *People* v. *Celis* (2004) 33 Cal.4th 667, 678 ["mere inchoate and unparticularized suspicion or hunch" is insufficient].
8. (2nd Cir. 2004) 376 F.3d 112, 116.
9. See *People* v. *Ledesma* (2003) 106 Cal.Ap.4th 857, 866 ["mere abstract theoretical possibility" of danger is insufficient].
10. See *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 863; *U.S.* v. *Hauk* (10th Cir. 2005) 412 F.3d 1179, 1187-88.
11. See *U.S.* v. *Archibald* (6th Cir. 2009) 589 F.3d 289, 300]; *U.S.* v. *Moran Vargas* (2nd Cir. 2004) 376 F.3d 112, 117"].
12. *Dillon* v. *Superior Court* (1972) 7 Cal.3d 305, 314. Edited.
13. (D.C. Cir. 1995) 56 F.3d 265, 270, fn.7.
14. (10th Cir. 2005) 412 F.3d 1179, 1186.
15. *U.S.* v. *Castillo* (9th Cir. 1988) 866 F.2d 1071, 1079.
16. See *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 864 [probation search]; *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 262.
17. See *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 262; *U.S.* v. *Gould* (5th Cir. 2004) 364 F.3d 578, 589.
18. See *People* v. *Maier* (1991) 226 CA3 1670, 1675; *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 766.
19. See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334, fn.1; *People* v. *Celis* (2004) 33 C.4th 667, 680.
20. See *Maryland* v. *Buie* (1990) 494 U.S. 325, 327.
21. See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659; *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 312.
22. See *People* v. *Mack* (1980) 27 Cal.3d 145, 149 ["multiple voices"]; *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514.
23. See *Guevara* v. *Superior Court* (1970) 7 Cal.App.3d 531, 535; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 5.
24. See *People* v. *Dyke* (1990) 224 Cal.App.3d 648 ["It's the fucking pigs"]; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191 ["Cops!"].
25. *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514. ALSO SEE *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 9.
26. *U.S.* v. *Lopez* (1st Cir. 1993) 989 F.2d 24, 26, fn.1.
27. *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1013. ALSO SEE *People* v. *Schmel* (1975) 54 Cal.App.3d 46, 49.
28. *U.S.* v. *Whitten* (9th Cir. 1983) 706 F2 1000, 1014. ALSO SEE *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396; *U.S.* v. *Tapia* (7C 2010) 610 F.3d 505, 511 [car belonging to possible gang associate parked outside].
29. *U.S.* v. *Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191.
30. *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 866.
31. See *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 743 [officers discovered unexpected occupant]; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396 ["there were at least five men including Hoyos who were not in custody"]; *U.S.* v. *James* (7th Cir. 1994) 40 F.3d 850, 863 [the officer "did not know if all of the suspects in the duplex had been subdued"]; *U.S.* v. *Mendoza-Burciaga* (5th Cir. 1992) 981 F.2d 192, 197 ["the officers did not know whether other suspects were in the house"].
32. *U.S.* v. *Mata* (5th Cir. 2008) 517 F.3d 279, 289.
33. *People* v. *Block* (1971) 6 Cal.3d 239, 245.
34. *People* v. *Mack* (1980) 27 Cal.3d 145, 151.
35. *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 312.
36. *U.S.* v. *Delgado* (11th Cir. 1990) 903 F.2d 1495, 1502.
37. (3d Cir. 1997) 128 F.3d 810, 824.
38. *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 767.
39. *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396.
40. *U.S.* v. *Cisneros-Gutierrez* (8th Cir. 2010) 598 F.3d 997, 1007.
41. *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291.
42. *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675.
43. *People* v. *Ledesma* (2003) 106 Cal.App.3d 857, 865.

44. *U.S.* v. *Tapia* (7th Cir. 2010) 610 F.3d 505, 511.
45. *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42.
46. *U.S.* v. *Barker* (7th Cir. 1994) 27 F.3d 1287, 1291.
47. See *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["Richards twice failed to answer [the officer's] question about whether anyone else was in the house"].
48. See *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 264 ["Of course, the police officers were not required to take Gandia at his word when he told them that he lived alone"]; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 ["The police had no way of knowing whether she was telling the truth"].
49. *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.
50. See *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 312; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284.
51. See *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675 ["Mr. Maier habitually pursued his criminal activities with accomplices in a most dangerous manner."]; *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 865-67 [officer reasonably believed that "drug users and those who associate with them are apt to have weapons in the house"]; *People* v. *Mack* (1980) 27 Cal.3d 145, 151 ["robbery in which shots had been fired"]; *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514 [drugs and murder]; *U.S.* v. *Castillo* (9th Cir. 1988) 866 F.2d 1071, 1081 [drug conspiracy]; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396 [drug sales; "any person hidden within could have heard Deputy Love's shouted commands"]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017 ["Mr. Burrows and Mr. Lin were suspected of committing a violent crime involving a firearm"]; *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42 [drug sales]; *U.S.* v. *Gould* (5th Cir. 2004) 364 F.3d 578, 591 [plot to kill judges]; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 ["the fact that the door was open could cause the officer to believe that anyone inside would be aware that Henry had been taken into custody"].
52. See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 654 [officers saw "a large caliber handgun within arm's reach of Dyke that appeared to be loaded"]; *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42 [spent shotgun shells outside]; *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 309 [officer "could see a pistol magazine and several loose rounds of ammunition in plain view"]; *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["Richards opened the door with a gun"]; *U.S.* v. *Miller* (2nd Cir. 2005) 430 F.3d 93, 102 [officer "caught sight of a firearm in plain view"]; *U.S.* v. *Atchley* (6th Cir. 2007) 474 F.3d 840, 850 [officers saw a handgun lying on the bed].
53. See *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42 [occupant "shrugged his shoulders" when asked about the location of a weapon].
54. See *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675 ["the police knew that Mr. Maier habitually pursued his criminal activities with accomplices in a most dangerous manner"]; *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 865 ["the residence was the site of ongoing narcotics activity. Firearms are, of course, one of the tools of the trade of the narcotics business."]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 9 ["The value of the contraband reasonably believed present by [the arresting officer] was surely not so de minimis as to make remote the possibility of violent and desperate efforts to resist the arrests and defend the contraband."]; *People* v. *Mack* (1980) 27 Cal.3d 145, 151 [officers knew that one of the occupants "had been arrested for an armed robbery in which shots had been fired," and that weapons taken in a recent burglary might be inside]; *U.S.* v. *Castillo* (9th Cir. 1989) 866 F.2d 1071, 1081 ["one of De La Renta's co-conspirators had hired an assassin to kill a DEA Agent"].
55. See *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017 ["[A]lthough the officers repeatedly announced their presence, those in the apartment had refused them entry, yet could be heard moving about inside."].
56. *U.S.* v. *Nascimento* (1st Cir. 2007) 491 F.3d 25, 49.
57. *Maryland* v. *Buie* (1990) 494 US 325, 327.
58. *U.S.* v. *Scroggins* (5th Cir. 2010) 599 F.3d 433, 441.
59. See *People* v. *Maier* (1991) 226 Cal.App.3d 1670 [under pile of clothing]; *U.S.* v. *Nascimento* (1st Cir. 2007) 491 F.3d 25, 51 [inside a closet]; *U.S.* v. *Lauter* (2nd Cir. 1995) 57 F.3d 212, 217 [the "space between the bed and the wall"]; *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 767 [behind sofa]; *U.S.* v. *Pruneda* (8th Cir. 2008) 518 F.3d 597, 603 ["the officer did not move any objects"].
60. (D.C. Cir. 1995) 56 F.3d 265, 270.
61. (7th Cir. 1995) 7 F.3d 1300, 1304.
62. See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326; *Warden* v. *Hayden* (1967) 387 U.S. 294, 299.
63. See *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 314.

64. (1st Cir. 2003) 351 F.3d 32. Edited. ALSO SEE *U.S.* v. *Oguns* (2nd Cir. 1990) 921 F.2d 442, 447 [“The agents no longer had authority to remain in Oguns’ apartment after they determined that no one else was there.”].
65. (8th Cir. 1999) 180 F.3d 967, 975. ALSO SEE *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 767 [second sweep permitted when, after the first sweep, the officer “was not secure in the notion that no one was left in the apartment”].
66. See *U.S.* v. *Tapia* (7th Cir. 2010) 610 F.3d 505, 511; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1285 [officers are not required to flee the premises once the arrest is made].
67. See *U.S.* v. *Gould* (5th Cir. 2004) 364 F.3d 578, 590.
68. See *U.S.* v. *Oguns* (2nd Cir. 1990) 921 F.2d 442, 447 [“The agents no longer had authority to remain in Oguns’ apartment after they determined that no one else was there.”]; *Sharrar* v. *Felsing* (3d Cir. 1997) 128 F.3d 810, 825 [“Once all four men were out of the house and in custody, the arresting officers had no basis to conclude that others remained inside.”].

Contributors and Attributions

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13.6: “Knock and Talks”

Consensual encounters may also take place at the doorway of a home.[1]

While most consensual encounters or “contacts” occur on the streets as a spontaneous response to a situation or circumstance, they may also take place at the suspect’s home. Commonly known as “knock and talks,” these types of contacts are usually employed when officers have reason to believe that a resident is involved in some sort of criminal activity but they lack any other effective means of confirming or dispelling their suspicion. So they visit him at home for the purpose of asking some questions and oftentimes seeking consent to search the premises.[2] As the Supreme Court observed, “In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”[3]

The main thing to remember about knock and talks is that, like all contacts, they must be voluntary, meaning that officers can neither expressly nor impliedly assert their authority. As the Fifth Circuit put it:

> The purpose of a “knock and talk” is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose of a “knock and talk” approach is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupants’ consent to search.[4]

Although knock and talks have been described as a “reasonable investigative tool”[5] and a measure that is “firmly rooted” in Fourth Amendment jurisprudence,[6] the courts are somewhat leery of them because they take place inside a residence—the most private of all structures protected by the Fourth Amendment. “[W]hen it comes to the Fourth Amendment,” said the Supreme Court, “the home is first among equals.”[7]

Just as important, the courts are concerned that knock and talks may take on the character of the “dreaded knock on the door” that is prevalent in totalitarian and police states. Addressing this subject, the Sixth Circuit observed that the “right of officers to thrust themselves into a home is a grave concern, not only to the individual but to society which chooses to dwell in reasonable security and freedom from surveillance.”[8]

Thus, officers who conduct knock and talks must not only understand the rules that cover all types of contacts (which we covered in the lead article), they must also be aware of the additional restrictions that are unique to these sensitive operations.

Making Contact

The manner in which officers make contact with the suspect at the front door is often crucial as it may reasonably be interpreted to mean that he was being detained; i.e., that he “was not at liberty to ignore the police presence and go about his business.”[9] Accordingly, the courts are especially alert to the following:

POLITE VS. PERSISTENT KNOCKING: When officers knock on the door or ring the doorbell they must do so in a manner consistent with an ordinary visitor— not as someone who is asserting a legal right to speak with the occupants. This means that continuous or repeated knocking may be deemed a command to open the door which will render the resulting encounter a seizure.[10] Thus, in *U.S. v. Reeves* (admittedly an extreme example) the court ruled that a “reasonable person faced with several police officers consistently knocking and yelling at their door for twenty minutes in the early morning hours would not feel free to ignore the officers’ implicit command to open the door.”[11]

Similarly, in *U.S. v. Jerez* [12] sheriff ’s deputies in Wisconsin decided to conduct a knock and talk at a motel room occupied by Jerez, a suspected drug trafficker. But no one answered the door, so they “took turns knocking” for about five minutes. Still no response. So while one deputy began knocking loudly on the window, another “shone his flashlight through the small opening in the window’s drapes, illuminating Mr. Jerez as he lay in the bed.” Eventually, Jerez opened the door and consented to a search which netted cocaine. But the court ruled the entry was not consensual because “[t]his escalation of the encounter renders totally without foundation any characterization that the prolonged confrontation was a consensual encounter.”

Note, however, that the Supreme Court has ruled that neither loud knocking nor a loud announcement will *automatically* convert the encounter into a seizure. This is mainly because, said the Court, a “forceful knock may be necessary to alert the occupants that someone is at the door” and, unless the officers make a loud announcement, the occupants “may not know who is at their doorstep.” [13]

COMMAND TO OPEN DOOR: An encounter at the doorway is plainly not consensual if officers *ordered* the residents to open the door. As the California Supreme Court put it, "The right to seek interviews with suspects at their homes does not include the right to demand that a suspect open his door."14 Similarly, the Fifth Circuit observed, "When officers demand entry into a home without a warrant, they have gone beyond the reasonable 'knock and talk' strategy of investigation."15

For example, in ruling that a knock and talk was involuntary, the Ninth Circuit said in *U.S. v. Winsor*, "[T]he police knocked on the door, identified themselves as police, and demanded that the occupants open the door, and [Winsor] opened the door on command. On these facts, there can be no consent as a matter of law."16

TIME OF ARRIVAL: The time of the officers' arrival is significant if it occurred late at night, especially if the lights were out and it appeared the residents were asleep. That is because of the "special vulnerability" of people "awakened in the night by a police intrusion at their dwelling place,"17 and the "peculiar abrasiveness" of such intrusions.18 For this reason, the courts "have recognized that nocturnal encounters with the police in a residence (or a hotel or motel room) should be examined with the greatest of caution."19 For example, in *U.S. v. Jerez* (discussed earlier) another reason the knock and talk was deemed unlawful was that the officers had arrived at about 11 P.M. and it appeared the residents had gone to bed; i.e., "the room was quiet; no sounds were heard coming from the room."20

LOITERING ON THE PROPERTY: Like any other visitor, officers may walk to the front door via normal access routes, then knock or otherwise announce their presence. But if no one answers the door within a reasonable time, they cannot loiter on the property or explore the grounds because such conduct is outside the scope of any implied consent. As the Supreme Court explained, officers are impliedly authorized "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."21

NUMBER OF OFFICERS: There is no rule that a maximum of two officers may attempt a knock and talk. But it's a good rule of thumb. That's because the more officers at the front door, the more the situation might appear to be a display of police authority.22 As the California Supreme Court observed in *People v. Michael*, "[T]he appearance of four officers at the door may be a disturbing experience."23 For example, in *U.S. v. Gomez-Moreno* the court ruled that officers did not engage in a "proper" knock and talk but instead "created a show of force when ten to twelve armed officers met at the park, drove to the residence, and formed two groups—one for each of the two houses" with a helicopter overhead."24

To avoid such problems but still address officersafety concerns, some officers may stay hidden. But if a resident happens to see them, the coercion level may increase substantially.25

The Greeting

The manner in which officers greeted the suspect or other person who answered the door is crucial because a cordial and respectful attitude may communicate to him that the officers are merely seeking his cooperation. In contrast, an overbearing or officious attitude will likely be interpreted to mean the officers have a legal right to obtain answers to their questions or conduct a search. For example, in *People v. Boyer* the court said that "[t]he manner in which the police arrived at defendant's home, accosted him, and secured his 'consent' . . . suggested that they did not intend to take 'no' for an answer."26

Conducting the Investigation

For a discussion of how officers must conduct themselves while questioning the suspect or seeking his consent to search, see "Conducting the Investigation" which begins on page eight in the lead article.

Warrantless Entry to Seize Evidence

There are two situations in which officers who are conducting a knock and talk may enter the premises without a warrant for the limited purpose of seizing or securing evidence.

EVIDENCE IN PLAIN VIEW FROM OPEN DOOR: While speaking with a resident at the front door, officers will sometimes see drugs or other evidence in plain view. Can they enter and seize it without a warrant? The answer is yes if both of the following circumstances existed: (1) they had probable cause to believe the item was evidence of a crime; and (2) an occupant had opened the door voluntarily, not in response to a show of authority. In other words, the officers must not have discovered the evidence—i.e., they must not have obtained "visual access" to it— by means of coercion. Said the Fourth Circuit:

> [A] a search occurs for Fourth Amendment purposes when officers gain visual or physical access to a room after an occupant opens the door not voluntarily, but in response to a demand under color of authority.27

On the other hand, if the door was opened voluntarily, a warrantless entry to seize the evidence would be permitted for at least two reasons: (1) an occupant cannot reasonably expect privacy as to something that is obviously evidence of a crime and that he knowingly and voluntarily exposed to the view of officers,28 and (2) the officers might reasonably believe that the suspect would realize they had seen the evidence and that he would immediately attempt to dispose of it if given a chance.29

For example, in *U.S. v. Scroger* 30 officers in Kansas City, having received reports of drug activity at a certain house, went there at 11 A.M. to conduct a knock and talk. As they were walking up to the front door, they heard someone say "go out the back," followed by the sounds of someone running. While two officers went to the back, two others went to the front door and knocked. Scroger answered the door, and it was apparent he had been cooking methamphetamine. Among other things, the officers saw "glassware" and detected a "strong odor"—both of which they associated with methamphetamine production. Just then, Scroger tried to slam the door shut, but the officers pushed their way in and took him into custody. After securing the house, they obtained a warrant and ultimately found "a large number of items commonly associated with the clandestine manufacturing of methamphetamine." Scroger argued that the evidence should have been suppressed because the officers had no right to enter without a warrant or consent. Citing exigent circumstances, however, the court said "[i]t is highly likely that the evidence would have been destroyed or moved if the officers had waited to apprehend Scroger until they had obtained a warrant."

EXIGENCY BASED ON REASONABLE INFERENCE: Before knocking on the door, officers will sometimes see or hear something that provides them with probable cause to believe the suspect had been alerted to their presence and had started—or would immediately start—to destroy any evidence on the premises. If this happens, the "destruction of evidence" exception to the warrant requirement would apply, in which case the officers could forcibly enter the premises for the limited purpose of securing it pending issuance of a search warrant.31

There is, however, an exception to this rule. Specifically, a warrantless entry will not be permitted if a court finds that the threat to the evidence was fabricated by the officers themselves. How can the courts make this determination? In the past, it was often difficult because the courts would try to determine the officers' subjective intent. But in 2011 the United States Supreme Court ruled in *Kentucky v. King* that a threat will be deemed fabricated only if, upon arrival, the officers said or did something that would have caused an occupant of the premises to reasonably believe that the officers were about to enter or search the premises in violation of the Fourth Amendment.32

This means, among other things, that a threat will not be deemed fabricated merely because the officers had somehow alerted the occupants to their presence, even though that might have caused the occupants to attempt to destroy any evidence on the premises. As the Supreme Court observed in *King*:

> [W]henever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them.

But the Court added that such a possibility will not constitute a fabricated exigency unless the officers had expressly or impliedly threatened to enter the premises without a warrant.

References

1. *People v. Rivera* (2007) 41 Cal.4th 304, 309.
2. See *Kentucky v. King* (2011) U.S. [131 S.Ct. 1849, 1860].
3. *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 227.
4. *U.S. v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355.
5. *U.S. v. Jones* (5th Cir. 2001) 239 F.3d 716, 720. ALSO SEE *People v. Michael* (1955) 45 Cal.2d 751, 754 ["it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes"]; *U.S. v. Lucas* (6th Cir. 2011) 640 F.3d 168, 174 [knock and talks are a "legitimate investigative technique"]; *U.S. v. Roberts* (5th Cir. 2010) 612 F.3d 306, 310 ["knock and talk" is "an accepted investigatory tactic"].
6. *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146. ALSO SEE *People v. Jenkins* (2004) 119 Cal.App.4th 368, 372 ["However offensive the [trial] court may have found the 'knock and talk' procedure, we can find no basis in law to support its conclusion that the practice is unconstitutional."].

7. *Florida v. Jardines* (2013) U.S. [133 S.Ct. 1409, 1414].
8. *U.S. v. Morgan* (6th Cir. 1984) 743 F.2d 1158, 1161.
9. See *Florida v. Bostick* (1991) 501 U.S. 429, 436.
10. See *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 [the officers "knocked on the door longer and more vigorously than would an ordinary member of the public. The knocking was loud enough to awaken a guest in a nearby room and to cause another to open her door."]. COMPARE *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["a single, polite knock on the door"]; *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1109 [the officer "knocked on the door for only a short period spanning seconds"]; *U.S. v. Kim* (3rd Cir. 1994) 27 F.3d 947, 951 [the encounter "began with a polite knock on the door"].
11. (10th Cir. 2008) 524 F.3d 1161, 1169.
12. (7th Cir. 1997) 108 F.3d 684, 690.
13. *Kentucky v. King* (2011) U.S. [131 S.Ct. 1849, 1861].
14. *People v. Shelton* (1964) 60 Cal.2d 740, 746. ALSO SEE *U.S. v. Reeves* (10th Cir. 2008) 524 F.3d 1161, 1167 ["Opening the door to one's home is not voluntary if ordered to do so under the color of authority."]; *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2 ["Open up"]; *U.S. v. Edmondson* (11th Cir. 1986) 791 F.2d 1512, 1515, ["FBI. Open up."].
15. *U.S. v. Gomez-Moreno* (5th Cir. 2007) 479 F.3d 350, 355-56.
16. (9th Cir. 1988) 846 F.2d 1569, 1573, fn.3.
17. *U.S. v. Jerez* (7th Cir. 1997) 108 F.3d 684, 690. COMPARE *U.S. v. Tavolacci* (D.C. Cir. 1990) 895 F.2d 1423, 1425 ["The time was not unusual (about 5:30 P.M.)]; *U.S. v. Crapser* (9th Cir. 2007) 472 F.3d 1141, 1146 ["The encounter occurred in the middle of the day"]; *U.S. v. Abdenbi* (10th Cir. 2004) 361 F.3d 1282, 1288 [officers arrived at about 6:15 A.M. "because they hoped to speak to [the suspect] before he left for work."].
18. *U.S. v. Ravich* (2nd Cir. 1970) 421 F.2d 1196, 1202. BUT ALSO SEE *Bailey v. Newland* (9th Cir. 2001) 263 F.3d 1022, 1026 [although the time was 2:15 A.M., "the lights were on in the room"].
19. *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110.
20. (7th Cir. 1997) 108 F.3d 684, 687. ALSO SEE *U.S. v. Quintero* (8th Cir. 2011) 648 F.3d 660, 670 [officers "roust[ed] the Quinteros from sleep"].
21. *Florida v. Jardines* (2013) U.S. [133 S.Ct. 1409, 1415].
22. See *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068; *Orhorhaghe v. I.N.S.* (9th Cir. 1994) 38 F.3d 488, 494; *U.S. v. Conner* (8th Cir. 1997) 127 F.3d 663, 666, fn.2. BUT ALSO SEE *People v. Munoz* (1972) 24 Cal.App.3d 900, 905 ["The fact there were four officers does not in itself carry an implied assertion of authority."].
23. (1955) 45 Cal.2d 751, 754.
24. (5th Cir. 2007) 479 F.3d 350, 355.
25. See *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068.
26. (1989) 48 Cal.3d 247, 268. COMPARE *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1110 [the officer "never spoke to Cormier in an authoritative tone or led him to believe that he had no choice other than to answer her questions"].
27. *U.S. v. Mowatt* (4th Cir. 2008) 513 F.3d 395, 400. ALSO SEE *People v. Shelton* (1964) 60 Cal.2d 740, 747; *U.S. v. Winsor* (9th Cir. 1988) 846 F.2d 1569.
28. See *Illinois v. Andreas* (1983) 463 US 765, 771; *People v. Haugland* (1981) 115 Cal.App.3d 248, 257; *U.S. v. Huffhines* (9th Cir. 1992) 967 F2 314, 319.
29. See *Kentucky v. King* (2011) U.S. [[131 S.Ct. 1849, 1862].
30. (10th Cir. 1997) 98 F.3d 1256.
31. See *Kentucky v. King* (2011) U.S. [131 S.Ct. 1849, 1856].
32. (2011) U.S. [131 S.Ct. 1849, 1862].

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13.7: Mincey v. Arizona

PETITIONER

Rufus Junior Mincey

RESPONDENT

Arizona

LOCATION

University Medical Center

DOCKET NO.

77-5353

DECIDED BY

Burger Court

LOWER COURT

Arizona Supreme Court

CITATION

437 US 385 (1978)

ARGUED

Feb 21, 1978

DECIDED

Jun 21, 1978

GRANTED

Oct 17, 1977

ADVOCATES

Richard Oseran *for petitioner*

Galen H. Wilkes *for respondent*

Facts of the case

On October 28, 1974, Officer Barry Headricks of the Tucson Metropolitan Area Narcotics Squad allegedly arranged to purchase a quantity of heroin from Rufus Mincey. Later, Officer Headricks knocked on the door of Mincey's apartment, accompanied by nine other plainclothes officers. Mincey's acquaintance, John Hodgman, opened the door. Officer Headricks slipped inside and quickly went to the bedroom. As the other officers entered the apartment -despite Hodgman's attempts to stop them -the sound of gunfire came from the bedroom. Officer Headricks emerged from the bedroom and collapsed on the floor; he died a few hours later.

The other officers found Mincey lying on the floor of his bedroom, wounded and semiconscious, then quickly searched the apartment for other injured persons. Mincey suffered damage to his sciatic nerve and partial paralysis of his right leg; a doctor described him as depressed almost to the point of being comatose. A detective interrogated him for several hours at the hospital, ignoring Mincey's repeated requests for counsel. In addition, soon after the shooting, two homicide detectives arrived at the apartment and took charge of the investigation. Their search lasted for four days, during which officers searched, photographed and diagrammed the entire apartment. They did not obtain a warrant. The state charged Mincey with murder, assault, and three counts of narcotics offenses. Much of the prosecution's evidence was the product of the extensive search of Mincey's apartment. Mincey contended at trial that this evidence was unconstitutionally taken without a warrant and that his statements were inadmissible because they were not made voluntarily. In a preliminary hearing, the court found that Mincey made the statements voluntarily.

Question

1. Did the admission of evidence taken during a four-day long warrantless search of Mincey's residence constitute an unreasonable search or seizure under the Fourth and Fourteenth Amendments?
2. Did the admission of Mincey's responses to police questioning made while he was a patient in the intensive care unit of a hospital violate his privilege against self-incrimination, rights to counsel and due process under the Fifth, Sixth, and Fourteenth

Amendments?

FOR	AGAINST
Burger White Powell Stevens Marshall Brennan Stewart Blackmun	Rehnquist

Conclusion

Yes and yes. In an 8-1 opinion written by Justice Potter Stewart, the Court held that the extensive, warrantless search of Mincey's apartment was unreasonable and unconstitutional under the Fourth and Fourteenth Amendments. Justice Stewart wrote that warrantless searches were *per se* unreasonable with a few specific exceptions, and rejected Arizona's argument that the search of a homicide scene was one of these exceptions. Justice William Rehnquist concurred in part and dissented in part. He agreed that the warrantless search was unconstitutional, but argued that the majority failed to defer to the trial court's determination that Mincey's statements were voluntary.

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CHAPTER OVERVIEW

14: Police Use of Force

14.1: Graham v. Conner

14.2: Tennessee v. Garner

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14.1: Graham v. Conner

PETITIONER	RESPONDENT
Dethorne Graham	M.S. Connor

LOCATION

United_States_District_Court, Western District North Carolina, Charlotte Division

DOCKET NO.	DECIDED BY
87-6571	Rehnquist Court

LOWER COURT

United States Court of Appeals for the Fourth Circuit

CITATION

490 US 386 (1989)

ARGUED

Feb 21, 1989

Decided

May 15, 1989

Granted

Oct 3, 1988

ADVOCATES

H. Gerald Beaver *on behalf of the Petitioner*

Mark Irving Levy *on behalf of Respondents*

Facts of the case

On November 12, 1984, Dethorne Graham, a diabetic, had an insulin reaction while doing auto work at his home. He asked a friend, William Berry, to drive him to a convenience store in order to purchase some orange juice to counter his reaction. When they arrived at the store, Graham rapidly left the car. He entered the store and saw a line of four or five persons at the counter; not wanting to wait in line, he quickly left the store and returned to Berry's car. Officer M.S. Connor, a Charlotte police officer, observed Graham entering and exiting the store unusually quickly. He followed the car and pulled it over about a half mile away. Graham, still suffering from an insulin reaction, exited the car and ran around it twice. Berry and Officer Connor stopped Graham, and he sat down on the curb. He soon passed out; when he revived he was handcuffed and lying face down on the sidewalk. Several more police officers were present by this time. The officers picked up Graham, still handcuffed, and placed him over the hood of Berry's car. Graham attempted to reach for his wallet to show his diabetic identification, and an officer shoved his head down into the hood and told him to shut up. The police then struggled to place Graham in the squad car over Graham's vigorous resistance. Officer Connor soon determined, however, that Graham had not committed a crime at the convenience store, and returned him to his home. Graham sustained multiple injuries, including a broken foot, as a result of the incident. Graham filed § 1983 charges against Connor, other officers, and the City of Charlotte, alleging a violation of his rights by the excessive use of force by the police.

Question

1. Must Graham show that the police acted "maliciously and sadistically for the very purpose of causing harm" to establish his claim that Charlotte police used excessive force?
2. Must Graham's claim that law enforcement officials used excessive force be examined under the Fourth Amendment's "objective reasonableness" standard?

UNANIMOUS

Blackmun

White

Scalia

Rehnquist

O'Conner

Marshall

Brennan

Stevens

Kennedy

Conclusion

No and yes. In a unanimous ruling written by Justice William Rehnquist, the Court held that claims of excessive force used by government officials are properly analyzed under the Fourth Amendment's "objective reasonableness" standard. The Court vacated the directed verdict and remanded the case to the district court to be decided by that standard. Justice Rehnquist rejected Connor's argument that "malicious and sadistic" is merely another way of describing conduct that is objectively unreasonable, noting that the subjective motivations of the officers are relevant under the Eighth Amendment, not the Fourth.

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14.2: Tennessee v. Garner

PETITIONER

Tennessee

RESPONDENT

Garner

LOCATION

House where alleged robbery took place

DOCKET NO.

81-430

DECIDED BY

Burger Court

LOWER COURT

United States Court of Appeals for the Sixth Circuit

CITATION

471 US 1 (1985)

ARGUED

Oct 30, 1984

DECIDED

Mar 27, 1985

ADVOCATES

W. J. Michael Cody *on behalf of appellants in 83-1035*

Henry I. Klein *on behalf of petitioners in 83-1070*

Facts of the case

These are two consolidated cases against different defendants involving the same incident. During a chase, police officer Elton Hymon shot 15-year-old Edward Eugene Garner with a hollow tip bullet to prevent Garner from escaping over a fence. Garner was suspected of robbing a nearby house. Hymon admitted that before he shot he saw no evidence that Garner was armed and "figured" he was unarmed. The bullet hit Garner in the back of the head. Garner was taken to the hospital where he died a short time later.

Garner's father sued seeking damages for violations of Garner's constitutional rights. The district court entered judgment for the defendants because Tennessee law authorized Hymon's actions. The court also felt that Garner had assumed the risk of being shot by recklessly attempting to escape. The U.S. Court of Appeals for the Sixth Circuit reversed, holding that killing a fleeing suspect is a "seizure" under the Fourth Amendment and such a seizure would only be reasonable if the suspect posed a threat to the safety of police officers or the community at large.

Question

Does a statute authorizing use of deadly force to prevent the escape of any fleeing suspected felon violate the Fourth Amendment?

Conclusion

6–3 Decision

Majority Opinion by Byron R. White

FOR	AGAINST
Blackmun White Powell Marshall Stevens Brennan	Burger O’Conner Rehnquist

Yes. In a 6-3 decision, Justice Byron R. White wrote for the majority affirming the court of appeals decision. The Fourth Amendment prohibits the use of deadly force unless it is necessary to prevent the escape of a fleeing felon and the officer has probable cause to believe that the suspect poses a significant threat of violence to the officer or the community. The Tennessee statute was unconstitutional as far as it allowed deadly force to prevent the escape of an unarmed fleeing felon.

Justice Sandra Day O'Connor wrote a dissent stating that the majority went too far in invalidating long-standing common law and police practices contrary to the holding. Chief Justice Warren E. Burger and Justice William H. Rehnquist joined in the dissent.

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CHAPTER OVERVIEW

15: 5th Amendment Protections

15.1: Miranda - When Compliance Is Compulsory

15.2: Miranda Waivers

15.3: Miranda v. Arizona

15.4: Escobedo v. Illinois

15.5: Rhode Island v. Innis

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15.1: Miranda - When Compliance Is Compulsory

In applying Miranda, one normally begins by asking whether custodial interrogation has taken place.[1]

It sounds fairly simple: Officers must obtain a waiver and comply with *Miranda's* other rules only if they want to "interrogate" someone who is "in custody."[2] As the California Supreme Court put it, "Absent custodial interrogation, *Miranda* simply does not come into play."[3]

The clarity of this rule is, however, illusory. In fact, most officers have learned from experience that determining whether *Miranda* applies can be a crapshoot. This is mainly because the courts have written hundreds of opinions in which they have defined, redefined, and interpreted the terms "custody" and "interrogation" so as to strip them of their everyday meanings. For example, a suspect who is being questioned in the comfort of his home may be in custody, while most convicted felons who are locked up in state prisons are not. This situation is especially problematic because officers need to know exactly when they need a *Miranda* waiver and, just as important, when they don't.

There is, of course, an easy way for officers to avoid this problem: *Mirandize* every suspect they question. Indeed, that's how they do it on many television shows. But actor-cops can be confident that actor-crooks will confess if it's in the script, while real officers know that *Mirandizing* real crooks often causes them to become more guarded and less likely to spill the beans. After all, those ominous words—"*Anything you say may be used against you in court*"—were not intended to make suspects feel chatty.[4]

Consequently, officers often find themselves in a dilemma: If they provide an unnecessary *Miranda* warning, the suspect may clam up. But if they provide no warning or a tardy one, anything he says may be suppressed.

Fortunately, the situation has improved lately as the courts have made it clear that officers must comply with *Miranda* only if the surrounding circumstances generated the degree of intimidation that the *Miranda* procedure was designed to alleviate. As a result, officers can now usually determine when compliance is required if they are familiar with a few rules and concepts which we will cover in this article. We will start with the two types of custody: actual and de facto. Then we will discuss "interrogation" and the custodial situations that are exempt from *Miranda*.

Actual Custody

It has always been easy to determine when a suspect was in actual custody because it automatically occurs at the moment officers notify him that he is under arrest. As the Court of Appeal observed, "We ordinarily associate the concept of being 'in custody' with the notion that one has been formally arrested."[5] Thus, in *Berkemer v. McCarty* the U.S. Supreme Court summarily ruled that the defendant was in custody "at least as of the moment he was formally placed under arrest."[6]

SUSPECT IN CUSTODY FOR ANOTHER CRIME: If the suspect was arrested for one crime, he is in custody even if officers wanted to question him about a crime for which he had not yet been arrested.[7] This is because it is custody—not the subject matter of the interview—that generates pressure on a suspect who is being questioned. Thus, if a suspect had been arrested for robbing a gas station, and if officers wanted to question him about a bank robbery, they would need a waiver.

SUSPECT RELEASED: An arrested suspect is no longer in custody after he was released, whether by officers pursuant to Penal Code section 849(b), or after posting bail or obtaining an OR. "Once released," explained the Court of Appeal, "the suspect is no longer under the inherently compelling pressures of continuous custody where there is a reasonable possibility of wearing the suspect down by badgering police tactics."[8]

De Facto Custody

Unlike actual custody, de facto custody is a rather ambiguous concept because it occurs whenever the surrounding circumstances combine to create the "functional equivalent" of an arrest.[9] To be slightly more specific, a suspect is in de facto custody if his freedom had been restricted to "the degree associated with a formal arrest."[10] Thus, the Court of Appeal pointed out that the term de facto custody is "a term of art that describes when a citizen has been subject to sufficient restraint by the police to require the giving of *Miranda* warnings."[11]

Rules and principles

While de facto custody is a obscure predicament, it is usually possible for officers to determine whether a suspect is in such a pickle if they keep following rules and principles in mind.

THE REASONABLE PERSON TEST: In determining whether a suspect was in de facto custody, the courts apply the "reasonable person" test, meaning they look to see if a reasonable person in the suspect's position would have believed he was under arrest.12 If so, he's in custody. Otherwise, he's not. "[T]he only relevant inquiry," said the Supreme Court, "is how a reasonable man in the suspect's position would have understood his situation."13

Although the "reasonable person" is a phantom, the courts have equipped him with two significant personality quirks:

1. HE'S OBJECTIVE: In determining whether he is in custody, the reasonable person will consider only the objective circumstances; i.e., the things he actually saw and heard.14
2. HE'S INNOCENT: Being a reasonable person, he was not even remotely involved in the planning or commission of the crime under investigation.15 This is significant because it means he "does not have a guilty state of mind"16 and will therefore view the circumstances much less ominously than the perpetrator.

THE OFFICERS' STATE OF MIND

Because the reasonable person will consider only what he saw or heard, it is irrelevant that, unbeknownst to him, the officers believed he was guilty, or that they thought they had probable cause to arrest him, or even that they intended to arrest him at the conclusion of the interview.17

For example, in *Berkemer v. McCarty* 18 a motorist who had been stopped for DUI contended that he was in custody from the moment the officer saw him stumble from his car. That was because the officer had testified that, based on the suspect's stumbling and bad driving, he had decided to arrest him. But the Supreme Court ruled that the officer's plan of action was irrelevant because he never communicated it to the driver.

Similarly, in *People v. Blouin* 19 an officer went to Blouin's house to arrest him for possessing a stolen car. But before placing him under arrest, the officer asked him some questions about the car, and Blouin responded by making an incriminating statement. On appeal, Blouin argued that he was in custody when he was questioned because the officer intended to arrest him. But the court ruled it didn't matter what the officer intended to do because his "intent to detain or arrest, if such did in fact exist, had not been communicated to defendant."

TEMPORARY RESTRICTIONS

A suspect is not in custody merely because he knew or reasonably believed that he was not free to walk away or move about. This is because a temporary restriction is not nearly as coercive or intimidating as the restrictions imposed on arrestees who will be transported to jail. As the Supreme Court recently observed:

> Not all restraints on freedom of movement amount to custody for purposes of *Miranda*. We have declined to accord talismanic power to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.20

Thus, the court in *People v. Pilster* noted that the issue "is not whether a reasonable person would believe he was free to leave, but rather whether such a person would believe he was in police custody of the degree associated with formal arrest."21 Similarly, in *People v. Brown* the court said, "Even if we make the assumption that defendant felt that he was not free to leave, we certainly would not be warranted in assuming that he felt he was arrested."22 This does not mean that freedom to leave is irrelevant. On the contrary, if a reasonable person in the suspect's position would have believed that he was, in fact, free to leave, the suspect would necessarily *not* be in custody. Thus, the Second Circuit observed, "It makes sense to begin any custody analysis by asking whether a reasonable person would have thought he was free to leave the police encounter at issue. If the answer is yes, the *Miranda* inquiry is at an end."23

It is important not to confuse *Miranda* custody with Fourth Amendment custody as they are subject to different tests. Specifically, a person is in custody for Fourth Amendment purposes (i.e., "seized") if he reasonably believed that he was not free to leave.24 But, as noted, such a restriction does not constitute *Miranda* custody unless it was so severe that it was tantamount to an arrest. For example, if officers question a suspect on the street, and if that person reasonably believed that he was not free to leave, he is deemed "detained." But, as noted, *Miranda* custody requires more than a temporary restriction on freedom. Thus, in rejecting the argument that a detainee was in *Miranda* custody, the court in *U.S. v. Luna-Encinas* pointed out that, "[e]ven accepting that Luna-Encinas had been 'seized' . . . we are convinced that a reasonable person in his position would not have understood his freedom of action to have been curtailed to a degree associated with formal arrest."25

QUESTIONING CHILDREN: In 2011, the Supreme Court ruled in *J.D.B. v. North Carolina* that officers who question juvenile suspects must take the suspect's age into account in determining whether he would have reasonably believed that his freedom had been restricted to the degree associated with an arrest.[26] The Court observed that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."

Although it is too early to tell how the courts will interpret *J.D.B.*, there is reason to believe that a minor's age will have little or no significance when, as is usually the case, the minor was at least 16.[27] That is because, as Justice Alito observed in his dissenting opinion (which was cited with apparent approval by the majority), "Most juveniles who are subjected to police interrogation are teenagers nearing the age of majority. These defendants' reactions to police pressure are unlikely to be much different from the reaction of a typical 18–year–old in similar circumstances."[28] Still, officers who are questioning unarrested minors should consider informing them they are free to leave. See "Questioning in police stations" ("You're free to leave"), below.

THE TOTALITY OF CIRCUMSTANCES: There are essentially only two circumstances that will automatically render a suspect in custody: (1) pointing a gun at him, and (2) compelling him to go to the police station for questioning. Other than that, it will depend on the totality of circumstances.[29] As the Court of Appeal put it, "[W]e look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest."[30]

The circumstances that officers are likely to encounter will usually depend on the setting in which the suspect was questioned. For example, while handcuffing is often a significant circumstance when the suspect was detained on the street, it is seldom a factor when the questioning occurred in a police station. We will therefore examine the various *situations* in which officers question suspects and, for each, the circumstances that commonly exist.

Questioning in police stations

We begin with the place in which most incriminating statements are obtained: the police station. While most of these statements are made by suspects who have been arrested (and who are therefore plainly in custody), officers frequently arrange to question unarrested suspects in police stations, usually because it is convenient and it may give the officers a tactical advantage.

While an interview with an unarrested suspect is not custodial merely because it occurred in a police station,[31] it is a relevant circumstance because people who are visiting police stations to discuss their guilt or innocence are more apt to be intimidated by the setting, which is usually "police-dominated" and maybe even "cold" and "hostile."[32] For this reason, officers must not only be alert for coerciveness, they must take affirmative steps to reduce it.

VOLUNTARY APPEARANCE: As noted, it is essential that the suspect voluntarily consented to be questioned at the station. It doesn't matter whether he accompanied officers in a police car or whether he took the bus—what counts is that he did so freely. As the California Supreme Court pointed out, "A reasonable person who is asked if he or she would come to the police station to answer questions, and who is offered the choice of finding his or her own transportation or accepting a ride from the police, would not feel that he or she had been taken into custody."[33] Similarly, the Ninth Circuit noted, "Where we have found an interrogation non-custodial, we have emphasized that the defendant agreed to accompany officers to the police station or to an interrogation room."[34]

For example, in ruling that unarrested suspects were not in custody when questioned in police stations, the courts have noted the following:

- "Beheler voluntarily agreed to accompany the police to the station house."[35]
- "The police did not transport Alvarado to the station or require him to appear at a particular time."[36]
- "[The officers] requested he come to the station for an interview but did not demand that he accompany them."[37]
- "[The officer] asked defendant to accompany him to his office for an interview and said 'if at any time he needed to come back, we'd drive him back, not to worry about a ride.'"[38]

But even if the suspect technically consented, his presence at a police station will be deemed involuntary if it was obtained by means of coercion. For example in *United States v. Slaight* [39] nine officers arrived at Slaight's home to execute a search warrant. After breaking in "with pistols and assault rifles at the ready," they asked Slaight if he "would be willing" to follow them to the police station for an interview. He agreed and, in the course of an *unMirandized* interview, he made an incriminating statement. The Seventh Circuit ruled, however, that the statement was obtained in violation of *Miranda* because the officers "made a show of force

by arriving at Slaight's house en mass," and it is "undeniable" that the "presence of overwhelming armed force in the small house could not have failed to intimidate the occupants."

"YOU'RE FREE TO LEAVE": While not technically an absolute requirement,[40] officers who interview unarrested suspects in police stations should begin by notifying them that they are free to leave.[41] That is because such an advisement—commonly known as a *Beheler* admonition[42]—is considered "powerful evidence" that the suspect was not in custody.[43]

There are, however, four things about *Beheler* admonitions that should be kept in mind. First, they are worthless if it appeared that, despite what the officers said, the suspect was not free to leave. As the Fourth Circuit observed, "Indeed, there is no precedent for the contention that a law enforcement officer simply stating to a suspect that he is 'not under arrest' is sufficient to end the inquiry into whether the suspect was 'in custody' during an interrogation."[44]

Consequently, the courts have ruled that, despite *Beheler* admonitions, suspects were in custody when the following circumstances existed:

- He was handcuffed.[45]
- He was kept under guard.[46]
- An officer told him that he could leave only after he told them the truth.[47]
- When he asked if he was under arrest, the officer "evaded" the question.[48]

Note, however, that while the security precautions in place at police stations (such as escorts and doors that lock automatically) would make it impossible for most suspects to leave at will, these are not unusual circumstances and are therefore not a strong indication of custody.[49]

Second, even though the suspect was told he was free to leave, he will likely be deemed in custody at the point he confessed or otherwise reasonably believed that the officers had probable cause to arrest him and therefore he "couldn't have believed they would actually let him go."[50] (This subject is also discussed in the section "Tone of the interview," below.)

Third, it may be necessary to provide multiple *Beheler* advisories if the interview had become lengthy, especially if it was also accusatory. As the court said in *People v. Aguilera*, "[W]here, as here, a suspect repeatedly denies criminal responsibility and the police reject his denials, confront the suspect with incriminating evidence, and continually press for the 'truth,' [a *Beheler* admonition] would be a significant indication that the interrogation remained non-custodial."[51]

Fourth, it is best to tell the suspect that he is free to leave, as opposed to saying he is not under arrest.[52] This is because a suspect who is told he is free to leave will necessarily understand that he is not under arrest, while a suspect who is told he is not under arrest will not necessarily understand that he is free to leave. Thus, the Eighth Circuit said that telling a suspect she is free to leave "weighs heavily in favor of noncustody. However, when officers inform a suspect only that she is not under arrest, [this circumstance] is less determinative in favor of noncustody."[53]

QUESTIONING IN INTERVIEW ROOMS: Officers who

question unarrested suspects in police stations will usually do so in an interview room. This is because most interview rooms are quiet and free from distractions, and also because many are equipped with concealed microphones and cameras.

Interview rooms are, however, considered an "inherently coercive environment"[54] because the suspect is "cut off from the outside world"[55] and because he is in a place that is almost always stark, windowless, and confining.[56] In fact, the Supreme Court in *Miranda v. Arizona* said "it is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[57]

For these reasons, the fact that the suspect was questioned in an interview room is a circumstance that is relevant in determining whether he was in custody.[58] It is not, however, a significant circumstance, especially if the suspect was told he was free to leave and there were no contrary indications. Thus, in *Green v. Superior Court* the court pointed out, "Notwithstanding the lock on the interview room door, the evidence does not compel the conclusion that defendant could not have left whenever he had wanted during the interview."[59]

It should also be noted that officers might be able to reduce the coercive nature of an interview room by, for example, explaining to the suspect that he was being questioned there because it is quiet or, as the officers did in *People v. Moore*, by placing an object next to the door "to keep it from closing and locking."[60]

THE TONE OF THE INTERVIEW: The officers' demeanor and the general atmosphere of the interview are especially important because an aggressive or confrontational interview may send the message that the officers have probable cause to arrest. On the other hand, the fact that officers appeared to be merely seeking information from the suspect is consistent with the notion that he was free to leave. For example, in ruling that suspects were not in custody, the courts have noted the following:

- "Instead of pressuring Alvarado with the threat of arrest and prosecution, [the officer] appealed to his interest in telling the truth and being helpful."[61]
- "These questions were nonaccusatory, and defendant was largely permitted to recount his observations and actions through narrative."[62]
- "[T]he questions focused on information defendant had indicated he possessed rather than on defendant's potential responsibility for the crimes."[63]
- "[T]he tone of the officers throughout the interview was courteous and polite" and they did not inform him that they "considered him to be guilty, or that they had the evidence to prove his guilt in court."[64]
- The officer "conducted his inquiry in a conversational tone, and there is no evidence he posed confrontational questions or pressured the defendant in any manner."[65]

This does not mean that stationhouse interviews will become custodial if officers informed the suspect that he had become the "focus" of their investigation, or because they told him about the incriminating evidence they had obtained to date. As the Supreme Court observed, "Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go."[66]

As we will discuss later, informing a suspect of the evidence that tends to incriminate him does not ordinarily constitute "interrogation." And it is not likely to render him in custody if it was done in an informative—not accusatorial—manner. Thus, in *In re Kenneth S.*[67] the court said, "The fact that Detective Carranza told respondent that he had information that respondent was involved in the robbery was insufficient by itself to constitute custody and to countervail these other factors." Similarly, the courts have ruled that an interview was not rendered custodial merely because officers told the suspect they had information that he was involved in the robbery under investigation,[68] that his fingerprints were found at the scene of a burglary,[69] or that his suspected accomplice had named him as the perpetrator.[70]

While merely informing the suspect of the evidence of his guilt is not apt to render an interview custodial, saying or implying that this evidence constitutes grounds for an immediate arrest will likely do so. For example, in *People v. Boyer* [71] the defendant accompanied officers to the Fullerton police station to talk about a double murder he was suspected of having committed. In the course of the interrogation, which the court described as "intense," the officers told Boyer that the victims' son had identified him as the killer, that the officers could prove he did it, and that he was "gonna fall." Boyer asked several times whether he was under arrest, but the officers "evaded the questions" in hopes of "prolonging the interview." He later confessed, but the court ruled his confession was obtained in violation of *Miranda* because, "in an intense interrogation spanning nearly two hours, they led the defendant to believe . . . they had the evidence to prove his guilt in court. [A] reasonable person in such circumstances would only have considered himself under practical arrest."

Similarly, in *People v. Aguilera* [72] San Jose police officers received a tip that Aguilera was involved in a gang-related shooting. So they went to his house and obtained his consent to accompany them to the station to talk about it. At the beginning, Aguilera claimed he was not involved in the shooting, at which point the officers called him a liar, said his story was "bullshit," accused him of "fabricating an alibi," and told him that his fingerprints had been found on one of the cars used by the shooters. After the interview progressed in this manner for a while, Aguilera abandoned his story and confessed. But the court ruled that his confession should have been suppressed because he was in custody. Among other things, the court noted that the interrogation "was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating." The court added, "Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee."

LENGTH OF THE INTERVIEW: Although the courts often note the length of the interview, this is seldom a significant factor unless its duration or intensity were excessive. Thus, in *People v. Morris* the California Supreme Court noted that "[t]he interview was fairly long—one hour and 45 minutes—but not, as a whole, particularly intense or confrontational."[73] Similarly, in *U.S. v. Bassignani* the Ninth Circuit noted that, while a two and a half hour interrogation was "at the high end" of situations which had

been deemed noncustodial, “this was not a marathon session designed to force a confession, and we therefore accord less weight to this factor.”[74]

Questioning detainees

Another setting in which officers frequently question suspects is the street. And if, as is often the case, the suspect had been detained, the officers will need to know whether a *Miranda* waiver is required. Here, the rule is straightforward: Although detainees are aware that they are not free to leave or move about, they are not in custody for *Miranda* purposes if the restraint on their freedom was apparently temporary and “comparatively nonthreatening.”[75] As the Court of Appeal put it, “Temporary detention only slightly resembles *[Miranda]* custody, ‘as the mist resembles rain.’”[76] A detention will, however, become custodial if the detainee was “subjected to treatment that rendered him ‘in custody’ for practical purposes.”[77] This ordinarily occurs if the questioning had “ceased to be brief and casual” and had become “sustained and coercive,”[78] or if the detainee’s freedom had been “curtailed to a degree associated with formal arrest.”[79]

HANDCUFFS: When officers arrest a suspect, one of the first things they will usually do is handcuff him. And because handcuffing is a “distinguishing feature”[80] or “hallmark”[81] of an arrest, it has been argued that handcuffing a detainee necessarily renders him in custody for *Miranda* purposes.

The courts have, however, consistently rejected these arguments on grounds that, because custody depends on an examination of the totality of circumstances, there may be offsetting circumstances that would have communicated to the detainee that, despite the handcuffs, he was not under arrest. As the Court of Appeal explained, “Police officers may sufficiently attenuate an initial display of force, used to effect an investigative stop, so that no *Miranda* warnings are required.”[82]

While there are no required circumstances, the cases seem to indicate that all of the following should exist:

1. “YOU’RE NOT UNDER ARREST”: At or near the time the detainee was handcuffed, the officers told him that he was not under arrest.
2. EXPLAINING THE HANDCUFFS: The officers also explained why he was being handcuffed; e.g., it was merely a temporary measure while they conducted further investigation; e.g., searched a vehicle, ran a warrant check, interviewed witnesses or other suspects. As the Court of Appeal noted, “[B]rief handcuffing of a detainee would look less like a formal arrest if the interviewing officer informed the detainee that handcuffs were temporary and solely for safety purposes . . . ”[83]
3. DURATION OF HANDCUFFING: The detainee was not handcuffed for a lengthy period of time.
4. NO OVERRIDING CIRCUMSTANCES: There were no other circumstances that would have reasonably indicated that, despite the officer’s assurances to the contrary, the suspect was under arrest. For example, in *U.S. v. Henley* the court ruled that a detainee was in custody for *Miranda* purposes because he was both handcuffed and placed in the back seat of a patrol car.[84]

DRAWN FIREARM: A detainee who is questioned at gunpoint is plainly in custody.[85] A drawn weapon would, however, have no coercive effect if the detainee did not see it.[86] Furthermore, even if a weapon was displayed before the detainee was questioned, he may be deemed not in custody if (1) the officer was justified in drawing the firearm, (2) the weapon was reholstered before the officer questioned the detainee, and (3) there were no other circumstances that reasonably indicated that the detainee was under arrest.[87] Officers can further reduce the coercive effect of a drawn firearm if, before they questioned the detainee, they explained why the weapon had been displayed.

KEEP HANDS IN SIGHT: Commanding a detainee to keep his hands in sight is not something that is associated with an arrest (because arrestees are usually handcuffed), and it is therefore not a significant circumstance.[88]

LENGTH OF THE DETENTION: Because most detentions are fairly brief, this circumstance is seldom noteworthy.[89]

AFTER PAT SEARCH: A detainee is not in custody merely because officers pat searched him, although it is a relevant circumstance.[90]

NUMBER OF OFFICERS: Questioning is considered more coercive—and is thus more indicative of custody—if the detainee was confronted by several officers, especially if several officers questioned him.[91] Conversely, the Court of Appeal recently observed, “Logically, the fewer the number of officers surrounding a suspect the less likely the suspect will be affected by custodial pressures.”[92]

For example, in *People v. Lopez* the Court of Appeal noted the following in ruling that a detainee was not in custody: "While there were four officers present, they did not congregate around defendant but were dispersed among the three suspects. One officer alone approached and questioned the defendant."[93] Similarly, other courts that have addressed this issue have noted that "only two of [the officers] participated in the questioning; the others remained apart,"[94] and although the suspect "did encounter multiple agents," she "was not confronted by them simultaneously."[95]

TONE OF THE INTERVIEW: Officers who are questioning a detainee will usually adopt an amicable tone because they are seeking his voluntary cooperation. Accordingly, the tone of most such interviews is seldom coercive. If, however, their questions became accusatory, this would be highly relevant.[96] Also see "Questioning in police stations" (Tone of the interview), above.

QUESTIONING IN POLICE CARS: For various reasons, officers will sometimes question detainees in police cars; e.g., it was cold, dark, windy, or rainy outside.[97] While this will not render the interview custodial,[98] it is a relevant circumstance if the detainee was required to sit in the caged back seat, as opposed to the front passenger seat or a back seat that was not caged.[99] Furthermore, a detainee who is questioned behind a cage will almost always be deemed in custody if he was handcuffed.[100]

"YOU'RE FREE TO LEAVE": Officers will usually be able to eliminate any coerciveness resulting from a detention by informing the suspect in no uncertain terms that the detention has concluded and that he is now free to leave. After determining that he understands this, officers may seek his consent to answer additional questions; and if he agrees to do so, it is likely that the encounter will be deemed noncustodial. This subject is covered in the section "Questioning in police stations" ("You're free to leave"), above.

Questioning in the suspect's home

The least coercive setting in which officers will question a suspect is the suspect's home.[101] As the Sixth Circuit observed in *United States v. Panak*, a person's home "is the one place where individuals will feel most unrestrained."[102] For this reason, a *Miranda* waiver is seldom necessary unless, as we will now discuss, the officers said or did something that dramatically changed the atmosphere.

HANDCUFFING, OVERBEARING CONDUCT: Questioning that occurs in the suspect's home will be deemed custodial if the officers handcuffed the suspect or otherwise conducted themselves, not as visitors seeking information, but as occupiers of the premises. As the Sixth Circuit explained:

> Even when an interrogation takes place in the familiar surroundings of a home, it still may become custodial without the officer having to place handcuffs on the individual. The number of officers, the show of authority, the conspicuous display of drawn weapons, the nature of the questioning all may transform one's castle into an interrogation cell—turning an inherently comfortable and familiar environment into one that a reasonable person would perceive as unduly hostile, coercive and freedom-restraining.[103]

That was exactly what happened in *Orozco v. Texas* [104] when four Dallas police officers went to Orozco's home at 4 A.M. to question him about a murder that had occurred a few hours earlier. They were admitted into the house by a woman who said that Orozco was sleeping in his bedroom, where upon all four officers entered the bedroom, awakened Orozco, and questioned him in his bed about the murder. They eventually obtained an incriminating statement, but the U.S. Supreme Court ruled that the statement was obtained in violation of *Miranda* because, although Orozco was "interrogated on his own bed, in familiar surroundings," the total situation—especially the officers' overbearing conduct—demonstrated that he was in custody.

Similarly, in *People v. Benally* [105] two officers in Sunnyvale went to the Benally's hotel room to question him about a rape that had occurred earlier that evening. One of the officers drew his handgun, opened the door with a passkey and ordered Benally to raise his hands. After determining that Benally was not armed, the officer holstered his gun. Then, without obtaining a *Miranda* waiver, he questioned him and obtained some incriminating information. But the court summarily ruled the information was obtained in violation of *Miranda* because the officers' conduct rendered the encounter custodial.

EXECUTING SEARCH WARRANTS: A suspect's home is especially likely to be deemed custodial if officers had made a non-consensual entry to execute a search warrant or conduct a parole or probation search. This is mainly because the officers will usually have taken complete control of the home— and everyone in it—for purposes of officer safety. For example, in ruling that

in-home questioning of an unarrested suspect was custodial after officers entered to execute search warrants, the courts have noted the following:

- "[N]ine officers drove up to the house, broke in with a battering ram, strode in with pistols and assault rifles at the ready, and when they found [the suspect] naked in his bed ordered him in an authoritative tone and guns pointed at him, to put his hands up."106
- "Craighead's home had become a police-dominated atmosphere. Escorted to a storage room in his own home, sitting on a box, and observing an armed guard by the door, Craighead reasonably believed that there was simply nowhere for him to go."107
- The suspect's house "was inundated" with over 23 FBI agents, and the suspect "was awakened at gun point and guarded at all times."108
- In contrast, the courts have noted the following in ruling that questioning by officers during the execution of search warrants was not custodial:
- An FBI agent told the suspect that he "was not under arrest and was free to leave" and there were no contradictory circumstances.109
- "[T]he officers specifically informed Sutera that he was not under arrest, that he did not have to answer their questions, and that he was free to move around the apartment or leave anytime he wished."110
- "[T]here is nothing to suggest that the officers acted in a hostile or coercive manner."111

Questioning in prisons

Officers will sometimes want to question state prison inmates about crimes that occurred before they were incarcerated; and correctional officers will often want to question them about crimes that occurred inside the facility, such as battery on another inmate or possession of drugs or other contraband. At first glance, it might seem that anyone who is locked up in prison would automatically be in custody. But upon closer examination, it becomes apparent they are not.

The reason is that a prison inmate who is questioned by officers is not nearly as vulnerable to pressure as a person who had recently undergone the "sharp and ominous"112 change of circumstances that results from an arrest. As the Supreme Court recently explained in *Howes v. Fields*, "[T]he ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same inherently compelling pressures" as those that result when "a person is arrested in his home or on the street and whisked to a police station for questioning."113 Furthermore, the Court pointed out that, unlike arrestees, prison inmates know that, regardless of what they say to the officers who question them, they will not be walking out the prison gates when the interview is over and, thus, they are "unlikely to be lured into speaking by a longing for prompt release."

For these reasons, the Court ruled that prison inmates are in custody only if they were questioned under circumstances that presented "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."114 In other words, inmates will be deemed in custody only if they were subjected to pressures and restrictions on their freedom above and beyond those which are inherent in the facility. Or, as the Ninth Circuit explained in a case that anticipated *Fields*:

In the prison situation [*Miranda* "custody"] necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.115

Accordingly, interviews with prison inmates have been deemed noncustodial when all of the following circumstances existed:

- "YOU CAN RETURN TO YOUR CELL": The inmate was told that he could leave the room or return to his cell whenever he wanted. This is the "most important" circumstance.116
- NO HANDCUFFS: The inmate was placed in handcuffs.
- TONE OF THE INTERVIEW: The interview was neither lengthy nor highly accusatorial.
- LOCATION OF INTERVIEW: The interview took place in familiar or comfortable surroundings, such as a conference room or library.117

For example, in *United States v. Menzer* the court ruled that an inmate who was questioned by FBI agents about child molesting allegations was not in custody because:

[T]he defendant voluntarily appeared at the interviews, he was not restrained in any manner, the room was well lit, there were two windows exposing the interview room to the prison administrative office area, the door to the interview room was unlocked and the

defendant was told by [an FBI agent] that he was free to leave at any time.[118]

Questioning in jails

Unlike state prisoners, many jail inmates have not been incarcerated long enough for the "ordinary restrictions" to have become "expected and familiar."[119] Thus, to determine whether a jail inmate is in custody for *Miranda* purposes, officers must first consider whether he was a timeserver or pretrial detainee.

TIME-SERVERS: Because inmates who are serving a sentence in jail have ordinarily been incarcerated throughout the time that was necessary to adjudicate their cases (usually several months or even years), most of them are not automatically in custody, which means their status will depend on the circumstances pertaining to interviews in prisons; e.g., whether they were told they could return to their cells whenever they wanted.

UNSENTENCED INMATES: It is more difficult to determine the custody status of unsentenced detainees because the length of their incarceration may vary from a few hours to several years. Consequently, officers must consider the following circumstances:

LENGTH OF INCARCERATION: The length of the inmate's incarceration is a significant circumstance because the longer the stay the more the jailhouse restrictions would have become expected and familiar. It follows that if the inmate had been recently booked or had otherwise not yet settled into a routine, he would likely be deemed in custody regardless of the surrounding circumstances. As for detainees who have been awaiting trial for months or years, it would seem that they are not automatically in custody, and that their custody status would therefore depend on an analysis of the circumstances discussed in the section on prison interviews.

There is, in fact, a pre-*Fields* California case— *People v. Macklem*—in which the Court of Appeal ruled that an unsentenced detainee was not "in custody" for *Miranda* purposes when he was questioned about a jailhouse assault.[120] The court's analysis in *Macklem* was almost identical to that of the Court in *Fields*, including the *Macklem* court's observation that the defendant was not handcuffed and "was given the opportunity to leave the room if he requested to do so."

PRIOR INCARCERATIONS: It is arguable that an unsentenced inmate's status would also depend on whether he had been previously incarcerated in the facility and, if so, the amount of time he had spent there. That is because frequent-flyers may view their local jail as a home away from home.

SAME OR DIFFERENT CRIME: The fact that the inmate was questioned about a crime unrelated to the one for which he had been incarcerated is relevant because a reasonable person in his position would know that the officers who were questioning him did not have the power to release him; i.e., he "is unlikely to be lured into speaking by a longing for prompt release."[121]

Questioning in other places

Questioning that occurs in the following places is not inherently coercive and is therefore not apt to render an interview custodial:

> public places,[122] ambulances,[123] hospitals,[124] probation and parole offices,[125] the suspect's workplace.[126]

As for courtrooms, a defendant or witness who is questioned in open court is not in custody for *Miranda* purposes even if he was incarcerated at the time. As the Ninth Circuit observed, "Cross-examination by a prosecutor, conducted in public and in the presence of both judge and jury, is hardly tantamount to custodial questioning by the police."[127]

Finally, it should be noted that, regardless of where the suspect was located when he was questioned, he will not be in custody if the officer was talking to him over the telephone. This is because the suspect can terminate the conversation by simply hanging up. As the California Supreme Court observed in *People v. Mayfield*, "[A]n officer who is talking to a suspect under these conditions is not physically in the suspect's presence and thus lacks immediate control over the suspect, who retains a degree of freedom of action inconsistent with a formal arrest."[128]

"Interrogation"

Even if a suspect was in custody, a *Miranda* waiver is not required unless officers planned to immediately "interrogate" him. "It is clear," said the Supreme Court, "that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."[129] What, then, is "interrogation"?

Actually, there are two types: direct and indirect. Direct interrogation is simply any request for information about the crime that the officers are investigating; e.g., "What did you do with all the money, Mr. Madoff?" [130] In contrast, indirect interrogation, also

known as the “functional equivalent” of interrogation, is broadly defined as any “practice that the police should know is reasonably likely to elicit an incriminating response.”131 Not surprisingly, almost all of the litigation in this area pertains to indirect interrogation.

General principles

In determining whether officers engaged in indirect interrogation the courts apply the following principles:

REASONABLY LIKELY: Indirect interrogation does not result merely because there was a “possibility” that the officer’s words would have prompted the suspect to make an incriminating statement, or because the officer hoped they would. Instead, it results only if the officer knew or should have known that an incriminating response was reasonably likely. As the California Supreme Court put it:

> Not every question directed by an officer to a person in custody amounts to an “interrogation” requiring *Miranda* warnings. The standard is whether under all the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect.132

LINK BETWEEN QUESTION AND CRIME: A question is not apt to constitute interrogation unless there was some factual link between it and the crime under investigation.133

THE OFFICERS’ INTENT: If officers intended to elicit an incriminating statement, their words would probably be deemed interrogation because they would have known that an incriminating response was reasonably likely.134 On the other hand, the fact that officers had no such intent is irrelevant if an incriminating response was reasonably likely.135

UTILIZING INTERROGATION TACTICS: Utilizing interrogation tactics such as “good cop-bad cop” would likely constitute interrogation because the objective is to elicit an incriminating information and, therefore, an incriminating response would have been reasonably foreseeable.136

EXPLOITING VULNERABILITIES: Exploiting a suspect’s weaknesses, fears, or other vulnerabilities to obtain a statement—especially extreme vulnerabilities—is likely to render an interview custodial because an incriminating response is reasonably likely. In the words of the Supreme Court, “Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response.”137

In the discussion that follows, we will show how the courts apply these principles in determining whether an officer’s words or conduct constituted interrogation.

Accusations

Accusing a suspect of having committed the crime under investigation will almost always constitute interrogation because of the likelihood he will respond by saying something incriminating. That’s what happened in *In re Albert R.* when an officer, having just arrested Albert for car theft, said “[t]hat was sure a cold thing you did to [your friend], selling him that hot car.” Albert responded, “Yes, but I made the money last.” Not surprisingly, the court suppressed the admission on grounds that the officer’s words constituted interrogation.138

Interrogation will also result if officers arranged for someone else to make the accusation in their presence. For example, in *People v. Stewart* 139 an officer brought two robbery suspects, Clements and Stewart, into an interview room and instructed Clements to read aloud his written confession in which he also implicated Stewart. At Stewart’s trial, prosecutors were permitted to present evidence that Stewart did not deny Clements’ allegation, but the court ruled this violated *Miranda* because Clements made the accusation while acting as a surrogate interrogator.

Confronting with evidence

In contrast to accusations, merely informing the suspect of the evidence of his guilt will not constitute interrogation if it was done in a brief, factual, and dispassionate manner.140 As the Ninth Circuit observed in *United States v. Hsu:*

> [O]bjective, undistorted presentations by the police of the evidence against a suspect are less constitutionally suspect than is continuous questioning because the risk of coercion is lessened when information is not directly elicited.141

For example, in *People v. Gray* an officer who had just arrested Gray for murder, told him of "considerable evidence pointing to his involvement in the death." In ruling that this did not constitute interrogation, the court pointed out that "the transcript reflects that [the officer's] recitation of the facts was accurate, dispassionate and not remotely threatening."142

Similarly, in *Shedelbower v. Estelle* officers were about to leave an interview room after the defendant, a suspect in a rape and murder, had invoked his *Miranda* right to counsel. As they were gathering up their papers, one of them informed Shedelbower that his accomplice had also been arrested, and that one of his victims had identified his photo as one of the men who had raped her and murdered her friend. In ruling the officer's words did not constitute interrogation, the Ninth Circuit pointed out that they "did not call for nor elicit an incriminating response. They were not the type of comments that would encourage Shedelbower to make some spontaneous incriminating remark."143

Finally, in *United States v. Davis* 144 FBI agents arrested the defendant for robbing a bank. During questioning, Davis invoked his right to remain silent, at which point an agent showed him a surveillance photo of the robbery. As Davis studied the photo and noticed the remarkable similarity between his face and that of the robber, the agent inquired, "Are you sure you don't want to reconsider?" Davis responded, "Well, I guess you've got me." He then waived his rights and confessed. On appeal, the Ninth Circuit ruled that the agent's act of showing Davis the photo did not constitute continued interrogation because he "merely asked Davis if he wanted to reconsider his decision to remain silent, in view of the picture; the questioning did not resume until Davis had voluntarily agreed that it should." In a subsequent case in which the court discussed its decision in *Davis*, it noted that the "key distinction between questioning the suspect and presenting the evidence available against him" was "central" to the decision.145

Interrogation may, however, result if the officer presented the evidence to the suspect in a goading, provocative, or accusatorial manner. For example, in *People v. Sims* an officer who was questioning a murder suspect described the crime scene "including the condition of the victim, bound, gagged, and submerged in the bathtub, and said to defendant that the victim 'did not have to die in this manner and could have been left there tied and gagged in the manner in which he was found.'" The California Supreme Court ruled that the officer's statement constituted interrogation.146

Even a brief comment might constitute interrogation if it was goading. For example, in *People v. Davis* 147 the defendant was arrested for murdering two people with an Uzi. At the police station, Davis invoked his right to remain silent and was placed in a holding cell. Later that day, a detective entered the cell and the following ensued:

> **Officer**: Remember that Uzi?
>
> **Davis**: Yeah.
>
> **Officer**: Think about that little fingerprint on it. We'll see ya. (Jail door closes.)

In ruling that the detective's comment constituted interrogation, the court explained that his parting words—"Think about that little fingerprint on [the Uzi]—implied that "defendant's fingerprint had been found on the Uzi, and thus indirectly accused defendant of personally shooting the victims."

Other statements of fact

Providing the suspect with other types of information will seldom constitute interrogation if the information was factual and was presented in a businesslike fashion. For example, the following have been deemed not interrogation:

> "YOU'RE UNDER ARREST FOR . . . " : Informing a suspect that he is under arrest for a certain crime or that he would be booked for a certain crime.148

EXPLAINING SUBJECT OF INTERVIEW: Informing a suspect of the nature of the questions that the officers wanted to ask.149

EXPLAINING THE POST-ARREST PROCEDURE: Informing a suspect of the post-arrest procedure; i.e., what's going to happen next.150

READING SEARCH WARRANT: Reading to the suspect the contents of a warrant to search his home.151 Also note that the Sixth Circuit recently ruled that an officer did not interrogate a suspect by informing him and the other passengers in a vehicle that, because they all denied that the contraband in the vehicle belonged to them, they would all be taken into custody and charged.152

Neutral questions

A “neutral” question is an inquiry that plainly did not call for information about the crime under investigation. Thus, a neutral question will not constitute interrogation even if it produced a confession or admission. Here are some examples:

BOOKING QUESTIONS: Questions that are asked as a matter of routine in conjunction with the booking process are not interrogation. This subject is covered below in the section on *Miranda* exceptions.

SEEKING CONSENT TO SEARCH: Seeking consent to search for evidence pertaining to the crime under investigation does not constitute interrogation because it essentially calls for a yes or no response.153

QUESTIONING A WITNESS: When officers question a person in custody about a crime for which he is believed to be only a witness, their questions will not constitute interrogation because there is little likelihood that they will elicit an incriminating response.154

Miscellaneous

LECTURES: An officer’s lecture to a suspect or other monologue in his presence may constitute interrogation, especially if it was lengthy, provocative, or goading.155

CASUAL CONVERSATION: Casual conversation or small talk is not apt to be deemed interrogation, especially if it was not a pretext to obtain incriminating information.156

ANSWERING SUSPECT’S QUESTIONS: Answering a suspect’s questions about sentencing or other matters is not likely to constitute interrogation if the officer’s answer was brief and to the point.157

REQUESTING CLARIFICATION: If a suspect makes a spontaneous statement or asks a question, it is not interrogation to simply request that he clarify something, or to ask the types of open-ended questions that merely tend to display interest; e.g., Would you repeat that?158

CONVERSATION FILLERS: Using a conversation filler when a suspect is making a statement does not constitute interrogation; e.g., “Yeah,” “I can understand that,” I hear you,” “Would you repeat that?159

QUESTIONS ABOUT HEALTH OR INJURY: Asking a suspect about an injury or some other physical ailment is not apt to be deemed interrogation unless it was a pretext to obtain incriminating information160

RECORDING CONVERSATION BETWEEN SUSPECTS:

Placing suspects together and secretly recording their conversation does not constitute interrogation. Thus, *U.S. v. Hernandez-Mendoza* the Eighth Circuit ruled that an officer’s “act of leaving the appellants alone in his vehicle, with a recording device activated, was not the functional equivalent of express questioning.”161

Miranda Exceptions

There are three exceptions to the rule that officers must obtain a *Miranda* waiver before engaging in custodial interrogation: (1) the routine booking question exception, (2) the public safety exception, and (3) the undercover agent exception.

Routine booking questions

When a person is arrested, there are certain questions that officers or jail personnel will ask as a matter of routine, usually in conjunction with the booking process. Such questions will seldom constitute interrogation because an incriminating response is seldom foreseeable. But even if it was foreseeable (e.g., the suspect’s address would be incriminating if drugs had been found there), the response will not be suppressed if the question was “normally attendant to arrest and custody.”162 As we will now explain, there are two types of routine booking questions: (1) questioning seeking basic identifying information, and (2) questions seeking administrative information.

BASIC IDENTIFYING INFORMATION: A *Miranda* waiver is not required before seeking basic identifying data or biographical information that is needed to complete the booking or pretrial services process; e.g., suspect’s name, gang moniker, address, date of birth, place of birth, phone number, occupation, social security number, employment history, arrest record, parents’ names, spouse’s name.163

BASIC ADMINISTRATIVE INFORMATION: A question may also be covered under the routine booking exception if the following circumstances existed:

1. LEGITIMATE ADMINISTRATIVE PURPOSE: The question sought information that was needed for a legitimate jail administrative purpose.
2. NOT A PRETEXT: The question was not a pretext to obtain incriminating information.164

For example, jail officials may ask an inmate about his gang affiliation in order to keep him separated from members of rival gangs.165 But such questions would not be covered if their objective was to obtain intelligence about gang activities in his neighborhood.166 Nor would the exception apply to questions as to why the arrestee possessed credit cards in various names,167 or how the arrestee had arrived at the house in which he was arrested.168

Two other things should be noted. First, a booking-related question may be deemed pretextual if it was not asked in conjunction with the booking process.169 Second, although some courts have ruled that the routine booking question exception does not apply if the question was reasonably likely to elicit an incriminating response,170 this is illogical. After all, if the exception applied only to questions that were not reasonably likely to elicit an incriminating response, the exception would be superfluous because the question would not constitute interrogation and, therefore, *Miranda* would not even apply.

The public safety exception

Under *Miranda's* public safety exception, officers may question a suspect who is in custody without obtaining a waiver (or after he invoked his right to remain silent or right to counsel) if they reasonably believed that he possessed information that would help save a life, prevent serious injury, or diffuse a serious threat to property.171 The justification for this exception is fairly straightforward: When a substantial threat to people or property could be reduced or eliminated by obtaining information from a suspect who was in custody, it is not in the public interest to require that officers begin the interview by warning him (essentially) that he would be better off if he refused to assist them. As we will now explain, the public safety exception will be applied only if both of the following circumstances existed:

1. THREAT EXISTED: The officers must have reasonably believed that a threat to public safety existed.
2. QUESTIONS REASONABLY NECESSARY: The officers' questions must have been directed toward obtaining information that was reasonably necessary to eliminate the threat.

THREAT EXISTED: Officers must have reasonably believed that there existed an imminent and serious threat to a person (whether a civilian, an officer, or the suspect) or to property. The following are examples of questions that have satisfied this requirement:

> "CARRYING A WEAPON?" Before pat searching an arrested suspect, an officer asked if he was carrying any weapons or sharp objects.172
>
> "WEAPONS NEARBY?" After arresting or detaining a suspect who was reasonably believed to be armed, an officer asked if he had any other weapons nearby.173

DEADLY WEAPON IN A PUBLIC PLACE: Officers reasonably believed that the suspect had recently discarded a deadly weapon in a public place.174

LOCATE MISSING VICTIM: Officers questioned a kidnapping suspect concerning the whereabouts of his victim.175

SUSPECT INGESTED DRUGS: Having probable cause to believe that the suspect had just swallowed one or more rocks of cocaine, a deputy asked if he had, in fact, ingested drugs.176

HOSTAGE NEGOTIATIONS: A police negotiator spoke with a barricaded suspect who was holding a hostage.177

QUESTIONS REASONABLY NECESSARY: As noted, the public safety exception covers only those questions that were reasonably necessary to eliminate the threat.178 As the Court of Appeal observed, the officer's inquiry "must be narrowly tailored to prevent potential harm."179 For example, while officers could ask an arrestee if he was carrying a weapon or if he had any sharp objects in his possession, they could not ask "What's in your pocket?" or "Why are you carrying a gun?"180

The undercover agent exception

The third *Miranda* exception, the "undercover agent" exception, covers situations in which the suspect doesn't know that the person who is asking questions is an undercover officer or a police agent.181 In these situations, *Miranda* does not apply because a suspect who is unaware he is speaking with an undercover officer or agent would not feel the type of coercion that *Miranda* was

designed to alleviate.[182] Note, however, that questioning by an undercover agent may violate the Sixth Amendment right to counsel if the suspect had been arraigned on the crime under discussion.[183]

References

1. *People v. Mayfield* (1997) 14 Cal.4th 668, 732.
2. See *Illinois v. Perkins* (1990) 496 U.S. 292, 297 [“It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation.”].
3. *People v. Mickey* (1991) 54 Cal.3d 612, 648.
4. See *New York v. Quarles* (1984) 467 U.S. 649, 657 [a *Mirandized* suspect “might well be deterred from responding”].
5. *People v. Taylor* (1986) 178 Cal.App.3d 217, 227. ALSO SEE *California v. Beheler* (1983) 463 U.S. 1121, 1125.
6. (1984) 468 U.S. 420, 434.
7. See *Arizona v. Roberson* (1988) 486 U.S. 675, 684; *Mathis v. United States* (1968) 391 U.S. 1, 4-5.
8. *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 583.
9. See *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 442; *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1189].
10. *California v. Beheler* (1983) 463 U.S. 1121, 1125.
11. *People v. Taylor* (1986) 178 Cal.App.3d 217, 228.
12. See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 662; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.
13. *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.
14. See *J.D.B. v. North Carolina* (2011) U.S. [131 S.Ct. 2394, 2402] [“whether a suspect is ‘in custody’ is an objective inquiry”]; *Stansbury v. California* (1994) 511 U.S. 318, 323 [“the initial determination of custody depends on the objective circumstances of the interrogation”].
15. See *United States v. Drayton* (2002) 536 U.S. 194, 202 [“The reasonable person test is objective and presupposes an *innocent* person.”]; *U.S. v. Luna-Encinas* (11th Cir. 2010) 603 F.3d 876, 881, fn.1; *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 469.
16. *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1239.
17. See *Stansbury v. California* (1994) 511 U.S. 318, 326 [“[A]ny inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*.”]; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.
18. (1984) 468 U.S. 420.
19. (1978) 80 Cal.App.3d 269.
20. *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1189-90].
21. (2006) 138 Cal.App.4th 1395, 1403, fn.1. ALSO SEE *U.S. v. Luna-Encinas* (11th Cir. 2010) 603 F.3d 876, 881 [“‘seizure’ is a necessary prerequisite to *Miranda*”]; *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 672 [“a court must ask whether, in addition to not feeling free to leave, a reasonable person would have understood his freedom of action to have been curtailed to a degree associated with formal arrest.”].
22. (1972) 26 Cal.App.3d 825, 848. Edited.
23. *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d. 659, 672. ALSO SEE *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1189 [“In determining whether a person is in custody in this sense, the *initial step* is to ascertain whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.” Emphasis added.].
24. See *Florida v. Bostick* (1991) 501 U.S. 429, 436; *Brendlin v. California* (2007) 551 U.S. 249, 254.
25. (11th Cir. 2010) 603 F.3d 876, 881. ALSO SEE *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 672 [“not every seizure constitutes custody for purposes of *Miranda*”].
26. (2011) U.S. [131 S.Ct. 2394, 2406].
27. See *J.D.B. v. North Carolina* (2011) U.S. [131 S.Ct. 2394, 2406] [“This is not to say that a child’s age will be a determinative, or even a significant, factor in every case.”].
28. At 131 S.Ct. 2406.
29. See *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1189; *J.D.B. v. North Carolina* (2011) U.S. [131 S.Ct. 2394, 2402.
30. *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.

31. *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 ["[A] noncustodial situation is not converted to one in which *Miranda* applies simply because . . . the questioning took place in a coercive environment. Any police interview of an individual suspected of a crime has 'coercive' aspects to it."].
32. ALSO SEE *Green v. Superior Court* (1985) 40 Cal.3d 126, 135 [the U.S. Supreme Court has "rejected the idea that a 'coercive environment' is itself sufficient to require *Miranda* warnings"].
33. *People v. Stansbury* (1995) 9 Cal.4th 824, 831-32. ALSO SEE *People v. Leonard* (2007) 40 Cal.4th 1370, 1401.
34. *U.S. v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 884.
35. *California v. Beheler* (1983) 463 U.S. 1121, 1122.
36. *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664.
37. *People v. Holloway* (2004) 33 Cal.4th 96, 120.
38. *Green v. Superior Court* (1985) 40 Cal.3d 126, 131.
39. (7th Cir. 2010) 620 F.3d 816.
40. See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 665; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162-64, fn.7; *U.S. v. Redlightning* (9th Cir. 2010) 624 F.3d 1090, 1105; *Reinert v. Larkins* (3d Cir. 2004) 379 F.3d 76, 86.
41. See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495; *People v. Moore* (2011) 51 Cal.4th 386, 402; *U.S. v. Crawford* (9th Cir. 2004) 372 F.3d 1048, 1060; *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 958.
42. See *California v. Beheler* (1983) 463 U.S. 1121.
43. *U.S. v. Czichray* (8th Cir. 2004) 378 F.3d 822, 826. ALSO SEE *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1240.
44. *U.S. v. Colonna* (4th Cir. 2007) 511 F.3d 431, 435. ALSO SEE *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1088.
45. *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d. 659, 676.
46. *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1482; *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1088.
47. *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166.
48. *People v. Boyer* (1989) 48 Cal.3d 247, 271.
49. See *People v. Stansbury* (1995) 9 Cal.4th 824, 834 [defendant was not in custody merely because he "had to pass through a locked parking structure and a locked entrance to the jail to get to the interview room"]; *In re Kenneth S.*, (2005) 133 Cal.App.4th 54, 65; *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 957.
50. *U.S. v. Slaight* (7th Cir. 2010) 620 F.3d 816, 819. ALSO SEE *People v. Bejasa* (2012) 205 Cal.App.4th 26, 37 [a "reasonable person in defendant's position would know that possession of methamphetamine and related paraphernalia is a parole violation and a crime, and that arrest would likely follow"]; *Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 87 [suspect was in custody after admitting "I killed him"].
51. (1996) 51 Cal.App.4th 1151, 1164, fn.7.
52. See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1164; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 437.
53. *U.S. v. Sanchez* (8th Cir. 2012) 676 F.3d 627, 631.
54. *People v. Celaya* (1987) 191 Cal.App.3d 665, 672.
55. *Miranda v. Arizona* (1966) 384 U.S. 436, 445.
56. See *U.S. v. Boslau* (8th Cir. 2011) 632 F.3d 422, 428 ["a small, windowless interview room"]; *Green v. Superior Court* (1985) 40 Cal.3d 126, 131 ["[t]he rooms are 7 by 12 feet, have no windows and require a key to enter or exit"]; *U.S. v. D'Antoni* (7th Cir. 1988) 856 F.2d 975, 981 ["[t]he room was unremarkable: about eight feet by twelve feet in size, with a half wall separating the interview area from a toilet area"]; *U.S. v. Slaight* (7th Cir. 2010) 620 F.3d 816, 820 [a "claustrophobic" room].
57. (1966) 384 U.S. 436, 457.
58. **NOTE**: The courts often note when stationhouse interviews were conducted in less intimidating rooms; e.g., "[the officers] used a spacious conference room" (*U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d 943, 957); "[t]he interview was conducted in a large, open office rather than an interview room" (*People v. Fierro* (1991) 1 Cal.4th 173, 217); the interviews "took place in what [a detective] described as a 'soft' interview room that had carpet, wallpaper, and comfortable furniture"].
59. (1985) 40 Cal.3d 126, 136.
60. (2011) 51 Cal.4th 386, 398. ALSO SEE *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 65.
61. *Yarborough v. Alvarado* (2004) 541 U.S. 652, 664. ALSO SEE *People v. Mosley* (1999) 73 Cal.App.4th 1081, 1091 ["the questioning was not accusatory or threatening"]; *People v. Lopez* (1985) 163 Cal.App.3d 602, 609 [the questioning "was investigatory rather than accusatory"]; *U.S. v. Boslau* (8th Cir. 2011) 632 F.3d 422, 428 ["mostly informational questions in a non-threatening manner"]; *U.S. v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 884 ["the interview "was conducted in an open,

friendly, tone"]; *U.S. v. Sanchez* (8th Cir. 2012) 676 F.3d. 627, 631 [the officer "did not use strong-arm tactics or deceptive stratagems during the interview; his raised voice and his assertions that Sanchez was lying were not coercive interview methods"]; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 437 ["the ambience was relaxed and non-confrontational"].

62. *People v. Stansbury* (1995) 9 Cal.4th 824, 832.
63. *People v. Moore* (2011) 51 Cal.4th 386, 396.
64. *People v. Spears* (1991) 228 Cal.App.3d 1, 25.
65. *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404.
66. *Stansbury v. California* (1994) 511 U.S. 318, 325.
67. (2005) 133 Cal.App.4th 54, 65. ALSO SEE *Oregon v. Mathiason* (1977) 429 U.S. 492, 495-96 [after noting that an officer falsely told a burglary suspect that his fingerprints had been found at the scene, the Court said, "Whatever relevance this fact may have to other issues in this case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule"]; *People v. Moore* (2011) 51 Cal.4th 386, 402 ["police expressions of suspicion, with no other evidence of a restraint on the person's freedom of movement, are not necessarily sufficient to convert voluntary presence at an interview into custody"]; *U.S. v. Ambrose* (7th Cir. 2012) 668 F.3d. 943, 958 [the tenor of the conversation was "businesslike," with one agent "presenting the evidence of Ambrose's involvement rather than questioning Ambrose"].
68. *People v. Kenneth S.* (2005) 133 Cal.App.4th 54, 65.
69. *Oregon v. Mathiason* (1977) 429 U.S. 492, 495-96; *Illinois v. Perkins* (1990) 496 U.S. 292, 298.
70. *Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 973.
71. (1989) 48 Cal.3d 247. ALSO SEE *Tankleff v. Senkowski* (2nd Cir. 1998) 135 F.3d 235, 244; *U.S. v. Revels* (10th Cir. 2007) 510 F.3d 1269, 1276 [officers "confronted her with a bag of cocaine that had been seized during the search"].
72. (1996) 51 Cal.App.4th 1151.
73. (2011) 51 Cal.4th 396, 402. ALSO SEE *Green v. Superior Court* (1985) 40 Cal.3d 126, 135 [two hour interview was "close" because of various circumstances; e.g., suspect not told he was not under arrest]; *People v. Spears* (1991) 228 Cal.App.3d 1, 26 [75 minutes, not unduly prolonged]; *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 467 [interview 45-60 minutes and "compares favorably with other encounters we have deemed non-custodial"].
74. (9th Cir. 2009) 575 F.3d 879, 886.
75. *Berkemer v. McCarty* (1984) 468 U.S. 420, 440. ALSO SEE *People v. Manis* (1969) 268 Cal.App.2d 653, 668.
76. *People v. Manis* (1969) 268 Cal.App.2d 653, 667 [quoting from Longfellow's "The Day is Done"]. ALSO SEE *P v. Tully* (2012) C4 [2012 WL 3064338] [*Miranda* not applicable even though the detainee was not free to leave].
77. *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.
78. *People v. Manis* (1969) 268 Cal.App.2d 653, 669.
79. *Berkemer v. McCarty* (1984) 468 U.S. 420, 440.
80. *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1405. ALSO SEE *Dunaway v. New York* (1979) 442 U.S. 200, 215 [handcuffing is one of the "trappings" of an arrest]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 228 ["One well-recognized circumstance tending to show custody is the degree of physical restraint used by police officers to detain a citizen."].
81. *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 675, 676.
82. *In re Joseph R.* (1998) 65 Cal.App.4th 954, 960-61.
83. *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404. ALSO SEE *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 675, 676.
84. (9th Cir. 1993) 984 F.2d 1040, 1042. ALSO SEE *People v. Bejasa* (2012) 205 Cal.App.4th 26, 39; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403 ["Most important, defendant remained in handcuffs when the investigating officer interrogated him."].
85. See *People v. Taylor* (1986) 178 Cal.App.3d 217, 229.
86. See *People v. Stansbury* (1995) 9 Cal.4th 824, 832 ["there is no evidence that defendant could see the guns"].
87. See *People v. Clair* (1992) 2 Cal.4th 629, 679; *People v. Holloway* (2004) 33 Cal.4th 96, 121; *People v. Taylor* (1986) 178 Cal.Ap.3d 217, 230; *U.S. v. Luna-Encinas* (11th Cir. 2010) 603 F.3d 876, 881; *Cruz v. Miller* (2nd Cir. 2001) 255 F.3d 77, 86.
88. See *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1167.
89. See *Berkemer v. McCarty* (1984) 468 U.S. 420, 437; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1163; *People v. Forster* (1994) 29 Cal.App.4th 1746, 1753.
90. See *U.S. v. Johnson* (7th Cir. 2012) F.3d [2012 WL 1871608].
91. See *People v. Taylor* (1986) 178 Cal.App.3d 217, 229; *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1085.

92. *People v. Bejasa* (2012) 205 Cal.App.4th 26, 36. ALSO SEE *Berkemer v. McCarty* (1984) 468 U.S. 420, 438; *People v. Stansbury* (1995) 9 Cal.4th 824, 833 [four officers did not constitute a "show of force"].
93. (1985) 163 Cal.App.3d 602, 609.
94. *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 436.
95. *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1242.
96. See *People v. Lopez* (1985) 163 Cal.App.3d 602, 609; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1164; *People v. Hubbard* (1970) 9 Cal.App.3d 827, 836; *People v. Haugland* (1981) 115 Cal.App.3d 248, 256.
97. See *People v. Moore* (2011) 51 Cal.4th 386, 396 ["the alternative, defendant's residence, was cold and dark"].
98. See *U.S. v. Guerrier* (1st Cir. 2011) 669 F.3d 1, 6 ["True, officers questioned Guerrier in an unmarked auto. But that fact does not by itself implicate *Miranda*"]; *U.S. v. Salvo* (6th Cir. 1998) 133 F.3d 943, 951 [although the interview took place in the officer's car, "this alone is not enough to convert the interview into a custodial interrogation"]; *U.S. v. Jones* (10th Cir. 2008) 523 F.3d 1235, 1242 ["Nor is the fact that most of the conversation took place inside Bridge's unmarked car dispositive of the custody issue"]; *U.S. v. Boucher* (8th Cir. 1990) 909 F.2d 1170, 1174.
99. See *U.S. v. Plumman* (8th Cir. 2005) 409 F.3d 919, 924; *U.S. v. Lamy* (10th Cir. 2008) 521 F.3d 1257, 1264 ["his position in the passenger seat of the vehicle suggests a lack of arrest"]; *U.S. v. Guerrier* (1st Cir. 2011) F.3d [2011 WL 6415042].
100. See *U.S. v. Henley* (9th Cir. 1993) 984 F.2d 1040, 1042; *People v. Thomas* (2011) 51 Cal.4th 449, 477.
101. See *Michigan v. Summers* (1981) 452 U.S. 692, 702, fn.15 ["[T]he seizure in this case [in the suspect's home] is not likely to have coercive aspects likely to induce self-incrimination."]; *People v. Morris* (1991) 53 Cal.3d 152, 198 ["The inquiry did not take place in jail or on police premises, but in defendant's own motel room"]; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 661; *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1083 ["courts have generally been much less likely to find that an interrogation in the suspect's home was custodial in nature"]; *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 465-66 [a person's home "is the one place where individuals will feel most unrestrained"].
102. (6th Cir. 2009) 552 F.3d 462, 465-66.
103. *U.S. v. Panak* (6th Cir. 2009) 552 F.3d 462, 466.
104. (1969) 394 U.S. 324. COMPARE *People v. Morris* (1991) 53 Cal.3d 152, 198 ["defendant was not physically restrained or directed to say or do anything"]; *People v. Breault* (1990) 223 Cal.App.3d 125, 135 ["Breault was explicitly told that he was not under arrest. He was not handcuffed or physically restrained. The questioning took place in Breault's own home."]; *In re Danny E.* (1981) 121 Cal.App.3d 44, 50 ["[N]o objective indicia of arrest or detention were apparent, and the questioning was brief and nonaccusatorial."]; *U.S. v. Hughes* (1st Cir. 2011) 640 F.3d 428, 437 ["The number of officers [on the premises] was impressive but not overwhelming," "no officer made physical contact with [the suspect]," and the officers "were polite and never hectored the defendant or raised their voices," but it was a "close" case mainly because the officers did not tell the suspect that he was free to leave]; *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1166 ["It does not appear that Basher's movements were significantly curtailed."].
105. (1989) 208 Cal.App.3d 900.
106. *U.S. v. Slaight* (7th Cir. 2010) 620 F.3d 816, 820. ALSO SEE *U.S. v. Revels* (10th Cir. 2007) 510 F.3d 1269, 1276.
107. *U.S. v. Craighead* (9th Cir. 2008) 539 F.3d 1073, 1089.
108. *U.S. v. Colonna* (4th Cir. 2007) 511 F.3d 431, 436.
109. *U.S. v. Hargrove* (4th Cir. 2010) 625 F.3d 170, 182.
110. *U.S. v. Sutera* (8th Cir. 1991) 933 F.2d 641, 647.
111. *U.S. v. Hinojosa* (6th Cir. 2010) 606 F.3d 875, 883.
112. *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1191].
113. (2012) U.S. [132 S.Ct. 1181, 1190].
114. *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1189-90]. ALSO SEE *People v. Fradiue* (2000) 80 Cal.App.4th 15, 20; *Garcia v. Singletary* (11th Cir. 1994) 13 F.3d 1487, 1492.
115. *Cervantes* v. *Walker* (9th Cir. 1978) 589 F.2d 424, 428.
116. *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1193].
117. See *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1123 ["appellant was not compelled to speak with the police"]; *People v. Ray* (1996) 13 Cal.4th 313, 338 ["prison officials exerted no influence on him to discuss or admit the crimes"]; *People v. Macklem* (2007) 149 Cal.App.4th 674, 696 ["Macklem was given the opportunity to leave the room if he requested to do so"]; *People v. Fradiue* (2000) 80 Cal.App.4th 15, 20-21 [an officer stood outside the suspect's cell and questioned him]; *Georgison*

v. Donelli (2nd Cir. 2009) 588 F.3d 145, 157 ["At no time was Georgison restrained during questioning, which took place in a visitors' room"]; *U.S. v. Conley* (4th Cir. 1985) 779 F.2d 970, 973-74 ["Although Conley wore handcuffs and, at some points, full restraints, evidence in the record indicates that this was standard procedure for transferring inmates to the infirmary"]; *U.S. v. Barner* (11th Cir. 2009) 572 F.3d 1239, 1245 ["[Barner] was not compelled to submit to the meeting with [the officer].

118. (7th Cir. 1994) 29 F.3d 1223, 1232.
119. See *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1191].
120. 120 (2007) 149 Cal.App.4th 674, 696. ALSO SEE *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427-28.
121. 121 *Howes v. Fields* (2012) U.S. [132 S.Ct. 1181, 1184]. ALSO SEE *People v. Macklem* (2007) 149 Cal.App.4th 674, 691; *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427-28; *Garcia v. Singletary* (11th Cir. 1994) 13 F.3d 1487, 1489.
122. See *Berkemer v. McCarty* (1984) 468 U.S. 420, 438; *People v. Sanchez* (1987) 195 Cal.App.3d 42, 47 [on a public street]; *U.S. v. Washington* (9th Cir. 2004) 387 F.3d 1060, 1068 [hallway of the suspect's apartment building]; *U.S. v. Yusuff* (7th Cir. 1996) 96 F.3d 982, 986 ["busy, public area of the airport"]; *U.S. v. Lockett* (3rd Cir. 2005) 406 F.3d 207, 211 [Amtrak station].
123. See *People v. Mosley* (1999) 73 Cal.App.4th 1081; *Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 86-87.
124. See *U.S. v. Jamison* (4th Cir. 2007) 509 F.3d 623.
125. See *Minnesota v. Murphy* (1984) 465 U.S. 420, 433; *People v. Carpenter* (1997) 15 Cal.4th 312, 384; *In re Richard T.* (1978) 79 Cal.App.3d 382; *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1310-11.
126. See *U.S. v. Bassignani* (9th Cir. 2009) 575 F.3d 879, 885 ["Here, Bassignani was interviewed at a conference room within his workplace—plainly a familiar environment."]. ALSO SEE *INS v. Delgado* (1984) 466 U.S. 210, 218.
127. *U.S. v. Kilgroe* (9th Cir. 1992) 959 F.2d 802, 804, 805. ALSO SEE *People v. Tarter* (1972) 27 Cal.App.3d 935, 942.
128. *People v. Mayfield* (1997) 14 Cal.4th 668, 733. ALSO SEE *People v. Webb* (1993) 6 Cal.4th 494, 526
129. *Rhode Island v. Innis* (1980) 446 U.S. 291, 300. ALSO SEE *U.S. v. Rambo* (10th Cir. 2004) 365 F.3d 906, 909 ["For the protections of *Miranda* to apply, custodial interrogation must be imminent or presently occurring."].
130. *Rhode Island v. Innis* (1980) 446 U.S. 291, 298-99.
131. *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.
132. *People v. Wader* (1993) 5 Cal.4th 610, 637. ALSO SEE *People v. Morris* (1987) 192 Cal.App.3d 380, 389.
133. See *People v. Wader* (1993) 5 Cal.4th 610, 637 ["The relationship of the question asked to the crime suspected is highly relevant." Quoting from *U.S. v. Booth* (9th Cir. 1981) 669 F.2d 1231, 1237].
134. See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.7 ["where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."]; *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934 ["the fact that the police intended to elicit incriminating information . . . suggests that they should have known a particular ploy was reasonably likely to succeed"].
135. See *In re Albert R.* (1980) 112 Cal.App.,3d 783, 793 [an intent to obtain incriminating information "is not required for the concept of custodial interrogation. It is the reasonable likelihood of the police words or conduct eliciting an incriminating response that is of significant import."].
136. See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fn.7; *Miranda v. Arizona* (1966) 384 U.S. 436, 452.
137. *Rhode Island v. Innis* (1980) 446 U.S. 291, 302, fn.8. ALSO SEE *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *Brewer v. Williams* (1977) 430 U.S. 398, 392 ["[the officer] knew that Williams was a former mental patient, and knew also that he was deeply religious."].
138. (1980) 112 Cal.App.3d 783, 792]. COMPARE*: In re Curt W.* (1982) 131 Cal.App.3d 169, 180 ["[T]he officer's remark ["The car's not yours"] could hardly be called anything but a tentative, and somewhat uncertain, statement not reasonably seen by him to invite a response."].
139. (1965) 236 Cal.App.2d 27. ALSO SEE *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934 ["Confronting a suspect with his alleged partner and informing him that his alleged partner has confessed is very likely to spark an incriminating response"].
140. See *People v. Gray* (1982) 135 Cal.App.3d 859, 865 [the "recitation of the facts was accurate, dispassionate and not remotely threatening."]; *People v. Patterson* (1979) 88 Cal.App.3d 742, 749 ["Your accomplice already made a statement"]; *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192 [the victim identified you]; *U.S. v. Thierman* (9th Cir. 1982) 678 F.2d 1331, 1334, fn.3 ["*Miranda* does not preclude officers, after a defendant has invoked his *Miranda* rights, from informing the defendant of evidence against him or of other circumstances which might contribute to an intelligent exercise of his judgment."]; *U.S. v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1134 ["even when a defendant has invoked his *Miranda* rights, this does not

preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case"]; *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169 [officer did not interrogate a suspect when he "told him that the agents had seized approximately 600 pounds of cocaine and that [he] was in serious trouble"]; *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203 ["statements by law enforcement officials to a suspect regarding the nature of the evidence against the suspect [do not] constitute interrogation as a matter of law"]; *Easley v. Frey* (7th Cir. 2006) 433 F.3d 969, 974 [not interrogation to inform a suspect that witnesses had ID'd him]; *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285 ["Merely apprising Vallar of the evidence against him by playing tapes implicating him in the conspiracy did not constitute interrogation."].

141. (9th Cir. 1988) 852 F.2d 407, 411.
142. (1982) 135 Cal.App.3d 859, 865.
143. (9th Cir. 1989) 885 F.2d 570, 573.
144. (9th Cir. 1976) 527 F.2d 1110.
145. *U.S. v. Pheaster* (9th Cir. 1976) 544 F.2d 353, 366.
146. (1993) 5 Cal.4th 405, 444. ALSO SEE *U.S. v. Rambo* (10th Cir. 2004) 365 F.3d 906, 910.
147. (2005) 36 Cal.4th 510.
148. See *People v. Celestine* (1992) 9 Cal.App.4th 1370, 1374; *People v. Harris* (1989) 211 Cal.App.3d 640, 647-48; *U.S. v. McGlothen* (8th Cir. 2009) 556 F.3d 698, 702.
149. See *People v. Huggins* (2006) 38 Cal.4th 175, 198; *U.S. v. Head* (8th Cir. 2005) 407 F.3d 925, 929.
150. See *People v. Guerra* (2006) 37 Cal.4th 1067, 1096; *People v. Harris* (1989) 211 Cal.App.3d 640, 647-48; *People v. Hayes* (1985) 169 Cal.App.3d 898, 908.
151. See *U.S. v. Johnson* (7th Cir. 2012) F3 [2012 WL 1871608].
152. *U.S. v. Collins* (6th Cir. 2012) F.3d [2012 WL 2094415].
153. See *People v. Ruster* (1976) 16 Cal.3d 690, 700; *People v. Shegog* (1986) 184 Cal.App.3d 899, 905.
154. See *People v. Moore* (2011) 51 Cal.4th 386, 395; *People v. Wader* (1993) 5 Cal.4th 610; *People v. Ochoa* (2001) 26 Cal.4th 398, 436-37; *People* v. *Mosley* (1999) 73 Cal.App.4th 1081, 1089. COMPARE: *People v. Roquemore* (2005) 131 Cal.App.4th 11, 26 [questions relating to gang activity in general were sufficiently connected to the charged crime as to constitute interrogation].
155. See *Brewer v. Williams* (1977) 430 U.S. 387; *In re Johnny V.* (1978) 85 Cal.App.3d 120, 134.
156. See *People v. Mickey* (1991) 54 Cal.3d 612, 651; *People v. Roldan* (2005) 35 Cal.4th 646, 735-36; *People v. Claxton* (1982) 129 Cal.App.3d 638, 654; *People v. Ashford* (1968) 265 Cal.App.2d 673, 685; *People v. Lewis* (1990) 50 Cal.3d 262, 274; *People v. Gamache* (2010) 48 Cal.4th 347, 388; *People v. Gurule* (2002) 28 Cal.4th 557, 602. ALSO SEE *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1073 ["There is nothing inherently wrong with efforts to create a favorable climate for confession."].
157. See *People v. Clark* (1993) 5 Cal.4th 950, 985; *People* v. *Dement* (2011) 53 Cal.4th 1, 27; *People v. Roldan* (2005) 35 Cal.4th 646, 735-36.
158. See *People v. Ray* (1996) 13 Cal.4th 313, 338 ["To the extent [the investigator] interrupted and asked questions, they were merely neutral inquiries made for the purpose of clarifying statements or points that he did not understand."]; *In re Frank C.* (1982) 138 Cal.App.3d 708, 714 ["What did you want to talk to me about?"]; *People v. Conrad* (1973) 31 Cal.App.3d 308, 319 [suspect entered a police station and said he wanted to turn himself in; when asked why, he said it was for murder; when asked when the murder happened, he said it was one week earlier]; *U.S. v. Gonzales* (5th Cir. 1997) 121 F.3d 928, 940 ["[W]hen a suspect spontaneously makes a statement, officers may request clarification of ambiguous statements without running afoul of the Fifth Amendment."]; *U.S. v. Mendoza-Gonzalez* (8th Cir. 2004) 363 F.3d 788, 795 [when the suspect asked if he could make a phone call, the officer asked why he wanted to make a call].
159. See *People v. Ray* (1996) 13 Cal.4th 318, 338; *People v. Matthews* (1968) 264 Cal.App.2d 557, 567.
160. See *People v. Jones* (1979) 96 Cal.App.3d 820, 827; *U.S. v. Howard* (8th Cir. 2008) 532 F.3d 755.
161. (8th Cir. 2010) 600 F.3d 971, 977. ALSO SEE *Nelson v. Fulcomer* (3rd Cir. 1990) 911 F.2d 928, 934 ["we cannot say that merely placing a suspect in the same room with his partner in crime, without *any* additional stimulus, is reasonably likely to evoke an incriminating response"].
162. See *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.
163. See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601; *People v. Farnam* (2002) 28 Cal.4th 107, 180; *People v. Clair* (1992) 2 Cal.4th 629, 679-80; *People v. Powell* (1986) 178 Cal.App.3d 36, 40; *People v. Palmer* (1978) 80 Cal.App.3d 239, 256; *People*

v. Valdivia (1986) 180 Cal.App.3d 657, 662; *U.S. v. Arellano-Ochoa* (9th Cir. 2006) 461 F.3d 1142, 1146; *U.S. v. Pacheco-Lopez* (6th Cir. 2008) 531 F.3d 420, 423; *Rosa v. McCray* (2nd Cir. 2005) 396 F.3d 210, 211; *U.S. v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1133 ["[T]he question about Washington's gang moniker was routine gathering of background information"].

164. See *People v. Gomez* (2011) 192 Cal.App.4th 609, 630; *U.S. v. Booth* (9th Cir. 1982) 669 F.2d 1231, 1238; *U.S. v. Salgado* (9th Cir. 2002) 292 F.3d 1169, 1172.
165. See *People v. Gomez* (2011) 192 Cal.App.4th 609, 634 ["It is reasonable to take steps to ensure that members of rival gangs are not placed together in jail cells."].
166. 166 See *People* v. *Roquemore* (2005) 131 Cal.App.4th 11, 26.
167. See *U.S. v. Minkowitz* (E.D.N.Y. 1995) 889 F.Supp. 624, 628 ["questions concerning a defendant's possession of credit cards in a different name can hardly be characterized as 'routine' or 'basic'"].
168. See *U.S. v. Pacheco-Lopez* (6th Cir. 2008) 531 F.3d 420, 424 ["But asking Lopez where he was from, how he had arrived at the house, and when he had arrived are [not routine booking questions]."].
169. See *People v. Gomez* (2011) 192 Cal.App.4th 609, 635. COMPARE: *U.S. v. Mata-Abundiz* (9th Cir. 1983) 717 F.2d 1277, 1280 ["[T]he questioning conducted by [the officer] [ten days after arrest] had little, if any, resemblance to routine booking"].
170. See *People v. Morris* (1987) 192 Cal.App.3d 380, 389; *U.S. v. Mata-Abundiz* (9th Cir. 1983) 717 F.2d 1277, 1280.
171. See *New York v. Quarles* (1984) 467 U.S. 649, 656; *People v. Mayfield* (1997) 14 Cal.4th 668, 732; *People v. Wills* (1980) 104 Cal.App.3d 433, 446-47; *People v. Panah* (2005) 35 Cal.4th 395, 471; *People v. Dean* (1974) 39 Cal.App.3d 875, 882; *Allen v. Roe* (9th Cir. 2002) 305 F.3d 1046, 1050. **NOTE**: Although we have found no cases in which application of the public safety exception was based exclusively on the threatened destruction of property, it seems apparent that such a threat falls well within the public safety exception. After all, if a substantial threat to property constitutes an exigent circumstance so as to excuse compliance with provisions of the Fourth Amendment, it should be sufficiently important to excuse compliance with procedural requirements that are not mandated by the Constitution. See *People v. Riddle* (1978) 83 Cal.App.3d 563, 572 ["Application of the principle of exigent circumstances is not restricted to situations where human life is at stake."].
172. See *People v. Cressy* (1996) 47 Cal.App.4th 981, 987; *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1166.
173. See *People v. Simpson* (1998) 65 Cal.App.4th 854, 862; *Allen v. Roe* (9th Cir. 2002) 305 F.3d 1046, 1051; *U.S. v. Basher* (9th Cir. 2011) 629 F.3d 1161, 1167; *U.S. v. Are* (7th Cir. 2009) 590 F.3d 499, 506.
174. See *New York v. Quarles* (1984) 467 U.S. 649; *People v. Gilliard* (1987) 189 Cal.App.3d 285; *People v. Cole* (1985) 165 Cal.App.3d 41, 51-52; *Allen v. Roe* (9th Cir. 2002) 305 F.3d 1046, 1050-51; *U.S. v. Watters* (8th Cir. 2009) 572 F.3d 479, 482.
175. See *People v. Davis* (2009) 46 Cal.4th 539, 592; *People v. Dean* (1974) 39 Cal.App.3d 875, 883; *People v. Coffman* (2004) 34 Cal.4th 1, 57; *People v. Riddle* (1978) 83 Cal.App.3d 563, 577; *People v. Panah* (2005)) 35 Cal.4th 395, 471.
176. See *People v. Stevenson* (1996) 51 Cal.App.4th 1234; *People v. Jones* (1979) 96 Cal.App.3d 820, 827-28.
177. See *People v. Mayfield* (1997) 14 Cal.4th 668, 734.
178. See *New York v. Quarles* (1984) 467 U.S. 649, 658-59 ALSO SEE *U.S. v. Newton* (2nd Cir. 2004) 369 F.3d 659, 678.
179. *People v. Cressy* (1996) 47 Cal.App.4th 981, 989.
180. See *U.S. v. Johnson* (7th Cir. 2012) F.3d [2012 WL 1871608].
181. See *Illinois v. Perkins* (1990) 496 U.S. 292, 296; *Arizona v. Mauro* (1987) 481 U.S. 520, 526; *People v. Gonzales* (2011) 52 Cal.4th 254, 284; *People v. Tate* (2010) 49 Cal.4th 635, 686; *People v. Miranda* (1987) 44 Cal.3d 57, 86; *People v. Davis* (2005) 36 Cal.4th 510, 555; *People v. Thornton* (2007) 41 Cal.4th 391, 433; *People v. Guilmette* (1991) 1 Cal.App.4th 1534; *People v. Plyler* (1993) 18 Cal.App.4th 535, 544-45; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1194-95; *People v. Leonard* (2007) 40 Cal.4th 1370, 1402; *U.S. v. Hernandez-Mendoza* (8th Cir. 2010) 600 F.3d 981, 977 [recorded conversation between two arrestees in patrol car]; *Reinert v. Larkins* (3d Cir. 2004) 379 F.3d 76, 87 [statement to EMT].
182. See *Illinois v. Perkins* (1990) 496 U.S. 292, 296.
183. See *Rothgery v. Gillespie County* (2008) 554 U.S. 191, 213.

Contributors and Attributions

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15.2: Miranda Waivers

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

—Anderson v. Terhune [1]

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

—Dickerson v. United States [2]

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

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

Despite the possibility that *Miranda* has outlived its usefulness, the Supreme Court is not expected to scrap it anytime soon. Over the years, however, the Court has made *Miranda* compliance much less burdensome. As it pointed out in 2000, "If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement."[5] For example, as we will discuss in this article, the Court has ruled that waivers may be implied, that the language of *Miranda* warnings may vary, that waivers need only be reasonably contemporaneous with the subsequent interview, and that pre-waiver conversations with suspects are permissible within fairly broad limits.

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

"Knowing and Intelligent"

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

"Knowing" waivers

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

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

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

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

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

Similarly, the Court of Appeal noted, "If officers begin to vary from the standard language, their burden of establishing that defendants have been adequately advised before waiving their rights will increase substantially."[17] For example, in *Doody v. Ryan* the Ninth Circuit invalidated a waiver because an officer's improvised *Miranda* warning was converted into a "twelve-page rambling commentary" that was partly "misleading" and partly "unintelligible."[18]

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

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

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

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

INCORRECT MIRANDA WARNINGS: If officers misrepresented the nature of the *Miranda* rights or the consequences of waiving them, a subsequent waiver may be deemed invalid on grounds that it was not knowing and intelligent. For example, in *People v. Russo* an officer's *Miranda* warning to Russo included the following: "If you didn't do this, you don't need a lawyer." This bit of information rendered Russo's waiver invalid because, said the court, "Russo was left with little choice but to waive the right to counsel in order, in his mind, to maintain the appearance of innocence."[30]

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

RECORDING WAIVERS: There is no requirement that officers record the waiver process.[34] Still, it is usually a good idea because it provides judges with proof of exactly what was said by the officers and the suspect. This was an issue in *People v. Gray* and the recording disposed of it. Said the court, "Thanks to the professionalism of [the officers] in their taping of the statement, there was little room to argue at trial that the waiver was not complete and unequivocal."[35] In addition, recordings may be helpful in determining whether a suspect waived or invoked because his tone of voice, emphasis on certain words, pauses, and even

laughter may "add meaning to the bare words." 36 Note that the waiver process, as well as the subsequent interview, may be recorded covertly.37

"Intelligent" waivers

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

EXPRESS STATEMENT OF UNDERSTANDING: Technically, officers are not required to obtain an express statement from the suspect that he understood his rights. That is because the courts must consider the totality of circumstances in making this determination.41 As a practical matter, however, it is dangerous to rely on circumstantial evidence because it creates uncertainty and generates an additional issue for the trial court to resolve. Furthermore, as we will discuss later, an express statement of understanding may be necessary if the suspect's waiver was implied or if he was mentally impaired. Accordingly, it is best to ask the standard *Miranda*-card question*: Did you understand each of the rights I explained to you?* If he says yes, that should be adequate.42

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

CLARIFYING THE RIGHTS: If the suspect said or indicated that he did not understand his rights, officers must try to clarify them.44 For example, when asked if he understood his rights, the defendant in *People v. Cruz* answered "more or less."45 So the officer "repeated each *Miranda* admonishment a second time, describing them in less 'formal' terms." The California Supreme Court ruled that such clarification was proper "so as to ensure that defendant could better understand the rights he was waiving." Note that clarification concerning the right to counsel is frequently necessary because suspects may be confused as to whether a waiver of their right to have counsel present during the interview also constitutes a waiver of their right to be represented by counsel in court.46 The answer, of course, is no.

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

UNDER THE INFLUENCE OF DRUGS OR ALCOHOL

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

MENTAL INSTABILITY

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

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

LEARNING DISABILITY

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

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

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

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

- "[H]e was no stranger to the justice system. Defendant had been arrested twice before . . . Both sets of charges led to proceedings in juvenile court, and the second resulted in a commitment to juvenile hall."[64]
- "Nelson was 15 years old. He had two prior arrests, the most recent resulting in a several month stay in juvenile hall."[65]
- "The minor was an experienced 15-year old at the time of his arrest [and had been] arrested innumerable times in the last couple of years."[66]
- "He was a 16 year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years . . . . There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be." [67]
- "Although she was a 16-year-old juvenile, she was streetwise, having run away from home at the ages of 13 and 15, and having traveled and lived on her own in San Francisco and the Southwest. [When questioned about the murder] she lied to the police about her name, age, and family background. She [invoked the right to counsel] when [the investigators] read her her *Miranda* rights which stopped the interrogation process."[68]

Voluntary Waivers

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

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

Two other things should be noted. First, the rule that prohibits involuntary *Miranda* waivers is similar to the rule that prohibits involuntary confessions and admissions, as both require the suppression of statements that were obtained by means of police coercion. As the California Supreme Court observed, the voluntariness of a *Miranda* waiver and the voluntariness of a statement

are based on "the same inquiry."[74] The main difference is that a waiver is involuntary if officers obtained it by pressuring the suspect into waiving his rights; while a statement is involuntary if, after obtaining a waiver, officers coerced the suspect into making it.

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

Express and Implied Waivers

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

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

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

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

IMPLIED WAIVERS: In 1969 the California Supreme Court ruled that *Miranda* waivers may be implied under certain circumstances.[81] Ten years later, the

U.S. Supreme Court reached the same conclusion.[82] And yet, because the language in both decisions was somewhat tentative,[83] there was some uncertainty as to what was required to obtain an implied waiver. Consequently, officers would often seek express waivers out of an abundance of caution.

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

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

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

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

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

Timely Waivers

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

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

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

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

• CHANGE IN LOCATION: The site of the interview had changed during the break.

• CHANGE IN OFFICERS: The preand post-break interviews were conducted by different officers.

• CHANGE IN TOPIC: When the interview resumed after the break, the officers questioned the suspect about a different topic.93

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

MIRANDA REMINDERS: Even if there was some mental impairment or a change in circumstances, the courts usually reject timeliness arguments if the officers reminded the suspect of his *Miranda* rights when the interview began or resumed; e.g., *Do you remember the rights I read to you earlier?* If he says yes, that will usually suffice. For example, in *People v. Viscotti* the court noted

that the defendant "was reminded of the rights he had waived earlier in the day . . . [the officer] clearly implied that those rights were still available to defendant."95

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

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

Pre-Waiver Communications

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

There are, however, two types of pre-waiver communications that may invalidate a subsequent waiver on grounds that they undermined the suspect's ability to freely decide whether to waive his *Miranda* rights. They are (1) communications that were part of a so-called "two-step" interrogation process, and (2) communications in which officers trivialized the *Miranda* protections. Less problematic, but worth discussing, is the subject of "softening up." Finally, we will cover the common—and usually legal—practice of seeking a waiver after informing the suspect of some or all the evidence that tends to prove he is guilty.

The "Two Step"

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

In most cases, they succeeded because the suspect would think (erroneously) that his first statement could be used against him and, therefore, he had nothing to lose by repeating it. As the Court in *Seibert* explained, the two step renders *Miranda* warnings ineffective "by waiting for a particularly opportune time to give them, after the suspect has already confessed."

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

How can the courts determine the officers' intent? It is seldom difficult because they will usually have begun by conducting a systematic, exhaustive, and illegal pre-waiver interrogation of the suspect pertaining to the crime under investigation; and the

interrogation will have produced a confession or highly incriminating statement which the suspect essentially repeated after he waived his rights.110

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

Trivializing Miranda

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

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

The court then ruled, however, that the officer who questioned Musselwhite did not engage in such a practice by merely saying, "[W]hat we'd like to do is just go ahead and advise you of your rights before we even get started and that way there's no problem with any of it." In contrast, in *Doody v. Ryan* the Ninth Circuit ruled that a juvenile's waiver was invalid because, among other things, the officers had implied that the *Miranda* warnings "were just formalities." 113

"Softening up"

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

For various reasons, however, California courts have not been receptive to "softening up" claims. One reason is, as the Court of Appeal noted, "*Honeycutt* involves a unique factual situation and hence its holding must be read in the particular factual context in which it arose."115 In addition, the *Honeycutt* court's discussion of "softening up" was pure dicta (i.e., it was irrelevant to the resolution of the case116) and it was contained in a plurality decision (i.e., a majority of the justices did not endorse it117). In addition, *Honeycutt* was based on the premise that softening-up renders a waiver "involuntary." But nine years later the United States Supreme Court rejected the idea that involuntariness can result from anything other than *coercive* police conduct.118 And because it is hardly "coercive" for officers to pretend to be sympathetic to the suspect's plight, there is reason to believe that *Honeycutt* is a dead letter.

Putting your cards on the table

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

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

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

In addition, having such information may be helpful to the suspect in determining whether or not to waive his rights. Thus, the Ninth Circuit ruled that "*Miranda* does not preclude officers, after a defendant has invoked his *Miranda* rights, from informing the

defendant of evidence against him or of other circumstances which might contribute to an intelligent exercise of his judgment."[120]

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

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

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

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

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

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

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

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

References

1. (9th Cir. 2008) 516 F.3d 781, 783.
2. (2000) 530 U.S. 428, 443.
3. *United States v. Washington* (1977) 431 U.S. 181, 188.
4. *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 681.
5. *Dickerson v. United States* (2000) 530 U.S. 428, 443. ALSO SEE *Berghuis v. Thompkins* (2010) U.S. [130 S.Ct. 2250, 2262 [*Miranda* "does not impose a formalistic waiver procedure"].
6. *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048; *People v. $241,600* (1998) 67 Cal.App.4th 1100, 1109.
7. See *Colorado v. Spring* (1987) 479 U.S. 564, 572.
8. *Moran v. Burbine* (1986) 475 U.S. 412, 421.
9. See *Miranda v. Arizona* (1966) 384 U.S. 436, 471-72 ["No amount of circumstantial evidence that a person may have been aware of his rights will suffice."]; *People v. Bennett* (1976) 58 Cal.App.3d 230, 239 ["The prosecution was required to prove that appellant was *in fact* aware of his rights"].
10. See *Miranda v. Arizona* (1966) 384 U.S. 436, 467-72; *Florida v. Powell* (2010) (1986) 475 U.S. 412, 421. U.S. [130 S.Ct. 1195, 1203]; *Moran v. Burbine*
11. See *Florida v. Powell* (2010) U.S. [130 S.Ct. 1195, 1203 ["can be used"]; *Dickerson v. United States* (2000) 530 U.S. 428, 435 ["can be used"]; *Colorado v. Spring* (1987) 479 U.S. 564, 577 ["may be used"]; *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 ["could be used"]; *People v. Johnson* (2010) 183 Cal.App.4th 253, 292 ["could be used"]. **NOTE**: Where did the grandiose "will be used" originate? The Court of Appeal explained it as follows: "In the latter part of the *Miranda* opinion the Court employed the overstatement 'can and will be used.' But at an earlier point the Court described the warning as being that what is said 'may be used,' and this alternative has been consistently approved by the lower courts. The courts have also upheld other formulations, including use of 'can' alone, of 'might,' and of 'could.'" *People v. Valdivia* (1986) 180 Cal.App.3d 657, 664.
12. *Florida v. Powell* (2010) U.S. [130 S.Ct. 1195, 1204]. ALSO SEE *People v. Cruz* (2008) 44 Cal.4th 636, 667 ["A valid waiver need not be of predetermined form"]; *People v. Nitschmann* (1995) 35 Cal.App.4th 677, 682 ["A reviewing court need not examine the *Miranda* warnings as if it were construing a will or defining the terms of an easement."].
13. *Duckworth v. Eagan* (1989) 492 U.S. 195, 203; *People v. Wash* (1993) 6 Cal.4th 215, 236-37 ["The essential inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by *Miranda*."].
14. See *People v. Bradford* (2008) 169 Cal.App.4th 843, 854.
15. See *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1091 [the waiver process was "somewhat sloppy"].
16. (2010) U.S. [130 S.Ct. 1195, 1206].
17. *People v. Prysock* (1982) 127 Cal.App.3d 972, 985. ALSO SEE *U.S. v. Warren* (3rd Cir. 2011) 642 F.3d 182, 187 [although the warning was sufficient, it was "disconcerting" that officer did not use a *Miranda* card, especially "considering the resources that have been expended to consider the [suppression] claim"].

18. (9th Cir. 2011) 649 F.3d 986, 1107.
19. See, for example, *Oregon v. Elstad* (1985) 470 U.S. 298, 314-15 ["[The officer] testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad's responses."].
20. See *In re Bonnie H.* (1997) 56 Cal.Ap.4th 563, 577 ["special caution" is not required in determining whether a juvenile waived his *Miranda* rights]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72 ["A presumption that all minors are incapable of a knowing, intelligent waiver of constitutional rights is a form of stereo-typing that does not comport with the realities of everyday living in our urban society. Many minors are far more sophisticated and knowledgeable in these areas than their parents."]; *U.S. v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074 ["The test for reviewing a juvenile's waiver of rights is identical to that of an adult's and is based on the totality of the circumstances."].
21. See *Fare v. Michael C.* (1979) 442 U.S. 707 [no right to talk with probation officer]; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 215 ["There is no requirement that a minor be advised of and waive the opportunity to speak to a parent or to have a parent present during police questioning."]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [no right to talk with mother]; *In re Charles P.* (1982) 134 Cal.App.3d 768, 771-72 [no right to consult with parents].
22. See *Berghuis v. Thompkins* (2010) US [130 S.Ct. 2250, 2256] ["[Y]ou have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned."]; *Florida v. Powell* (2010) US [130 S.Ct. 1195, 1198] ["officers told the suspect that he had "the right to use any of his rights at any time he wanted during the interview"]; *People v. Clark* (1992) 3 Cal.4th 41, 120-21 ["The detectives repeatedly made clear to him that . . . he could stop the interview at any time by merely saying he wanted an attorney."].
23. See *Moran v. Burbine* (1986) 475 U.S. 412, 422 ["[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights."]; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 590 ["we do not require that a criminal defendant understand every consequence of waiving his rights or make the decision that is in his best interest"].
24. (1987) 479 U.S. 564, 576.
25. See *Colorado v. Spring* (1987) 479 U.S. 564, 577.
26. See *People v. Wash* (1993) 6 Cal.4th 215, 239; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405; *People v. Boyette* (2002) 29 Cal.4th 381, 411; *People v. Acuna* (1988) 204 Cal.App.3d 602, 611.
27. See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1235.
28. See *People v. Hill* (1992) 3 Cal.4th 959, 982; *People v. Clark* (1993) 5 Cal.4th950, 987, fn.11; *People v. Jackson* (1996) 13 Cal.4th 1164, 1207, fn.4.
29. See *Moran v. Burbine* (1986) 475 U.S. 412, 422; *People v. Ledesma* (1988) 204 Cal.App.3d 682.
30. (1983) 148 Cal.App.3d 1172, 1177.
31. *Illinois v. Perkins* (1990) 496 U.S. 292, 297.
32. *People v. Tate* (2010) 49 Cal.4th 635, 683.
33. *U.S. v. Farley* (11th Cir. 2010) 607 F.3d 1294.
34. See *People v. Thomas* (2012) Cal.4th [2012 WL 3043901] ["we reject defendant's contention that the absence of a recording of the *Miranda* advisements and his waiver of his rights precludes the conclusion that his waiver was knowing and voluntary"]; *People v. Lucas* (1995) 12 Cal.4th 415, 443 ["The police had no obligation to make a tape recording of the *Miranda* advisements"]. BUT ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 603 [although recording is not required, "we have no wish to discourage law enforcement officials from recording such interrogations"].
35. (1982) 135 Cal.App.3d 859, 864.
36. *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526.
37. See *Lopez v. United States* (1963) 373 U.S. 427, 439 ["Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory."]; *U.S. v. White* (1971) 401 U.S. 745, 751 ["If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations"]; *People v. Jackson* (1971) 19 Cal.App.3d 95, 101 ["Admissions and confessions secretly recorded are admissible."].
38. See *Brady v. United States* (1970) 397 U.S. 749, 748 ["Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."]; *People v.*

Clark (1993) 5 Cal.4th 950, 985 ["All that is required is that the defendant comprehend all of the information the police are required to convey."].

39. *People v. Simpson* (1998) 65 Cal.App.4th 854, 859, fn.1.
40. (1998) 65 Cal.App.4th 854, 859, fn.1.
41. See *Moran v. Burbine* (1986) 475 U.S. 412, 421; *Fare v. Michael C.* (1979) 442 U.S. 707, 724-25.
42. See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 ["Yeh"]; *People v. Memro* (1995) 11 Cal.4th 786, 834 ["Defendant said on both occasions that he understood the consequences of speaking, and elected to proceed. We cannot conclude that his waiver was made unknowingly or unintelligently."]; *U.S. v. Labrada-Bustamante* (9th Cir. 2005) 428 F.3d 1252, 1259 [court rejects the argument that suspect who told officers he understood his rights did not really understand them because he was unfamiliar with the criminal justice system].
43. See *Oregon v. Elstad* (1985) 470 U.S. 298, 315, fn.4 ["A recent high school graduate, Elstad was fully capable of understanding this careful administering of *Miranda* warnings."]; *People v. Samayoa* (1997) 15 Cal.4th 795, 831 [he "was an ex-felon who would have been familiar with the *Miranda* admonitions"]; *People v. Nelson* (2012) 53 Cal.4th 367, 375 [two prior arrests]; *People v. Mickle* (1991) 54 Cal.3d 140, 170 ["[Defendant] was familiar with the criminal justice system and could reasonably be expected to know that any statements made at this time might be used against him in the investigation and any subsequent trial"]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [defendant was a college student and had had "previous experience with law enforcement having been arrested as a juvenile"].
44. See *People v. Turnage* (1975) 45 Cal.App.3d 201, 211 [the law "permits clarifying questions with regard to the individual's comprehension of his constitutional rights or the waiver of them"]; *People v. Wash* (1993) 6 Cal.4th 215, 239 ["[W]here a defendant expresses ambiguous remarks falling short of an invocation of his *Miranda* rights, the officers may continue talking for the purpose of obtaining clarification of his intentions."]; *Tolliver v. Sheets* (6th Cir. 2010) 594 F.3d 900, 921 ["The difference between permissible follow-up questions and impermissible interrogation clearly turns on whether the police are seeking clarification of something that the suspect has just said, or whether instead the police are seeking to expand the interview."].
45. (2008) 44 Cal.4th 636, 668.
46. See *Duckworth v. Egan* (1989) 492 U.S. 195, 204 ["We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel."].
47. (1993) 5 Cal.4th 950, 988. **NOTE**: A suspect who was not fluent in English will be deemed to have understood his rights if he expressly said he understood them and his answers to the officers' questions were responsive and coherent. See *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1127-28 ["there was no indication by any of the officers that Mr. Rodriguez had difficulty understanding English nor that the officers had trouble understanding his English"]. ALSO SEE *People v. Gutierrez* (2012) Cal.Ap.4th [2012 WL 4336239] [waiver by injured suspect].
48. *U.S. v. Burson* (10th Cir. 2008) 531 F.3d 1254, 1260.
49. *People v. Conrad* (1974) 31 Cal.App.3d 308, 321.
50. *People v. Moore* (1971) 20 Cal.App.3d 444, 450.
51. *People v. Loftis* (1984) 157 Cal.App.3d 229, 232. ALSO SEE *People v. Markham* (1989) 49 Cal.3d 63, 66 [although the suspect appeared to be under the influence of "some drug," his answers were "logically consistent"]; *People v. Ventura* (1985) 174 Cal.App.3d 784, 791 [although there was testimony that the suspect was "loaded on alcohol and drugs," he admitted that he understood his *Miranda* rights].
52. *People v. Lewis* (2001) 26 Cal.4th 334, 384. ALSO SEE *People v. Watson* (1977) 75 Cal.App.3d 384, 397 ["A schizophrenic condition does not render a defendant incapable of effectively waiving his rights. Nor does the presence of evidence of subnormality require the automatic exclusion of a confession."].
53. *People v. Panah* (2005) 35 Cal.4th 395, 472.
54. *People v. Mitchell* (1982) 132 Cal.App.3d 389, 405-406. ALSO SEE *People v. Palmer* (1978) 80 Cal.App.3d 239, 257 [the suspect "had a history of emotional instability" but "was able to respond to the questions asked of her coherently"].
55. *Reinert v. Larkins* (3rd Cir. 2004) 379 F.3d 76, 88.
56. *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002.
57. *People v. Whitson* (1998) 17 Cal.4th 229, 249.
58. *U.S. v. Robinson* (4th Cir. 2005) 404 F.3d 850, 861. ALSO SEE *In re Brian W.* (1981) 125 Cal.App.3d 590, 602 ["He had an I.Q. of 81 and the mental age of 11 or 12 but this is only a factor to be considered in determining whether he lacked the ability

to understand his rights."]; *U.S. v. Rosario-Diaz* (1st Cir. 2000) 202 F.3d 54, 69.

59. *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1413.
60. See *People v. Whitson* (1998) 17 Cal.4th 229, 249.
61. See *Fare v. Michael C.* (1979) 442 U.S. 707, 725 ["We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so."]; *People v. Lewis* (2001) 26 Cal.4th 334, 384 ["We also reject defendant's contention that his young age and low intelligence precluded him from making a voluntary, knowing, and intelligent waiver."]; *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 ["special caution" not required in determining whether a juvenile waived his *Miranda* rights].
62. *(*1982) 134 Cal.App.3d 768, 771-72. ALSO SEE *In re Eduardo G.* (1980) 108 Cal.App.3d 745, 756 ["there is no presumption that a minor is incapable of a knowing, intelligent waiver of his rights"]; *U.S. v. Doe* (9th Cir. 1998) 155 F.3d 1070, 1074 "The test for reviewing a juvenile's waiver of rights is identical to that of an adult's and is based on the totality of the circumstances."].
63. See *J.D.B. v. North Carolina* (2011) U.S. [131 S.Ct. 2394]; *People v. Lessie* (2010) 47 Cal.4th 1152, 1169 ["Because defendant is a minor, the required inquiry includes evaluation of the juvenile's age, experience, education, background and intelligence, and into whether he has the capacity to understand the warnings"]; *People v. Nelson* (2012) 53 Cal.4th 367, 378 ["courts must consider a juvenile's state of mind"].
64. *People v. Lessie* (2010) 47 Cal.4th 1152, 1169. ALSO SEE *In re Steven C.* (1970) 9 Cal.App.3d 255, 268, fn.12; *In re Charles P.* (1982) 134 Cal.App.3d 768, 772 ["He was on probation and had been advised of his *Miranda* rights on a prior occasion"]; *In re Jessie L.* (1982) 131 Cal.App.3d 202, 216 ["prior arrest for arson"]; *People v. Lewis* (2001) 26 Cal.4th 334, 386 [minor "had prior experience with the police"].
65. *People v. Nelson* (2012) 53 Cal.4th 367, 375.
66. *In re Frank C.* (1982) 138 Cal.App.3d 708, 712.
67. *Fare v. Michael C.* (1979) 442 U.S. 707, 726.
68. *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 578.
69. See *Berghuis v. Thompkins* (2010) U.S. [130 S.Ct. 2250, 2260] [a waiver "must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception"]; *Colorado v. Connelly* (1986) 479 U.S. 157, 169 ["Of course, a waiver must at a minimum be 'voluntary' to be effective against an accused."]. **NOTE**: While some older cases held that a waiver might be involuntary if it was a result of the "slightest pressure," this standard was abrogated by the U.S. Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-86. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 986, fn.10.
70. *Connecticut v. Barrett* (1987) 479 U.S. 523, 527.
71. *People v. Sauceda-Contreras* (2012) Cal.4th [2012 WL 3263996].
72. *Moran v. Burbine* (1986) 475 U.S. 412, 421. ALSO SEE *People v. Whitson* (1998) 17 Cal.4th 229, 248-49; *In re Brian W.* (1981) 125 Cal.App.3d 590, 603.
73. *Colorado v. Spring* (1987) 479 U.S. 564, 573-74.
74. *People v. Guerra* (2006) 37 Cal.4th 1067, 1093. ALSO SEE *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70 ["There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context."].
75. See *Colorado v. Connelly* (1986) 479 U.S. 157, 169-70 ["The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word."]; *Fare v. Michael C.* (1979) 442 U.S. 707, 725; *Collins v. Gaetz* (7th Cir. 2010) 612 F.3d 574, 584 ["The Supreme Court has said that when the police are aware of a suspect's mental defect but persist in questioning him, such dogged persistence can contribute to a finding that the waiver was involuntary." Citations omitted.]. COMPARE *Illinois v. Perkins* (1990) 496 U.S. 292, 297 [an otherwise voluntary waiver will not be invalidated merely because officers utilized "[p]loys to mislead" or "lull him into a false sense of security."].
76. See *North Carolina v. Butler* (1979) 441 U.S. 369, 372-73 [Court rejects argument that a suspect who agreed to speak with officers must also expressly waive his right to counsel]; *People v. Mitchell* (1982) 132 Cal.App.3d 389, 406 ["The record shows Mitchell understood his rights, including that of counsel, and waived each by agreeing to answer the officer's questions."].
77. *North Carolina v. Butler* (1979) 441 U.S. 369, 373 ["An express written or oral statement of waiver … is usually strong proof of the validity of that waiver but is not inevitably either necessary nor sufficient to establish waiver."].
78. (1984) 37 Cal.3d 216, 230.

79. See *Berghuis v. Thompkins* (2010) U.S. [130 S.Ct. 2250, 2256] ["Thompkins declined to sign the form."]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78; *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1315 ["The Seventh and Eighth Circuits, and a number of other circuits, have stated that a refusal to sign a waiver form does not show that subsequent statements are involuntary." Citations omitted.]; *U.S. v. Brown* (7th Cir. 2011) 664 F.3d 1115, 1118 ["It is immaterial that defendant did not sign a waiver form"]; *U.S. v. Plugh* (2nd Cir. 2011) 648 F.3d 118, 123; *U.S. v. Binion* (8th Cir. 2009) 570 F.3d 1034, 1041 ["Refusing to sign a written waiver of the privilege against self incrimination does not itself invoke that privilege"].
80. See *Connecticut v. Barrett* (1987) 479 U.S. 523, 530, fn.4 ["[T]here may be several strategic reasons why a defendant willing to speak to the police would still refuse to write out his answers to questions"].
81. See *People v. Johnson* (1969) 70 Cal.2d 541, 558.
82. See *North Carolina v. Butler* (1979) 441 U.S. 369, 374-75.
83. See *North Carolina v. Butler* (1979) 441 U.S. 369, 374-75 ["the question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."]; *People v. Johnson* (1969) 70 Cal.2d 541, 558 ["Once the defendant has been informed of his rights, and indicates that he understands those rights, *it would seem* that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them." Emphasis added.].
84. (2010) U.S. [130 S.Ct. 2250, 2263].
85. **NOTE**: The following pre-*Berghuis* opinions were consistent with *Burghuis*: *People v. Lessie* (2010) 47 Cal.4th 1152, 1169 ["While defendant did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights."]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 86; *People v. Johnson* (2010) 183 Cal.App.4th 253, 294; *People v. Whitson* (1998) 17 Cal.4th 229, 245 ["the investigating police officers advised defendant of his *Miranda* rights at each of the three interviews. On each one of these occasions, defendant affirmatively told the interviewing officers that he understood those rights [and] his answers were responsive to the questions asked of him."]; *People v. Riva* (2003) 112 Cal.App.4th 981, 988-89; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1127-28.
86. (2012) 53 Cal.4th 367, 380. Citations omitted. ALSO SEE *People v. Gutierrez* (2012) Cal.App.4th [2012 WL 4336239] ["A defendant, by his words and conduct, may make an implied waiver of his *Miranda* rights by acknowledging that he understands the rights read and answering questions."].
87. (1969) 70 Cal.2d 541, 558 ["mere silence of the accused followed by grudging responses to leading questions will be entitled to very little probative value"].
88. See *People v. Johnson* (1969) 70 Cal.2d 541, 558
89. See *Wyrick v. Fields* (1982) 459 U.S. 42; *People v. Smith* (2007) 40 Cal.4th 483, 504 ["This court repeatedly has held that a *Miranda* readvisement is not necessary before a custodial interrogation is resumed, so long as a proper warning has been given, and the subsequent interrogation is reasonably contemporaneous with the prior knowing and intelligent waiver."]; *People v. Lewis* (2001) 26 Cal.4th 334, 386. ALSO SEE *Berghuis v. Thompkins* (2010) U.S. [130 S.Ct. 2250, 2263] [officers are "not required to rewarn suspects from time to time"].
90. *People v. San Nicolas* (2004) 34 Cal.4th 614, 640.
91. **NOTE**: There is no set time limit after which a reminder or new waiver will be required. See *U.S. v. Andaverde* (9th Cir. 1995) 64 F.3d 1305, 1312 ["The courts have generally rejected a per se rule as to when a suspect must be readvised of his rights after the passage of time or a change in questioners."].
92. *People v. Schenk* (1972) 24 Cal.App.3d 233, 236
93. See *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. Also see *People v. Martinez* (2010) 47 Cal.4th 911, 944-50 [overnight, same location, different officers, different topics, reminder given]; *People v. Riva* (2003) 112 Cal.App.4th 981, 994 ["Both interrogations were conducted by the same officer."]; *People v. Rich* (1988) 45 Cal.3d 1036, 1077 [new waiver not required merely because the defendant was notified he had failed a polygraph test]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 640 ["*Miranda* does not require a second advisement when a new interviewer steps into the room."]; *People v. Schenk* (1972) 24 Cal.App.3d 233, 236 ["[A] repeated and continued *Miranda* warning need not precede every twist and turn in the investigatory phase of the criminal proceedings."]; *U.S. v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3d 1118, 1129 ["[T]here were no intervening events which might have given RodriguezPreciado the impression that his rights had changed in a material way."]; *Guam v. Dela Pena* (9th Cir. 1995) 72 F.3d 767, 769 [an arrest does not automatically constitute a sufficient changed circumstance to require a new waiver].

94. (1991) 54 Cal.3d 140, 170. ALSO SEE *People v. Riva* (2003) 112 Cal.App.4th 981, 994 [court noted that the defendant was a college student and had had "previous experience with law enforcement having been arrested as a juvenile."]; *People v. Smith* (2007) 40 Cal.4th 483, 504 [we consider "the suspect's sophistication or past experience with law enforcement"].
95. (1992) 2 Cal.4th 1, 55. ALSO SEE *People v. Pearson* (2012) 53 Cal.4th 306, 317 ["defendant was asked if he remembered his *Miranda* rights, and he said he did"]; *People v. Martinez* (2010) 47 Cal.4th 911, 950 ["they did remind him of the admonition given the night before and then specifically asked him if he remembered those rights and whether he still wanted to talk"]; *People v. Smith* (2007) 40 Cal.4th 483, 504 [relevant circumstances include "an official reminder of the prior advisement"]; *People v. McFadden* (1970) 4 Cal.App.3d 672, 687 [reminder after one day lapse OK]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677-78 [reminder after three day lapse OK].
96. *Wyrick v. Fields* (1982) 459 U.S. 42, 47-48. ALSO SEE *People v. Martinez* (2010) 47 Cal.4th 911, 944-50.
97. *People v. Lewis* (2001) 26 Cal.4th 334, 386-87.
98. *People v. Miller* (1996) 46 Cal.App.4th 412, 418.
99. *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972.
100. *People v. Smith* (2007) 40 Cal.4th 483, 504-5.
101. *Guam v. Dela Pena* (9th Cir. 1995) 72 F.3d 767, 770.
102. *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1088.
103. *People v. Pearson* (2012) 53 Cal.4th 306, 316-17.
104. *People v. Mickle* (1991) 54 Cal.3d 140, 171.
105. (9th Cir. 2003) 331 F.3d 1062, 1073. ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 559
106. (2004) 542 U.S. 600.
107. See *U.S. v. Narvaez-Gomez* (9th Cir. 2007) 489 F.3d 970, 973 ["A two-step interrogation involves eliciting an unwarned confession, administering the *Miranda* warnings and obtaining a waiver of *Miranda* rights, and then eliciting a repeated confession."].
108. **NOTE**: Because none of the views in *Seibert* garnered the votes of five Justices, the holding of the Court "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. U.S.* (1977) 430 U.S. 188, 193. Because Justice Kennedy concurred in the judgment of the plurality on the narrowest grounds (he rejected the plurality's position that a "fruits" analysis should be applied to unintentional violations), his opinion represents the holding of the Court. And because Justice Kennedy would apply the "fruits" analysis only if the two-step procedure was employed deliberately, a statement will not be suppressed if it was employed inadvertently. See *People v. Camino* (2011) 188 Cal.App.4th 1359, 1370 ["Because Justice Kennedy concurred in the judgment on the narrowest grounds, his concurring opinion [in which the invalidity of a waiver depends on whether the officers intended to circumvent *Miranda*] represents the *Seibert* holding."]. BUT ALSO SEE *U.S. v. Heron* (7th Cir. 2009) 564 F.3d 879, 885 [court questions whether *Seibert* established an intent-based test].
109. See *People v. Scott* (2011) 52 Cal.4th 452, 478 [two-step violation occurs if "the officers were following a policy of disregarding the teaching of *Miranda*"]; *U.S. v. Reyes-Bosque* (9th Cir. 2010) 596 F.3d 1017, 1031 ["If the use of the two-step method is not deliberate, the post-warning statements are admissible if they were voluntarily made."].
110. See *Missouri v. Seibert* (2004) 542 U.S. 600, 616 [the questioning was "systematic, exhaustive, and managed with psychological skill," adding that when the police were finished "there was little, if anything, of incriminating potential left unsaid."]; *Bobby v. Dixon* (2011) U.S. [132 S.Ct. 26, 31 [in discussing *Seibert*, the court noted that a "detective exhaustively questioned Seibert"]; *People v. Camino* (2010) 118 Cal.App.4th 1359, 1376 [court notes "the comprehensiveness of the first interview which left little, if anything, of incriminating potential left unsaid"]; *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 ["[T]he method and timing of the two interrogations establish intentional, calculated conduct by the police"; the unwarned interrogation "lasted approximately ninety minutes"]. COMPARE *People v. San Nicolas* (2005) 34 Cal.4th 614, 639 ["[D]efendant answered a few questions posed by the Nevada police officer concerning the location of his car and his duffel bag. Defendant did not speak about the crime itself."]; *U.S. v. Narvaez- Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [court noted the brevity of the initial questioning]; *U.S. v. Walker* (8th Cir. 2008) 518 F.3d 983, 985 [the pre-waiver interview consisted of a single question]; *U.S. v. Fellers* (8th Cir. 2005) 397 F.3d 1090, 1098 [the pre-waiver conversation "was relatively brief"]. COMPARE: *Bobby v. Dixon* (2011) U.S. [132 S.Ct. 26, 31] ["But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had 'nothing whatsoever' to do with Hammer's disappearance."].

111. See *People v. Camino* (2010) 118 Cal.App.4th 1359, 1376 [court notes "the continuity between the two interviews"]; *U.S. v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1159 [relevant circumstances include "the timing, setting, and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the preand postwarning statements."]; *U.S. v. Narvaez- Gomez* (9th Cir. 2007) 489 F.3d 970, 974 [court notes the "lack of any reference to the prewarning statements during the more comprehensive postwarning interrogation" and the four-hour delay between the two admissions]; *U.S. v. Heron* (7th Cir. 2009) 564 F.3d 879, 887 ["Here, the lengthy temporal separation between Heron's first and second encounters persuades us that the district court did not err when it found that the later warnings served their intended purpose."]; *U.S. v. Aguilar* (8th Cir. 2004) 384 F.3d 520, 525 [the pre-waiver interrogation "included some good cop/bad cop questioning tactics"].
112. (1998) 17 Cal.4th 1216, 1237.
113. (9th Cir. 2011) 649 F.3d 986, 1002. BUT ALSO SEE *People v. Johnson* (2010) 183 Cal.App.4th 253, 294 ["Referring to the process as clearing a 'technicality' and encouraging Holmes to talk and ask questions did not minimize the significance of her rights or the risks of her speaking with detectives."].
114. (1977) 20 Cal.3d 150.
115. *People v. Patterson* (1979) 88 Cal.App.3d 742, 751. ALSO SEE *People v. Gurule* (2002) 28 Cal.4th 557, 602 ["But unlike in *Honeycutt*, neither [of the officers] discussed the victim. Nor is there any other evidence suggesting that the manner in which [the officers] engaged in small talk overbore defendant's free will." *Honeycutt* is thus distinguishable."]; *People v. Scott* (2011) 52 Cal.4th 452, 478 [no softening up as the officers "had no prior relationship with defendant [and] did not seek to ingratiate themselves with him by discussing unrelated past events and former acquaintances. Nor did they disparage his victims."]; *People v. Michaels* (2002) 28 Cal.4th 486, 511 ["the facts here are not at all like *Honeycutt*"]; *People v. Posten* (1980) 108 Cal.App.3d 633, 647 ["*Honeycutt* is distinguishable on its facts"].
116. See *People v. Mendoza* (2000) 23 Cal.4th 896, 915 ["A decision is not authority for everything said in the opinion but only for the points actually involved and actually decided."].
117. See *People v. Gray* (1982) 135 Cal.App.3d 859, 863 ["the entire 'softening up' issue in *Honeycutt* was *dicta* joined in by at most four justices."]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829 [plurality decisions do not constitute binding authority].
118. *Colorado v. Connelly* (1986) 479 U.S. 157, 170. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 988.
119. (1982) 135 Cal.App.3d 8593. ALSO SEE *U.S. v. Hsu* (9th Cir. 1988) 852 F.2d 407, 411; *U.S. v. Washington* (9th Cir. 2006) 462 F. 3d 1124, 1134 ["even when a defendant has invoked his *Miranda* rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case"].
120. *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169.
121. *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192.
122. *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199, 203. ALSO SEE *U.S. v. McGlothen* (8th Cir. 2009) 556 F.3d 698, 702 [an officer showed an arrested drug dealer a gun he had found during a search of his home].
123. *U.S. v. Moreno-Flores* (9th Cir. 1994) 33 F.3d 1164, 1169. ALSO SEE *U.S. v. Lopez* (1st Cir. 2004) 380 F.3d 538, 545-46 [an officer told an arrested drug dealer that he has found "the stuff" in his van]; *U.S. v. Wipf* (8th Cir. 2005) 397 F.3d 677.
124. *U.S. v. Vallar* (7th Cir. 2011) 635 F.3d 271, 285.
125. *U.S. v. Davis* (9th Cir. 1976) 527 F.2d 1110.
126. *People v. Patterson* (1979) 88 Cal.App.3d 742, 752

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15.3: Miranda v. Arizona

PETITIONER	RESPONDENT
Miranda	Arizona

LOCATION

Phoenix, Arizona

DOCKET NO.	DECIDED BY
759	Warren Court

CITATION

384 US 436 (1966)

ARGUED

2/27/66; 2/28/66; 3/1/66

DECIDED

Jun 13, 1966

ADVOCATES

John J. Flynn et. al. *for the petitioner, 759*

Gary K. Nelson et. al. *for the respondent, 759*

Thurgood Marshall *Solicitor General, for the United States, 761*

Telford Taylor *for the State of New York as amicus curiae in all cases by special leave of the Court*

Duane R. Nedrud *for the National District Attorneys' Association, as amicus*

Facts of the case

This case represents the consolidation of four cases, in each of which the defendant confessed guilt after being subjected to a variety of interrogation techniques without being informed of his Fifth Amendment rights during an interrogation. On March 13, 1963, Ernesto Miranda was arrested in his house and brought to the police station where he was questioned by police officers in connection with a kidnapping and rape. After two hours of interrogation, the police obtained a written confession from Miranda. The written confession was admitted into evidence at trial despite the objection of the defense attorney and the fact that the police officers admitted that they had not advised Miranda of his right to have an attorney present during the interrogation. The jury found Miranda guilty. On appeal, the Supreme Court of Arizona affirmed and held that Miranda's constitutional rights were not violated because he did not specifically request counsel.

Question

Do the Fifth Amendment's protection against self-incrimination extend to the police interrogation of a suspect?

Conclusion

5–4 Decision for Miranda Majority Opinion by Earl Warren

FOR	AGAINST
Douglas Fortas Warren Brennan Black	White Clark Stewart Harlan

The Fifth Amendment requires that law enforcement officials advise suspects of their right to remain silent and to obtain an attorney during interrogations while in police custody. Chief Justice Earl Warren delivered the opinion of the 5-4 majority. The Supreme Court held that the Fifth Amendment's protection against self-incrimination is available in all settings. Therefore, prosecution may not use statements arising from a custodial interrogation of a suspect unless certain procedural safeguards were in place. Such safeguards include proof that the suspect was aware of his right to be silent, that any statement he makes may be used against him in court, etc.

The Court held that, in each of the cases, the interrogation techniques used did not technically fall into the category of coercive, but they failed to ensure that the defendant's decision to speak with the police was entirely the product of his own free will. Justice Tom C. Clark wrote a dissenting opinion in which he argued that the majority's opinion created an unnecessarily strict interpretation of the Fifth Amendment that curtails the ability of the police to effectively execute their duties.

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15.4: Escobedo v. Illinois

PETITIONER

Danny Escobedo

RESPONDENT

Illinois

LOCATION

Chicago Police Department

DOCKET NO.

615

DECIDED BY

Warren Court

CITATION

378 US 478 (1964)

ARGUED

Apr 29, 1964

DECIDED

Jun 22, 1964

Facts of the case

Danny Escobedo was arrested and taken to a police station for questioning. Over several hours, the police refused his repeated requests to see his lawyer. Escobedo's lawyer sought unsuccessfully to consult with his client. Escobedo subsequently confessed to murder.

Question

Was Escobedo denied the right to counsel as guaranteed by the Sixth Amendment?

Conclusion

5–4 Decision for Escobedo Majority Opinion By Arthur J. Goldberg

FOR	AGAINST
Douglas Warren Black Goldberg Brennan	White Clark Stewart Harlan

Yes. Justice Goldberg, in his majority opinion, spoke for the first time of "an absolute right to remain silent." Escobedo had not been adequately informed of his constitutional right to remain silent rather than to be forced to incriminate himself. The case has lost authority as precedent as the arguments in police interrogation and confession cases have shifted from the Sixth Amendment to the Fifth Amendment, emphasizing whether the appropriate warnings have been given and given correctly, and whether the right to remain silent has been waived.

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15.5: Rhode Island v. Innis

PETITIONER

Rhode Island

RESPONDENT

Innis

LOCATION

Police Car

DOCKET NO.

78-1076

DECIDED BY

Burger Court

LOWER COURT

Rhode Island Supreme Court

CITATION

446 US 291 (1980)

ARGUED

Oct 30, 1979

DECIDED

May 12, 1980

ADVOCATES

John A. MacFadyen, III *Argued the cause for the respondent*

Dennis J. Roberts, II *Argued the cause for the petitioner*

Facts of the case

After a picture identification by the victim of a robbery, Thomas J. Innis was arrested by police in Providence, Rhode Island. Innis was unarmed when arrested. Innis was advised of his Miranda rights and subsequently requested to speak with a lawyer. While escorting Innis to the station in a police car, three officers began discussing the shotgun involved in the robbery. One of the officers commented that there was a school for handicapped children in the area and that if one of the students found the weapon he might injure himself. Innis then interrupted and told the officers to turn the car around so he could show them where the gun was located.

Question

Did the police "interrogation" en route to the station violate Innis's Miranda rights?

Conclusion

6–3 Decision for Rhode Island Majority Opinion by Potter Stewart

FOR	AGAINST
Blackmun White Powell Burger Stewart Rehnquist	Marshall Brennan Stevens

No. In a 6-to-3 decision, the Court held that the Miranda safeguards came into play "whenever a person in custody is subjected to either express questioning or its functional equivalent," noting that the term "interrogation" under Miranda included "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are

reasonably likely to elicit an incriminating response from the subject." The Court then found that the officers' conversation did not qualify as words or actions that they should have known were reasonably likely to elicit such a response from Innis.

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CHAPTER OVERVIEW

16: Suspect Identification

16.1: Lineups and Showups

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16.1: Lineups and Showups

That man there is the one. He's the one that shot me. — Lineup ID, *Colman* v. *Alabama* 1

hat man there is in trouble. Big trouble. Even if he didn't fire the shot, he could easily be found guilty at trial because a witness's positive identification of a suspect at a lineup or showup is, in the words of the California Supreme Court, "frequently determinative of an accused's guilt."2 Or, as the United States Supreme Court put it, "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation."3

One reason that a pretrial identification carries so much weight is that a witness who has picked out a person at a lineup is "not likely to go back on his word later on."4 In addition, if the witness appears to be credible to the jury, his identification of the defendant is apt to be convincing because a crime victim or witness will seldom have reason to lie about the identity of the perpetrator. And, as if that weren't enough, prosecutors will usually be permitted to buttress the reliability of the witness's in-court identification of the defendant by presenting testimony that the witness had also identified him at a lineup or showup when, as is usually the case, the perpetrator's features would have been fresh in the witness's memory.5

Simply put, the combination of the witness's pretrial identification of the defendant and his positive identification in the courtroom generates such convincing force that, from the defendant's perspective, it is devastating.

This is, of course, a good thing—*if* the defendant was the perpetrator. But what if he wasn't? What if the witness was mistaken? And what if he was mistaken because the lineup or showup was intentionally or inadvertently structured so as to induce or otherwise prompt him to identify the defendant? The Supreme Court had this possibility in mind when it observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."6

To help prevent this from happening and also to combat the inherent "vagaries of eyewitness identification,"7 the courts require that officers employ certain procedures that are designed to minimize suggestiveness and maximize reliability. As we will discuss later, if officers fail to comply with these requirements, a court may find that the resulting ID was unreliable and, therefore, inadmissible.

There is another reason that compliance is important. Assuming the witness's ID of the defendant was not so unreliable as to render it inadmissible in court, its impact on jurors will be severely weakened if they think the lineup or showup was unfair. As the Supreme Court cautioned in *Manson* v. *Brathwaite*, "Suggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence." 8 For these reasons, it is essential that officers understand exactly what they are required to do, and what they are prohibited from doing, when conducting lineups and showups.

In addition to the reliability of the ID, there are several other legal issues that officers and prosecutors commonly confront, and which will also be covered in this article. They include a suspect's right to have counsel at a lineup and the attorney's role, what officers can do when a suspect refuses to stand in a lineup, the issuance of Appearance Orders, and defense motions for lineups. But first, the basics.

Types of Lineups and Showups

There are four types of lineups and two types of showups. Although they all serve the purpose of identifying the perpetrator of a crime, they are used in different situations and, as we will discuss later, are subject to different requirements.

LIVE LINEUPS: In common usage, the term "lineup" means a live or "corporeal" lineup in which the suspect is displayed to the witness in the company of five or more people who resemble him; i.e., "fillers" or "foils." As the Court of Appeal explained, a lineup is "a relatively formalized procedure wherein a suspect is placed among a group of other persons whose general appearance resembles the suspect."9

To say that lineups are "formalized" simply means they usually take place in lineup rooms in police stations and jails where the suspect and fillers stand on a stage. Bright lights directed at the stage prevent the suspect from seeing the witnesses, which gives them a much-needed sense of security.

Because live lineups require the suspect's presence, they are usually used only when the suspect is in custody for the crime under investigation or some other crime. If he is not in custody, the usual procedure is to conduct a photo lineup.

RECORDED LINEUPS: In a recorded lineup, officers conduct a live lineup, but without the witness in attendance. Instead, they record the lineup on videotape or digitally, and show it to the witness later. While this procedure is often used when the witness cannot attend a live lineup, it may also be useful if the suspect has a right to have counsel present but an attorney is not available. This is because, as we will discuss later, a suspect does not have a right to counsel when a witness views a recorded lineup.

PHOTO LINEUPS: In a photo lineup, the witness is shown photographs of the suspect and the fillers, usually booking or DMV photos. In most cases, officers will utilize this procedure when it is impractical to conduct a live lineup, usually because the suspect had not yet been arrested.10 A photo lineup may also be necessary if the suspect changed his appearance after the crime occurred, and officers had obtained a photograph of him that better depicted his appearance then.

PHOTO COLLECTIONS: If officers have no suspect, but there is reason to believe that the perpetrator belonged to a certain group, they may show the witness photos of members of that group; e.g., gang books, sexual assault registries, school yearbooks.

VOICE-ONLY LINEUPS: If the witness heard the perpetrator speak, but did not see him, officers may conduct a voice-only lineup in which the witness listens to the voices of the suspect and fillers, but does not see their faces.11 In most cases, the suspect and fillers will say something that the perpetrator said.

Voice-only lineups may be live or prerecorded.

FIELD SHOWUPS: The most common pretrial identification procedure is the field showup in which the suspect is displayed to the witness alone (i.e., without fillers) and the witness is essentially asked, "Is this the perpetrator?" Such a procedure is, of course, highly suggestive, but the courts permit it if there was an overriding reason for not conducting a live or photo lineup.12

In most cases, the overriding reason is that the crime had just occurred, that officers had detained a suspect and they needed to quickly confirm or dispel their suspicion that he was the perpetrator.13 In these situations a showup is justified because, as the Court of Appeal pointed out, "A prompt on-thescene confrontation between a suspect and a witness enables the police to exclude from consideration innocent persons so a search for the real perpetrator can continue while it is reasonably likely he is still in the immediate area."14 Furthermore, the suggestiveness that is inherent in showups will ordinarily be "offset by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later."15

Two other things should be noted about showups. First, there are some procedural restrictions in addition to those relating to suggestiveness. For example, officers must be diligent in conducting showups and they must not transport the suspect to another location for a showup unless he consented or there was good cause. We covered these restrictions in the article "Investigative Detentions" in the Spring 2010 -.

Second, the California Legislature is now considering an addition to the Penal Code which would prohibit officers from conducting showups of suspects if they had probable cause to arrest them. We have discussed some of the problems with such a rule in a comment on page 22 entitled "Showups: Should probable cause make them illegal?"

CONFIRMATORY SHOWUP: Officers have sometimes attempted to confirm that an arrested suspect was the perpetrator by displaying him without fillers, whether live or by photograph. Such a procedure is, of course, highly suggestive.16 For example in the case of *People* v. *Sandoval* 17 officers arrested a suspect in a purse snatch that had occurred about 15 minutes earlier. As they drove him to the police station, the victim, who was already seated in a room at the station, was informed by other officers that the suspect "would be brought through the hallway." As he walked by, the victim identified him, but the court ruled the ID should have been suppressed because this procedure "in effect suggested to the victim that defendant was the robber." Also see "Pre-lineup photo display" on pages 12-13.

Misidentification: The "Primary Evil"

The main legal issue in most ID cases is whether the investigating officers said or did something that was apt to result in misidentification. This, said the U.S. Supreme Court, is the "primary evil to be avoided."18 As we will now discuss, the courts try to prevent this from happening by prohibiting testimony pertaining to a pretrial ID unless there was sufficient reason to believe it was reliable.

Before going further, it should be noted that there may be some confusion about this issue. In the past, a witness's pretrial identification testimony would be suppressed if officers employed procedures that were unduly "suggestive."19 But this changed in

1977 when the Supreme Court in *Manson* v. *Brathwaite* pointed out that suggestiveness, while relevant, does not necessarily lead to misidentification; that the admissibility of a pretrial ID should depend simply on whether it was reliable.20 Said the Court, "Reliability is the linchpin in determining the admissibility of identification testimony." The question, then, is how can the courts determine whether an ID was sufficiently reliable?

The test for admissibility

To determine whether a witness's identification of a defendant at a lineup was sufficiently reliable to be admitted into evidence at trial, the courts employ a two-part test. First, they look to see whether the officers utilized a procedure that was unduly suggestive. If it wasn't, the ID will be admissible.21 If it was, they will determine whether, despite such suggestiveness, the witness's identification of the defendant was sufficiently trustworthy; i.e., whether, despite such suggestiveness, there was no "substantial likelihood of misidentification."22 And if the identification was sufficiently reliable, the ID will be admissible; if not, it will be suppressed. (We will discuss how the courts calculate the trustworthiness of an identification later in this article.)

To recap, the test for determining the admissibility of a lineup identification is as follows:

(1) SUGGESTIVE? Was the lineup unduly suggestive?

No: The ID testimony will be admissible. Yes: Proceed to part (2).

(2) TRUSTWORTHY? Despite such suggestiveness, was the witness's identification of the defendant trustworthy?

No: The lineup results will be suppressed. Yes: The lineup results will be admissible.

Note that if the lineup ID is suppressed, the witness will not be given an opportunity to identify the defendant in court unless prosecutors can prove "by clear and convincing evidence that the in-court identification is based upon observations of the suspect other than the lineup identification."23

What is suggestiveness?

A lineup or showup will be deemed "suggestive" if it was conducted in a manner that would have communicated to the witness that the suspect was, in fact, the perpetrator. As the Court of Appeal explained, a lineup is suggestive "if it suggests in advance of a witness's identification the identity of the person suspected by the police."24 Or, in the words of the California Supreme Court, to warrant the suppression of a witness's identification of a defendant, "the state must, at the threshold, improperly suggest something to the witness; i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure."25

"UNDULY" SUGGESTIVE: As noted, a witness's identification resulting from a suggestive lineup or showup may be suppressed only if the suggestiveness was "undue" or excessive.26 The reason that suggestiveness, in and of itself, will not result in suppression is that, as the Court of Appeal observed in *People* v. *Perkins*, "No identification can be completely insulated from risk from suggestion."27 For example, field showups are inherently suggestive because the witness views only a single person. And lineups are suggestive because the number of fillers is, by necessity, relatively small; plus it is often difficult to locate fillers who closely resemble the suspect.

MERE SUGGESTIVENESS GOES TO WEIGHT: Any suggestiveness that does not rise to the level of "undue" goes to the weight of the identification, not its admissibility.28

UNINTENTIONAL SUGGESTIVENESS: If the actions of the officers rendered the lineup or showup unduly suggestive, it is immaterial that they did not intend to do so.29

BURDEN OF PROOF: The defense has the initial burden of proving that the lineup or showup was unduly suggestive.30 Furthermore, it must prove such suggestiveness "as a demonstrable reality, not just speculation."31 If the defense sustains its burden, the prosecution must prove—by clear and convincing evidence—that the identification was nevertheless trustworthy.32

Suggestiveness: Relevant Circumstances

In determining whether a lineup or showup was unduly suggestive, the courts examine the overall procedure—the totality of circumstances.33 As a practical matter, however, the circumstances we discuss next are almost always decisive.

But first it should be noted that, while we included most of these circumstances because of their longstanding influence on the courts, some were added as the result of a report by the California Commission on the Fair Administration of Justice (CCFAJ) entitled "Report and Recommendations Regarding Eyewitness Identification Procedures." In its report, the CCFAJ suggested that

the reliability of lineups and showups would be improved if law enforcement agencies made certain changes in their procedures. Although these suggestions are not mandated by the courts, we have incorporated them in the following discussion, but with notations that they are CCFAJ recommendations. The California Legislature is, however, considering a bill that would require that "law enforcement study and consider adopting" these procedures.[34]

Similarity between suspect and fillers

While the suspect and the fillers should be similar in age and general appearance, "there is no requirement that [the suspect] be surrounded by people nearly identical in appearance."[35] As the California Supreme Court pointed out, "Because human beings do not look exactly alike, differences are inevitable."[36] Still, officers should attempt to locate fillers who were sufficiently similar in appearance to the suspect so as to enhance the reliability and significance of the witness's identification. The following comments by the courts illustrate what they look for in evaluating the composition of lineups:

LIVE LINEUPS

- "The five men were of substantially equivalent race, height, and weight."[37]
- "The participants all appeared to be of comparable age and of similar build."[38]
- "All six participants were bearded and wore identical clothing . . . with one exception, the others resembled defendant very much."[39]
- "[T]he men in the lineup were dressed in street clothes consisting of sport shirts and slacks of varying designs and colors. All were black men of similar height and physical build."[40]
- Defendant and one of the fillers "had braids or dreadlocks in their hair, while two others appear to have similar type of hair."[41]
- "All of the men have a mustache and some have other facial hair. Several have a hairstyle similar to that of defendant."[42]
- "[A]ll the participants had different types of facial hair, some with mustaches, some with beards, goatees, etc."[43]

PHOTO LINEUPS

- "All [of the five Caucasian women in the photo lineup] are of medium build. The four at the left appear to be of the same general age, that is, between 40 and 50, the tall woman at the extreme right being somewhat younger. None bears a facial resemblance to any of the others. None has extremely distinctive features. The facial idiosyncrasies among the five women are no more marked than those which normally distinguish one person from another."
- The men depicted in the photographs "are all Caucasian, of a reasonably similar build and within the same age group."[44]
- "All of the men depicted in the photographs are White; all have long hair in various shades from blond to brown; and all have beards."[45]
- "All of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other . . . . Minor differences in facial hair among the participants did not make the lineup suggestive."[46]
- "Each lineup consists of five identically sized photographs of Caucasian males of apparently similar age and with similar facial features. Four of the men . . . appear to have similarly colored light red hair. . . . The color photographs show the subjects against identical blue backgrounds." [47]
- "[A]ll six of the pictures are of Caucasian males in the same age range, with similar skin, eye, and hair coloring. Each photo depicts a subject wearing distinctive glasses. Four of the six photos show men with similar length hair, with two having somewhat shorter hair. All except for one are clean-shaven."[48, 49]

VOICE-ONLY LINEUPS: The participants' voices should be "similar in tone, pitch, volume and accent."[50] Thus, in rejecting an argument that a voice-only lineup was suggestive, the court in *People* v. *Vallez* said, "While none of the five imitators was especially talented in impersonating the defendant's voice, the differences between the voices was not so great as to be unfair or impermissibly suggestive."[51]

Did the suspect "stand out?"

If the suspect and fillers were similar in appearance, it is ordinarily immaterial that there was something about the suspect that caused him to stand out. This is because there is usually something about everyone in a lineup that is arguably distinctive; e.g., the tallest, heaviest, best dressed, most uncouth. Consequently, so long as the suspect was not "marked for identification" (discussed later), the fact that there was something distinctive about him will seldom affect the validity of the lineup. As the California Supreme Court explained, the issue is not whether the defendant stood out, but whether he stood out "in a way that would suggest

the witnesses should select him."[52] For example, in rejecting arguments that the defendant stood out in this manner, the courts have noted the following:

- While the defendant was the shortest person in the lineup, he was not "significantly" shorter than the others.[53]
- "[A]lthough defendant was the tallest, all the others were tall as well."[54]
- "Although the other men may have been darker in complexion and not as thin, the men in the lineup were sufficiently similar in appearance"[55]
- "[A]ppellant notes that he was wearing a bright white sweatshirt or sweater. However, so long as the defendant is not alone dressed in a striking manner, there is no need for the police to match outfits of everyone in the lineup anymore than the police are required to match the physical proportions of the other men with scientific exactitude."[56]
- "While defendant's profile is facing the opposite direction from the other five pictures, the point of concern to the witness is the person's features, not the direction he is facing."[57]
- "[A]ny discoloration in defendant's photograph would not suggest it should be selected."[58]
- "[T]he fact defendant's face has a 'yellow cast' is unimpressive as photograph number six has a distinctly 'red cast,' number four has an 'orange cast,' and others have differing color characteristics."[59]
- Although the defendant was the only person in the photo lineup wearing a gold shirt and gold sweater, this clothing "was not similar to that described to the police by [the witness]."[60]
- "[D]efendant's tattoo did not make the live lineup impermissibly suggestive. None of the witnesses observed a tattoo on the gunman's head."[61]

In contrast, the court in *People* v. *Carlos* [62] ruled that a photo lineup was suggestive because the suspect's name and ID number were printed below his photo, while none of the other photos were similarly marked. Said the court, "Although the name placement is not quite an arrow pointing to Carlos, it is plainly suggestive."

LINEUP POSITION: The suspect's position in the lineup is irrelevant. As the California Supreme Court noted, "[N]o matter where in the array a defendant's photograph is placed, he can argue that its position is suggestive."[63]

NUMBER OF FILLERS: The number of fillers is sometimes noted, but it is seldom a significant circumstance because it is common practice to include at least five. An especially large number of fillers will, of course, reduce any suggestiveness; e.g., witness looked for the perpetrator in gang books, mug books, sexual assault registries, school yearbooks.[64]

MULTIPLE LINEUP APPEARANCES: A suspect in a lineup may stand out because the witness had seen him in a previous showup or photo lineup. But, so long as there was a legitimate need for multiple lineup appearances, this circumstance will not render an identification unduly suggestive.[65]

SUSPECT DIRECTS ATTENTION TO HIMSELF: While a suspect will certainly "stand out" if he said or did something that drew attention to himself, the courts will disregard this circumstance in determining whether a lineup or showup was suggestive. As the California Supreme Court observed, the rule prohibiting suggestive lineups and showups "speaks only to suggestive identification procedures employed by the People."[66]

For example, in *People* v. *Boyd* [67] the defendant claimed that his lineup was unduly suggestive because he "hung his head, moved it back and forth and continued to look at the floor for some seconds." In rejecting the argument, the Court of Appeal ruled that "a defendant may not base his claim of deprivation of due process in a lineup on his own behavior." Similarly, in *People* v. *Wimberly*,[68] a robbery case, the suspect and the fillers in a live lineup were asked to say certain words that the robber had said. Because Wimberly spoke too softly to be heard clearly, an officer asked him to repeat the words. On appeal, Wimberly contended that the officer's request rendered the subsequent ID suggestive, but the court, citing *Boyd*, ruled that a suspect may not challenge a lineup "when his own conduct has caused the procedure to be suggestive."

COVERING UP A DISTINCTIVE FEATURE: In some cases it may be possible to reduce or eliminate any suggestiveness resulting from a single feature by covering it up. For example, in *People* v. *De Santis*,[69] where the suspect was much shorter than the fillers in a live lineup, officers eliminated the problem by having the suspect stand on some books that were concealed from the witnesses. And in *People* v. *Adams*,[70] where officers were concerned that the photo of the suspect stood out because of a bandage on his forehead, they covered it up with a piece of paper—then covered all the other photos in the same way. Finally, in *People* v. *De Angelis*,[71] where the photos of comparable fillers were in black and white, but the only photo of the suspect was in color, the officers reproduced it in black and white.

Was the suspect "marked for identification"?

The most obvious example of a suggestive lineup is one in which the suspect was "marked for identification," which occurs if both of the following circumstances existed: (1) the witness provided officers with a particular description of the perpetrator or his clothing, or reported that he had a distinctive feature; and (2) the suspect was the only person in the lineup who matched that description or possessed that feature. As the Second Circuit put it, "A lineup is unduly suggestive as to a given defendant if he meets the description of the perpetrator previously given by the witness and the other lineup participants obviously do not."72

For example, in *People* v. *Caruso* 73 two robbery victims described the driver of the getaway car as "big, with dark wavy hair and a dark complexion." Caruso was arrested and placed in a lineup with four other men. But while he was big, dark, "of Italian descent" with "dark wavy hair," the other four "were not his size, not one had his dark complexion, and none had dark wavy hair." In ruling that the lineup was unduly suggestive, the court said, "During the robbery [the witnesses] noted the driver's large size and dark complexion, and if they were to choose anyone in the lineup, defendant was singularly marked for identification."

Similarly, in *Torres* v. *City of Los Angeles* 74 the court ruled that a suspect was marked for identification in a photo lineup because "only one other photo in the six-pack besides the photo of [the suspect] was of a visibly overweight individual and thus of a person who fit [the victim's] description."

The same principle applies to clothing worn by the perpetrator. For example, in *Foster* v. *California* 75 the Supreme Court invalidated a lineup because "petitioner stood out from the other two men . . . by the fact that he was wearing a leather jacket similar to that worn by the robber." And in *People* v. *Ware* 76 the court ruled that a photo lineup was suggestive because the defendant was "the only person in the photos wearing a blue denim jacket of the type [that the victim] reported her assailant was wearing."

On the other hand, if the feature was not particularly distinctive, or if it was shared by other fillers, the courts will usually admit the ID and let the jury decide its weight. Thus, in ruling that the defendant was not marked for identification, the courts have noted the following:

- "While it is true that defendant's photograph has the mustache with the most pronounced gap in the center [the perpetrator had a gapped mustache], others of the photographs have mustaches with at least slight gaps."77
- "The mere fact that defendant was wearing the same color pants worn by the robber did not make the lineup unfair."78
- Although the perpetrator wore a bandana, and although the defendant was the only person in the photo lineup who wore a bandana, "two of the other photos showed persons with different headgear."79
- While the man who robbed a liquor store was wearing a blue jacket, and although the defendant was wearing a blue jacket at the lineup, all of the eight men in the lineup were wearing similar blue jackets.80

Pre-lineup communications

A lineup or showup that was otherwise fair may be deemed suggestive if officers said or did something beforehand that would have prompted the witness to select the suspect. As the United States Supreme Court observed, "Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they suspect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification."81

PROVIDING SUGGESTIVE INFORMATION: Officers must, of course, say nothing to the witness that could be reasonably interpreted as directing attention to the suspect.82 Thus, the Court of Appeal warned against "[s]uggestive comments or conduct that single out certain suspects or otherwise focus a witness's attention on a certain person in a lineup."83 For example, in *Torres* v. *City of Los Angeles* 84 the court ruled it was suggestive to tell the witness that officers had "possibly identified the 15 to 16 year-old chubby boy" who was involved in a drive-by murder, and there were only two overweight boys in the lineup, one of whom was the defendant.

IMPLYING A SUSPECT OR PERPETRATOR IS IN LINEUP: It has been argued that officers must not even inform a witness that they have arrested someone, or that one of the people in the lineup is a "suspect." While officers should avoid suggesting that the perpetrator is in the lineup ("Which one of these guys did it?"85), the courts have consistently rejected arguments that it was unduly suggestive to inform a witness that someone in the lineup was a suspect. This is because witnesses who are asked to view a lineup will naturally assume that officers did not grab six people off the street at random in hopes that one of them might have been

the perpetrator.[86] Still, when suggestiveness is an issue, the courts often note, at least in passing, whether the officers did or did not tell the witness that they had a "suspect" or that a "suspect" was in the lineup.[87]

"ANOTHER WITNESS MADE AN ID": If another witness had previously identified someone in a lineup, officers should keep this confidential as it may be viewed as pressuring the witness to make an identification.[88]

CAUTIONARY INSTRUCTIONS: It is considered standard procedure for officers to help reduce any inherent suggestiveness by giving the witness certain information and instructions.[89] The following are fairly common:

LINEUPS

- The perpetrator may or may not be in the lineup. (Or, do not assume that we have identified the perpetrator merely because we are asking you to attend a lineup.)
- You are not obligated to identify anyone.
- Do not discuss your case with other witnesses or anyone else in the room.
- Do not call out a person's number or do anything that might indicate to others that you have identified someone.
- If you want to have a certain person say or do something, make your request to the officer conducting the lineup. All people in the line will then be asked to say or do the same thing.
- Our investigation in this case will continue regardless of whether you identify or do not identify anyone. (CCFAJ recommendation)

SHOWUPS

- Do not assume that the person you will be seeing is the perpetrator merely because we are asking you to look at him [or because he is handcuffed] [or because he is sitting in a patrol car].
- Do not speak with the other witnesses who will be going with us.
- When we arrive, do not say anything in the presence of other witnesses that would indicate you did or did not recognize someone. You will be questioned separately.
- Our investigation in this case will continue regardless of whether you identify or do not identify anyone. (CCFAJ recommendation)

Post-lineup communications

After a live or photo lineup, officers will ordinarily want to talk to the witness about his identification of the suspect or his failure to make an identification. As we will now discuss, such communications are ordinarily appropriate and will not affect the admissibility of subsequent identifications.

HOW CONFIDENT? If the witness identified someone, the CCFAJ recommends that officers inquire as to his degree of confidence that he picked the perpetrator; and that his responses be recorded or included in the lineup report. The Seventh Circuit also addressed this issue in *United States* v. *Williams* when it said, "Obtaining immediate estimates of confidence also reduced the chance of error. People often profess greater confidence after the fact; their memories realign to their earlier statements, so that trial testimony may reflect more confidence than is warranted."[90]

"ANYONE CLOSELY RESEMBLE?" If the witness did not identify anyone, or if he made only a tentative ID, it is not suggestive to ask whether anyone in the lineup closely resembled the perpetrator. In fact, the court in *People* v. *Perkins* [91] pointed out that such a question was "a logical one" after the officer's chief witness failed to identify a suspect. Said the court, "In order to continue the investigation and make certain he was on the right track, [the officer] needed to explore [the witness's] recollection and description of the robber."

WITNESS REACTS TO SEEING SOMEONE: If the witness did not make an ID, but said or did something that indicated he recognized someone in the lineup, it is appropriate to question him about this. Said the Court of Appeal, "It is not impermissible or unduly suggestive for a police officer to question witnesses further if the officer believes the witnesses may actually recognize someone in the lineup."[92]

WITNESS REQUESTS INFORMATION: Officers at a lineup may provide information about the suspect to a witness if (1) the witness made a positive or tentative identification of a suspect, and (2) the witness requested the information. For example, in *People* v. *Ochoa* [93] a rape victim picked the defendant's photo but added that, to be sure, she would need to see a profile photo; so

the officer showed her one. In rejecting the argument that the officer's act of providing this information rendered the procedure suggestive, the California Supreme Court said, "Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything."

Similarly, in *People* v. *Perkins* 94 the victim of a robbery noticed that one of the robbers had a tattoo of a lightning bolt on his neck. During the lineup, the victim recognized Perkins as the robber but said she "could not be sure" until she knew whether he had such a tattoo; the officer then confirmed that he did. On appeal, the court ruled that the officer's confirmation did not render the lineup unduly suggestive because the victim had recognized Perkins as the robber before she learned about the tattoo, and that the purpose of her question was only to confirm a "key detail."

"YOU PICKED THE RIGHT ONE": Officers should not inform a witness that he picked the "right" person in a lineup or otherwise confirm that he selected the suspect because it may have a "corrupting effect" on his subsequent identifications.95 This is especially true if the witness made only a tentative ID. For example, in *People* v. *Gordon* 96 police arrested Gordon for the robbery-murder of an armored car guard. At a live lineup, a witness told officers that Gordon "looks familiar, but I'm not certain." Later that day, an officer phoned the witness to inquire about her comment. According to the court, in the course of the conversation the officer essentially told her that she had "picked the right person." As the result, all subsequent identifications of Gordon by the witness were suppressed.

Even if the witness positively identified the suspect, officers should not inform him that there was additional evidence of his guilt. For example, in *People* v. *Slutts* 97 two witnesses to an indecent exposure tentatively identified Slutts, after which an officer told them that Slutts "had committed a prior similar offense" and needed psychiatric help. The court observed that this statement "was made apparently to persuade the girls to hold to their identification of defendant." And although this did not result in the suppression of the ID (because the ID occurred beforehand), it was a legitimate issue on appeal.

Other relevant circumstances

WERE THE WITNESSES SEPARATED? Whenever two or more witnesses will be viewing a lineup or showup, it would be inherently suggestive if one of them were to hear another witness identify the suspect. As the court explained in *People* v. *Ingle*,98 "It has been recognized that permitting one eyewitness to a crime the opportunity to observe another eyewitness make a photo lineup identification before he himself is asked to make his own identification is unnecessarily suggestive and fraught with the potential for irreparable misidentification." It has also been noted that a witness who identifies a suspect after hearing another witness identify him may subconsciously become unduly confident of his identification due to "mutual reinforcement."99

For this reason, it has become standard procedure to segregate the witnesses before the viewing occurs, and question them separately.100 For example, in *People* v. *Sequeira* 101 the court ruled that one of the circumstances that rendered a lineup "eminently fair" was that the witnesses "were separated, told not to talk with each other, and to designate their identifications by writing the suspect's number on a card provided them."

DOUBLE-BLIND LINEUPS: To help prevent suggestiveness, the CCFAJ has recommended that live and photo lineups be "double-blind," meaning that the officers who conduct the lineup do not know the identity of the suspect. The advantage of this procedure is that the officers cannot possibly say or do anything—whether intentionally or inadvertently— that would have called attention to the suspect.102 (By the way, it is called a *double* blind lineup because neither the officers nor the witnesses are informed beforehand of the suspect's identity.)

SEQUENTIAL LINEUPS: When officers are conducting double-blind live or photo lineups, the CCFAJ recommends that they display the suspect and the fillers to the witness one at a time. These are known as "sequential" lineups, as opposed to simultaneous live lineups in which the suspect and the fillers appear on stage at the same time, and simultaneous photo lineups in which the photographs are displayed all at once.

According to some psychologists, witnesses who view simultaneous lineups may tend to compare the people in the lineup with one another instead of comparing each one with their mental picture of the perpetrator. And this tendency, they contend, may result in misidentifications because, if the perpetrator was not in the lineup, the witness may identify the person who most resembles him. To date, only one California court has discussed the subject of sequential lineups, and its conclusion was positive. The case was *People* v. *Brandon* and the court said, "The circumstances surrounding the photographs being shown to [the witness] (loose, in a stack and shown one at a time) reflect she was not influenced by any so-called 'filler' photographs." 103

PRE-LINEUP PHOTO DISPLAY: Just before conducting a lineup, officers have sometimes shown surveillance photos of the perpetrator to the witness. Such a procedure is, to put it mildly, "arguably suggestive."[104] Nevertheless, the courts have not strictly prohibited it when there was good reason to believe the ID was reliable; e.g., the witness got a good look at the perpetrator.[105] It is also probably because the perpetrator's ID is not apt to be a significant issue at trial if prosecutors have photographs of him committing the crime. But if ID will be a contested issue, this procedure should be avoided because, even if the identification is ruled admissible, it is apt to have little weight with the jury.[106]

RECORDING LINEUPS; RETAINING PHOTOS: To prove that live lineups were fair, the CCFAJ recommends that they be recorded. As for photo lineups, it is already standard practice to retain the photos.[107]

Identification Trustworthiness

As noted, even if a lineup or showup was unduly suggestive, the resulting identification will not be suppressed if it was nevertheless trustworthy. While the courts will consider the totality of circumstances in determining whether an identification was trustworthy,[108] the following circumstances are usually key:

OPPORTUNITY TO OBSERVE PERPETRATOR: The courts almost always note the extent to which the witness had an opportunity to see the perpetrator before, during, or after the crime. This is because the danger of misidentification is particularly grave "when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."[109] Of particular importance are the length of time the witness saw the perpetrator, the distance between them, whether the witness's view of the perpetrator was obstructed, and the lighting conditions. For example, in ruling that witnesses had a good opportunity to see the perpetrator, the courts have noted the following:

- "two to three minutes . . . within two feet . . . natural light"[110]
- "up to half an hour . . . under adequate artificial light in her house and under a full moon outdoors"[111]
- "The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber for periods ranging up to five minutes."[112]
- "close range for at least three minutes"[113]
- a "clear and unobstructed view [for 15-20 minutes] . . . well-lighted conditions"[114]
- the victim had an "unobstructed view . . . for at least three minutes"[115]
- "well-lit bedroom for a couple of minutes"[116]
- "20-to-30 second opportunity . . . with lighting provided by the headlights of both cars and a streetlight"[117]
- "Her view of his face with the nylon covering (which did not distort his features) from a foot away lasted about a minute and a half."[118]

ATTENTION DIRECTED AT PERPETRATOR: A witness's identification is especially likely to be deemed trustworthy if his attention had been directed at the perpetrator.[119] For example, in *People* v. *Gomez* [120] the court ruled that a robbery victim's ID of the defendant was trustworthy because, among other things, she "kept reminding herself to study the face of the robber because she knew she would be called upon later to identify him." And in *People* v. *Sanders* [121] the court noted that a man who survived an attack in which his friend was killed testified that he "focused on his attackers' faces in order to identify them if he survived the attack."

Conversely, the trustworthiness of an identification may become an issue if the witness had only a glance at the suspect, or if he was just a casual or passing observer.[122]

SOMETHING DISTINCTIVE: In some cases, a witness's attention may be directed to the perpetrator because there was something distinctive or unusual about him.[123] For example, in *People* v. *Cunningham* [124] the witnesses to a robbery-murder testified that their attention was initially drawn to the perpetrator because of his unusual appearance which included a "burgundy three-piece pinstripe polyester suit and tie," "thick glasses with dark rims," "a mustache that connected with a goatee-like beard," and his "hair in back was shoulder-length in the middle."

DETAILED DESCRIPTION: The courts often consider whether the witness had initially provided officers with a detailed description of the perpetrator, or whether the description was vague or general. For example, in ruling that a witness's description appeared to be trustworthy, the courts have noted the following:

- The description included "the assailant's approximate age, height, weight, complexion, skin texture, build, and voice." [125]

- The description included the perpetrator's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing [he] wore."126
- The witness "described his age, facial appearance and his wearing apparel in some detail."127
- The witness described his "clothing, hair, complexion, facial hair, height, weight, and condition of intoxication."128

ACCURACY OF INITIAL DESCRIPTION: A strong indication of trustworthiness is the accuracy of the witness's initial description of the perpetrator; i.e., the number of descriptive details that matched.129 For example, in *People* v. *Guillebeau* 130 the court explained that one of the reasons a rape victim's identification of the defendant was reliable was that she was able to help make a composite picture of her assailant "which strongly resembled appellant." While inaccuracies are also relevant,131 the courts understand that witnesses are often unable to provide detailed descriptions, and that discrepancies are inevitable. Consequently, a somewhat inaccurate description may be offset by other circumstances that tend to show the ID was reliable.132

INCONSISTENCIES: If an identification was otherwise reliable, some inconsistencies in the witness's description of the perpetrator will go to the weight of the ID, not its admissibility.133

ID BASED ON MULTIPLE FACTORS: For the same reason that the specificity of a witness's initial description is a sign of trustworthiness, the courts also consider whether the witness's subsequent identification of the defendant was based on several characteristics or just one.134 For example, although a witness in *People* v. *Flint* 135 "had difficulty" identifying a burglar by his facial features, the Court of Appeal ruled the identification was sufficiently trustworthy because it was also based on "his clothing, posture, build, hairstyle, and race."

WITNESS TRAINED TO PAY ATTENTION: The trustworthiness of an identification may be bolstered by the fact that the witness had been trained to pay special attention to people he thinks he might need to identify later; e.g., bank tellers, police officers.136 As the United States Supreme Court observed in *Manson* v. *Brathwaite*, "[A]s a specially trained, assigned, and experienced officer, [the witness] could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his [drug] vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial."137

WITNESS HAD SEEN PERPETRATOR BEFORE: An ID is naturally likely to be more trustworthy if the witness was acquainted with the perpetrator or had seen him before.138 For example, in ruling that a rape victim's identification of her attacker was reliable, the court in *People* v. *Nash* noted that she "had seen appellant around the neighborhood on one or two occasions prior to this event."139

ACCURACY IN EARLIER LINEUPS: It may be logical to infer that the witness's identification was accurate if he previously failed to identify anyone in a lineup in which the defendant was not present.140 Thus, in *Neil* v. *Biggers* the Supreme Court pointed out that "the victim made no previous identification at any of the showups, lineups, or photographic showups. Her record for reliability was thus a good one."141 On the other hand, there may be problems if the witness identified a filler, especially if he did not resemble the defendant.142

LEVEL OF CERTAINTY: The courts frequently note whether, and to what extent, the witness had expressed certainty that the person he picked was the perpetrator.143 A lack of certainty will not, however, render an ID untrustworthy. As the Court of Appeal explained in *People* v. *Lewis*, "Lack of positiveness in identification does not destroy the value of the identification but goes onto to its weight."144 (For additional cases that are related to this subject, see "Mere suggestiveness goes to weight" on page 4.)

IMMEDIATE ID: Although it is relevant that the witness immediately identified the defendant,145 it is seldom a significant circumstance because the courts know that witnesses often take their time in making such an important decision. Furthermore, officers often instruct the witnesses to take their time.146

TIME LAPSE BETWEEN CRIME AND LINEUP: Because memories fade, the length of time between the crime and the lineup or showup is relevant.147

INDEPENDENT EVIDENCE OF GUILT: It is logical to infer that a witness's ID of the defendant was trustworthy if there was additional independent evidence of his guilt; e.g., the defendant confessed to the crime, his fingerprints were found at the crime scene, he was identified by other witnesses.148

Right to Counsel

Under certain circumstances, a suspect has a right to have counsel present for the purpose of observing the manner in which the lineup was conducted. As we will now discuss, there are essentially three legal issues pertaining to this right: (1) When does a suspect have a right to counsel? (2) What is the attorney permitted to do? (3) How can officers obtain a waiver of the right?

When the right attaches

Under the Sixth Amendment, a suspect acquires a right to have counsel present at a lineup or showup if all of the following circumstances exist: (1) the suspect was charged with a crime and had been arraigned on that charge, (2) the lineup or showup pertained to the charged crime, and (3) the suspect appeared in person at the lineup or showup.

ARRAIGNMENT: In 2008, the United States Supreme Court ruled that, for Sixth Amendment purposes, a suspect becomes "charged" with a crime at the point he makes his first court appearance pertaining to that crime. Said the Court, "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."149

IN-PERSON IDENTIFICATION: Even if the suspect had been arraigned on the crime under investigation, he does not have a right to have counsel to observe the lineup procedure unless the witness will be viewing him in person or, in the case of a voice-only lineup, listening to him in person. Consequently, a suspect will not have a right to counsel when the witness views his photograph in a photo lineup, views a videotape of a live lineup, or listens to a tape recording of a voice-only lineup.150

The reason the right to counsel does not attach in these situations is that the defendant's trial attorney will be able to explore the possibility of suggestiveness by looking at the photos or videotape, or listening to the audio tape. Note, however, that a violation of the right to counsel might occur if officers are unable to provide the defense with copies of the photographs or recordings.151

SUPPRESSION OF EVIDENCE: If a court rules that officers conducted a lineup in violation of the defendant's right to counsel, the prosecution will be prohibited from introducing testimony that the witness had identified the defendant at the lineup.152 The witness will also be prohibited from identifying the defendant at trial unless prosecutors can prove, by clear and convincing evidence, that the in-court identification was independent of the unlawful lineup identification.153

What the attorney is permitted to do

The attorney's role at a lineup is limited to that of a silent observer, taking note of any suggestiveness in the procedure so that he can later assist trial counsel in challenging the lineup.154 A good explanation of the attorney's function was provided by Justice Mosk in *People* v. *Williams*:

[D]efense counsel has no affirmative right to be active during the course of the lineup. He cannot rearrange the personnel, cross-examine, ask those in the lineup to say anything or to don any particular clothing or to make any specific gestures. Counsel may not insist law enforcement officials hear his objection to procedures employed, nor may he compel them to adjust their lineup to his views of what is appropriate. At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination . . . 155

RIGHT TO BE PRESENT WHEN ID IS MADE: Because

the attorney serves as an observer of the identification process, he has a right to be present when the witness is asked if anyone in the lineup was the perpetrator.156 This is because any suggestiveness at that point is just as likely to result in misidentification as suggestivess that occurs during the viewing.

For example, in *People* v. *Williams*, discussed above, the defendant's attorney was present when a witness viewed the lineup, but then the officers took the witness into another room "for the purpose of making his identification." The attorney asked to observe but his request was denied on grounds that it was against departmental policy. On appeal, the California Supreme Court ruled that such a departmental policy violated Williams' right to counsel because, said the court, "It is not the moment of viewing alone, but rather the whole procedure by which a suspect is identified that counsel must be able to effectively reconstruct at trial."

PRE- AND POST-LINEUP INTERVIEWS: The suspect's attorney does not have a right to be present when officers interview a witness before the lineup begins or after it was completed.157 For example, in *People* v. *Perkins* 158 the defendant's attorney left the lineup after the witness failed to identify Perkins as the man who robbed her. A few minutes later, an officer asked the witness if there was anyone in the lineup who resembled the robber. She replied that one of the men was, in fact, the robber—it was Perkins. On appeal, Perkins, contended that the post-ID interview violated his right to counsel, but the court disagreed, saying, "[S]ince the

identification process had been completed, Perkins' counsel had no more right to be present at the interview than he would at any nonconfrontational identification by a victim. No defendant has the right to demand representation by counsel at every interview between the prosecution and its witnesses."

Similarly, in *People* v. *Mitcham* 159 a robbery victim who was viewing a live lineup at Oakland police headquarters placed a question mark on the lineup card next to Mitcham's number. The robbery investigator did not immediately ask her to explain the question mark because it was "standard practice in his office not to discuss lineup details in the presence of defense counsel." One week later, he met with the victim and asked her about the question mark, and she said she was "95% sure" that Mitcham was the robber. On appeal, Mitcham contended that the victim's identification of him should have been suppressed, urging the California Supreme Court to rule that a lineup is not "over" until the post-lineup interview is completed. But the court refused, ruling instead that the lineup was complete when the victim "filled out and signed the identification card, indicating her identification of defendant, qualified by a question mark."

Waiver of right to counsel

A suspect may waive the right to counsel, even if he has an attorney.160 To obtain a waiver, officers must begin by advising him of the following rights:

1. You have a right to have counsel present at the lineup.
2. You are not required to participate in the lineup without counsel.
3. If you want an attorney but cannot afford one, the court will appoint one for you at no charge.161

Officers must then ask the suspect if, having these rights in mind, he is willing to waive the right to counsel. Furthermore, like any other waiver, the waiver of the right to counsel must be made freely, meaning that officers must not pressure the suspect to waive. Note that because there are significant differences between the right to counsel at a lineup and the *Miranda* right to counsel during interrogation, a *Miranda* waiver does not constitute a waiver of counsel's presence at a lineup.162

Attorney not available or won't participate

If the suspect requests a certain attorney who cannot attend the lineup or refuses to do so, officers may proceed with the lineup if they obtain "substitute counsel."163 If the suspect's attorney appears at the lineup but, for whatever reason, refuses to observe the procedure, officers may proceed with the lineup without him. For example, in *People* v. *Hart* the public defender, "[u]pon seeing the composition of the lineup," objected that it was unfair and immediately "departed." On appeal, the California Supreme Court rejected the defendant's argument that the lineup violated his Sixth Amendment right to counsel because, said the court, "the public defender's *refusal* to attend the lineup cannot be equated with a *denial* of defendant's right to counsel."164 In such a situation, however, officers should photograph or videotape the lineup so that prosecutors can prove the lineup was not suggestive.

There is one other option when counsel cannot or will not participate in a lineup: Photograph or record the lineup without the witness being present, then show the witness the photos or the recording of the lineup. As noted earlier, such a procedure does not violate the suspect's right to counsel because a suspect does not have a right to counsel unless the witness is viewing a live lineup.

Other Lineup Issues

REFUSAL TO STAND IN A LINEUP: A suspect does not have a right to refuse to participate in a lineup, refuse to speak during a voice lineup, or refuse to wear clothing for identification purposes.165 And if he refuses, prosecutors may be permitted to disclose it to the jury at trial as evidence of his consciousness of guilt.166

To help ensure the admissibility of this evidence at trial, officers should notify the suspect that his refusal to participate may be used against him in court as evidence that he knew he would be identified as the perpetrator.167 The following is an example of such an admonition:

You do not have a right to refuse to participate in a lineup. But if you refuse, your decision to do so may be used in court as proof that you are, in fact, guilty of the crime for which you have been arrested, and that you knew the witness[es] at the lineup would positively identify you as the perpetrator. Having these consequences in mind, do you still refuse to participate in the lineup?

Note that if the suspect refuses to speak at a lineup, and if he was previously *Mirandized*, officers must notify him that the *Miranda* right to remain silent does not give him a right to refuse to participate in a voice test.168

COMPELLING A SUSPECT TO STAND IN LINEUP: If a suspect refuses to participate in a live lineup, officers may seek a court order that would compel him to do so. Such an order may also authorize officers to use reasonable force if, after being served with a copy of the order, he still refuses to comply.169 As the Seventh Circuit observed in *In re Maguire*, "While it may not enhance the image of justice to force a [suspect] kicking and screaming into a lineup, the choice has been made by the [suspect], not the court."170

In terms of form and procedure, it appears that such an order would be virtually the same as a search warrant. First, an officer would submit to the judge an affidavit containing the following: (1) the name of arrestee and any identifying number, (2) the name of the jail in which the arrestee is currently being held, (3) the crime for which the arrestee was arrested, and (4) the names of the affiant and his agency. The affidavit must then demonstrate probable cause to believe (1) that the arrestee committed the crime under investigation, (2) that the results of the lineup would be relevant to the issue of his guilt,171 and (3) that the arrestee notified officers that he would not voluntarily appear in a lineup.

A sample court order is shown on the next page. To obtain a copy via email in Microsoft Word format, send a request from a departmental email address to POV@acgov.org.

APPEARANCE ORDERS: If the suspect is in custody in another county in California, officers may seek an "Appearance Order" authorizing them to transport the suspect to the county in which the lineup will be held. Such an order may be issued upon an *ex parte* declaration that establishes "sufficient cause" to believe that the suspect committed the crime under investigation, and that a live lineup was reasonably necessary.172 If the suspect is out of custody, there is currently no procedure for compelling him to appear in a live lineup.173

DEFENDANT'S MOTION FOR LINEUP: A defendant may file a motion for a court order requiring that officers place him in a live lineup. But such a motion may be granted only if it establishes the following: (1) the perpetrator's identity will be a material issue in the case, (2) there is a reasonable likelihood of a mistaken identification which a lineup would tend to alleviate, and (3) the motion was made in a timely manner.174

References

1. (1970) 399 U.S. 1, 5.
2. *Evans* v. *Superior Court* (1974) 11 Cal.3d 617, 623.
3. *United States* v. *Wade* (1967) 388 U.S. 218, 235.
4. *United States* v. *Wade* (1967) 388 U.S. 218, 229.
5. See *Gilbert* v. *California* (1967) 388 U.S. 263, 273 ["[T]he witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury."]; *People* v. *Gould* (1960) 54 Cal.2d 621, 626 ["Evidence of extrajudicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence of identity."].
6. *United States* v. *Wade* (1967) 388 U.S. 218, 229 [quoting from Wall, "Eye-Witness Identification in Criminal Cases"].
7. *United States* v. *Wade* (1967) 388 U.S. 218, 228.
8. (1977) 432 U.S. 98, 112, fn.12. Also see *People* v. *Carter* (1975) 46 Cal.App.3d 260, 266 ["[T]he probative value of an identification depends on the circumstances under which it was made."].
9. *People* v. *Dampier* (1984) 159 Cal.App.3d 709, 712-13. Edited.
10. **NOTE**: There is no rule requiring that officers conduct live lineups instead of photo lineups. See *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052, fn. 16 ["there is no constitutional requirement that a live lineup be conducted"]; *People* v. *Lawrence* (1971) 4 Cal.3d 273, 277 [although it might have been "better" to conduct a live lineup, "the failure to take such action is not the crucial factor in the determination of the case at bench"]; *People* v. *Whittaker* (1974) 41 Cal.App.3d 303, 309 [no requirement that "once [the defendant] was in custody, officers were limited to use of a corporeal lineup"]; *People* v. *Suttle* (1979) 90 Cal.App.3d 573, 581 ["we will not go farther by holding that a corporeal lineup should have been used since appellant was in custody"].
11. See *People* v. *Ellis* (1966) 65 Cal.2d 529, 534 ["The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics"]; *People* v. *Clark* (1992) 3 Cal.4th 41, 135-37.
12. See *People* v. *Sandoval* (1977) 70 Cal.App.3d 73, 85 ["Such a procedure should not be used, however, 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."]; *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587 ["a single person showup is not necessarily unfair"].

13. See *Stovall* v. *Denno* (1967) 388 U.S. 293, 302; *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1219.
14. *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072.
15. *People* v. *Odom* (1980) 108 Cal.App.3d 100, 110.
16. See *People* v. *Bisogni* (1971) 4 Cal.3d 582, 586-87 [witnesses "were asked to look through a hole in a door or wall [at the police station] where they observed [the suspect] alone in a room"; a "highly suggestive" procedure]; *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 ["After Lopez failed to identify appellant from the photo lineup, the deputy district attorney showed him a single photo of Contreras two days before the preliminary hearing and asked if Lopez could identify him as his assailant"].
17. (1977) 70 Cal.App.3d 73.
18. *Neil* v. *Biggers* (1972) 409 U.S. 188, 198.
19. See *Neil* v. *Biggers* (1972) 409 U.S. 188, 198.
20. (1977) 432 U.S. 98, 114.
21. See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114; *People* v. *Virgil* (2011) 51 Cal.4th 1210, 1256 ["If the answer to the first question is 'no,' because we find that the challenged procedure was not unduly suggestive, our inquiry into the due process claim ends."]; *People* v. *Avila* (2009) 46 Cal.4th 680, 699 ["Because we have concluded the lineup was not unduly suggestive, we need not consider whether it was reliable"].
22. *Neil* v. *Biggers* (1972) 409 U.S. 199, 198.
23. *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587. Also see *United States* v. *Crews* (1980) 445 U.S. 463, 473.
24. *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052. Also see *Foster* v. *California* (1969) 394 U.S. 440, 443.
25. *People* v. *Ochoa* (1998) 19 Cal.4th 353, 413.
26. See *Neil* v. *Biggers* (1972) 409 U.S. 199, 198-99; *People* v. *Kennedy* (2006) 36 Cal.4th 595, 610.
27. (1986) 184 Cal.App.3d 583, 590.
28. See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116 ["We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill."]; *Foster* v. *California* (1969) 394 U.S. 440, 442, fn.2 ["The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury."]; *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 591 ["Here, Perkins's counsel was able to effectively develop and cross-examine witnesses about the facts of Maria's identification. No more was required."]; *People* v. *DeVaney* (1973) 33 Cal.App.3d 630, 636 ["[I]t was for the jury to determine whether Pendleton's in-court identification was believable."]; *U.S.* v. *Williams* (7th Cir. 2008) 522 F.3d 809, 811 ["The normal way of dealing with [errors] is to expose the problem at trial so that a discount may be applied to the testimony, rather than to exclude relevant evidence."].
29. See *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 881 ["it matters not" whether suggestiveness "was caused by inadvertence"].
30. See *People* v. *Avila* (2009) 46 Cal.4th 680, 700 ["Defendant does bear the burden of demonstrating the identification procedure was unduly suggestive."]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 989 ["The defendant bears the burden of demonstrating the existence of an unreliable identification procedure."]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 ["The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted"].
31. *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1222; *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 589.
32. See *People* v. *Cooks* (1983) 141 Cal.App,3d 224, 306; *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 881; *People* v. *Ratliff* (1986) 41 Cal.3d 675, 689.
33. See *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839; *People* v. *Blum* (1973) 35 Cal.App.3d 515, 520 ["The fairness of a lineup is to be assessed in the light of the totality of the circumstances."].
34. Assembly Bill 308 — 2011-2012 Regular Session.
35. *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 790. Also see *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052 ["[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance."].
36. *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367.
37. *People* v. *Mosher* (1969) 1 Cal.3d 379, 396.
38. *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280.
39. *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367.
40. *People* v. *O'Roy* (1972) 29 Cal.App.3d 656, 662.
41. *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 272.

42. *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990.
43. *People* v. *Adams* (1982) 137 Cal.App.3d 346, 353.
44. *People* v. *Holt* (1972) 28 Cal.App.3d 343, 350.
45. *People* v. *Wash* (1993) 6 Cal.4th 215, 245, fn.11.
46. *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1217.
47. *People* v. *Yeoman* (2003) 31 Cal.4th 93, 124-25, fn.6.
48. *U.S.* v. *Beck* (9th Cir. 2005) 418 F.3d 1008, 1012.
49. *People* v. *Malich* (1971) 15 Cal.App.3d 253, 260.
50. *People* v. *Vallez* (1978) 80 Cal.App.3d 46, 55.
51. (1978) 80 Cal.App.3d 46, 54.
52. *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367. Also see *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 391
53. *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355. Also see *People* v. *Mosher* (1969) 1 Cal.3d 379, 396 ["While it has been suggested that a lineup with a tall defendant among short men could be unfair, the California cases have held that the height disparity in a lineup is not per se suggestive."]; *People* v. *Rist* (1976) 16 Cal.3d 211, 218 ["Aside from the fact that defendant may have been the shortest member of the lineup there is no evidence that he differed in appearance from the other members."]; *People* v. *Blair* (1979) 25 Cal.3d 640, 661["[D]efendant does not appear to be significantly taller, heavier, or older than the other participants."].
54. *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1243. Also see *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237 [suspect was the tallest].
55. *People* v. *Floyd* (1970) 1 Cal.3d 694, 712. Also see *People* v. *Guillebeau* (1980) 107 Cal.App.3d 531, 557 ["While in the six-picture color photo lineup appellant was darker complected than the other Negroes, this does not by itself render the identification unduly suggestive."].
56. *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 790.
57. *People* v. *West* (1984) 154 Cal.App.3d 100, 105.
58. *People* v. *Gonzalez* (2006) 38 Cal.4th 932, 943. Also see *People* v. *Hicks* (1971) 4 Cal.3d 757, 764 [court rejects the argument that a photo lineup was unreliable because his photo "had a gray background while the others had a white background"]
59. *People* v. *West* (1984) 154 Cal.App.3d 100, 105.
60. *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280.
61. *People* v. *Gonzalez* (2006) 38 Cal.4th 932, 944.
62. (2006) 138 Cal.App.4th 907, 912.
63. *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1217. Also see *People* v. *De Angelis* (1979) 97 Cal.App.3d 837, 841 ["[T]he contention of 'strategically' placing defendant's photo toward the center of the display fails of merit. No matter where placed, a like complaint could be made."]; *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237-38 [immaterial that defendant was at the end of the line]; *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 392 ["the positions of the lineup participants were allotted by chance drawing"].
64. See *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 [school yearbook]; *People* v. *Pervoe* (1984) 161 Cal.App.3d 342, 357 [scrapbook]; *People* v. *Posten* (1980) 108 Cal.App.3d 633, 647 ["mug" book]; *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 [book of parolees]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 ["All together well over 20 person are depicted"].
65. See *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 272; *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355.
66. *People* v. *Yeoman* (2003) 31 Cal.4th 93, 125.
67. (1990) 222 Cal.App.3d 541.
68. (1992) 5 Cal.App.4th 773. Also see *U.S.* v. *Jones* (4th Cir. 1990) 907 F.2d 456, 459-60 ["Johnson may have been asked to repeat 'Hit the floor!' but only because he had spoken softly the first time."].
69. (1992) 2 Cal.4th 1198.
70. (1982) 137 Cal.App.3d 346.
71. (1979) 97 Cal.App.3d 837.
72. *Raheem* v. *Kelly* (2nd Cir. 2001) 257 F.3d 122, 134.
73. (1968) 68 Cal.2d 183. COMPARE *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280; *People* v. *Thomas* (1970) 5 Cal.App.3d 889, 900.
74. (9th Cir. 2008) 548 F.3d 1197, 1208.

75. (1969) 394 U.S. 440, 442-43.
76. (1978) 78 Cal.App.3d 822, 839.
77. *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 792. Also see *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1222 [“This hardly uncommon apparel cannot be termed a badge of identity here”]; *People* v. *McDaniels* (1972) 25 Cal.App.3d 708, 711 [blue shirt]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990 [“at least one of the other men is dressed in a three-piece suit, and another is wearing a suit jacket”]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169-70 [the witness’s “recollection and use of a distinct aspect of the robber’s appearance [i.e., ‘a bad case of acne’] enhances, rather than undermines, the inference that his photo identification was accurate”].
78. *People* v. *Harris* (1971) 18 Cal.App.3d 1, 6.
79. *In re Charles B.* (1980) 104 Cal.App.3d 541, 544-45.
80. *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237.
81. *Moore* v. *Illinois* (1977) 434 U.S. 220, 224-25. Also see *Simmons* v. *United States* (1968) 390 U.S. 377, 383 [“The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.”].
82. See *Moore* v. *Illinois* (1977) 434 U.S. 220, 230, fn.4 [as the defendant was led into the lineup, a prosecutor identified him as the suspect and told her that evidence pertaining to the crime had been found in his apartment]; *People* v. *Arias* (1996) 13 Cal.4th 92, 167 [DA’s process server told witness that the suspect “had already been convicted of murder and rape”]. COMPARE *Simmons* v. *United States* (1968) 390 U.S. 377, 385 [“There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.”].
83. *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 588.
84. (9th Cir. 2008) 548 F.3d 1197, 1208.
85. See *People* v. *Vanbuskirk* (1976) 61 Cal.App.3d 395, 400 [“Which man is the man that came in the store that night?”].
86. See *People* v. *Carpenter* (1997) 15 Cal.4th 312, 368 [“Anyone asked to view a lineup would naturally assume the police had a suspect.”]; *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 [“Telling a witness suspects are in custody … is not impermissible.”]; *People* v. *Ballard* (1969) 1 Cal.App.3d 602, 605 [not suggestive to inform witnesses that “the police had two suspects who fit the description that she had given them”]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1196 [not suggestive to tell the witness “that one or more of the suspects ‘might’ be in the lineup”]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 [not suggestive for an officer to tell the witness, prior to a showup, “that he had been able to catch a few people but that he needed a witness to identify them.”]; *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1218.
87. See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386; *People* v. *Johnson* (1989) 210 Cal.App.3d 316, 323.
88. See *People* v. *Vanbuskirk* (1976) 61 Cal.App.3d 395, 402, fn.4.
89. See, for example, *People* v. *Avila* (2009) 46 Cal.4th 680, 698; *People* v. *Yeoman* (2003) 31 Cal.4th 92, 124 [“Before each lineup, Trimble admonished Ford that the suspect’s photograph might or might not be included and that she should not feel obligated to choose one.”]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169 [the officer told the witness that “the suspect might be in here, he might not”]; *People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 16 [“The witnesses were separated, told not to talk with each other, and to designate their identifications by writing the suspect’s number on a car provided them.”]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990 [the witness “was instructed that he was not to assume the person who committed the crime was pictured therein, that it was equally important to exonerate the innocent, and that he had no obligation to identify anyone.”].
90. (7th Cir. 2008) 522 F.3d 809, 812.
91. (1986) 184 Cal.App.3d 583, 590. Also see *People* v. *Nation* (1980) 26 Cal.3d 169, 180.
92. *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 590. Also see *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 [“questioning a witness further if the officer believes the witness actually recognized someone in the lineup is not impermissible”].
93. (1998) 19 Cal.4th 353.
94. (1986) 184 Cal.App.3d 583.
95. *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1242.
96. (1990) 50 Cal.3d 1223.
97. (1968) 259 Cal.App.2d 886.
98. (1986) 178 Cal.App.3d 505, 513.
99. See *People* v. *Nation* (1980) 26 Cal.3d 169, 180.

100. See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116 [“And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another.”]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 793 [“Each child was called in separately to view the photographs and admonished not to discuss what transpired with the others.”].
101. (1981) 126 Cal.App.3d 1, 16.
102. See *U.S.* v. *Williams* (7th Cir. 2008) 522 F.3d 809, 811 [suggestiveness may be reduced if “the officer conducting [the lineup is] ignorant of the suspect’s identity”].
103. (1995) 32 Cal.App.4th 1033, 1052.
104. *U.S.* v. *Lawson* (D.C. Cir. 2005) 410 F.3d 735, 740 [it was “arguably suggestive” to show witnesses surveillance photos of the bank robbers]; *U.S.* v. *Sanders* (8th Cir. 1980) 626 F.2d 1388, 1389.
105. See, for example, *People* v. *Kennedy* (2005) 36 Cal.4th 595, 611; *People* v. *Ingle* (1986) 178 Cal.App.3d 505, 513; *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 273; *People* v. *Alexander* (2010) 49 Cal.4th 846, 903; *U.S.* v. *Beck* (9th Cir. 2005) 418 F.3d 1008, 1013.
106. See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116.
107. See *People* v. *Bethea* (1971) 18 Cal.App.3d 930, 938 [it may be difficult to prove the fairness of a photo lineup without the photos].
108. See *Neil* v. *Biggers* (1972) 409 U.S. 188, 199; *People* v. *Kennedy* (2006) 36 Cal.4th 595, 610; *People* v. *Cook* (2007) 40 Cal.4th 1334, 1354 [“The cases hold that despite an unduly suggestive identification procedure, we may deem the identification reliable under the totality of the circumstances”].
109. *United States* v. *Wade* (1967) 388 U.S. 218, 229. Also see *People* v. *Cook* (2007) 40 Cal.4th 1334, 1354 [“we consider such factors as the witness’s opportunity to view the suspect at the time of the offense”].
110. *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114.
111. *Neil* v. *Biggers* (1972) 409 U.S. 188, 200.
112. *Simmons* v. *United States* (1968) 390 U.S. 377, 385.
113. *People* v. *York* (1980) 108 Cal.App.3d 779, 786.
114. *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839, fn.11.
115. *People* v. *Rist* (1976) 16 Cal.3d 211, 216.
116. *People* v. *Fortier* (1970) 10 Cal.App.3d 760, 764.
117. *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1220.
118. *People* v. *Edwards* (1981) 126 Cal.App.3d 447, 454.
119. See *Neil* v. *Biggers* (1972) 409 U.S. 188, 200 [“She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes.”]; *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115 [“Glover was not a casual or passing observer, as is so often the case with eyewitness identification.”]; *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 [“This was not a case of a hurried look in circumstances where there was no reason to observe with particularity.”]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 [“[The witness] ‘looked straight in his face,’ and made a conscious effort to ‘stare at him.’ Her degree of attention could hardly have been higher: appellant Phan was a threat not only to her but to her children.”]; *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412 [“[T]he victim took time while in the motel room to get a clear view, under daylight, of her assailant.”]; *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 [“their degree of attention [during a ‘tense conversation’] can hardly be passed off as that of casual observers”]; *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072 [“Her degree of attention was high: she kept fighting off defendant, who was trying to remove her clothes.”]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 [“[The victim’s] degree of attention was high since there were no other customers in the store, and appellant’s companion [had] asked for [the victim’s] assistance.”].
120. (1976) 63 Cal.App.3d 328.
121. (1990) 51 Cal.3d 471.
122. See *Moore* v. *Illinois* (1977) 434 U.S. 220, 229 [“only 10 to 15 seconds” after awakening from a nap]; *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587 [only “two short looks” and “a glance”]; *People* v. *Caruso* (1968) 68 Cal.2d 183, 188 [“fleeting glance”]; *People* v. *Nation* (1980) 26 Cal.3d 169, 181 [a “glance”].
123. See *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 [the “oddity” of the perpetrator’s hair styling caused the victim to notice him]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169-70 [the witness recalled “a distinct aspect of the robber’s appearance”]; *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261-62 [“small wire on her upper right teeth”]; *People* v. *Harpool* (1984) 155 Cal.App.3d

877, 886 [“very distinct dental features”]; *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 392 [“unusual high forehead” and “chuke”].

124. (2001) 25 Cal.4th 926, 958, 990.
125. *Neil* v. *Biggers* (1972) 409 U.S. 188, 200. Also see *People* v. *Blum* (1973) 35 Cal.App.3d 515, 519 [“a detailed description”].
126. *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115.
127. *People* v. *Rodriguez* (1970) 10 Cal.App.3d 18, 32.
128. *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1220.
129. See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [“generally accurate description”]; *People* v. *Sanchez* (1982) 131 Cal.App.3d 718, 731 [“substantial congruity”]; *People* v. *Johnson* (1989) 210 Cal.App.3d 316, 323 [“[H]is description of the perpetrator matched Johnson precisely.”]; *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412 [“Her descriptions of defendant’s vehicle and personal appearance as well as her clothing . . . were all accurate.”].
130. (1980) 107 Cal.App.3d 531, 557.
131. See *United States* v. *Wade* (1967) 388 U.S. 218, 241 [it is relevant whether there was “any discrepancy between any pre-lineup description and the defendant’s actual description”].
132. See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 [“The accuracy of her description of appellant, while inaccurate as to the type of pants he was wearing, was an otherwise generally accurate description.”]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169 [“These estimates are not so disparate as to cast particular suspicion on Lam’s reliability at trial.”]; *People* v. *Blair* (1979) 25 Cal.3d 640, 662 [“In spite of these discrepancies, there are significant factors pointing in the direction of reliability.”]. ALSO SEE *People* v. *Smith* (1970) 4 Cal.App.3d 41, 48 [“Crime victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock.”].
133. See *People* v. *Virgil* (2011) 51Cal.4th 1210, 1256 [“Inconsistencies in her descriptions of the man she saw, and in her accounts of her activities on the day of the murder, are matters affecting the weight of her eyewitness testimony, not its admissibility.”].
134. See *Neil* v. *Biggers* (1972) 409 U.S. 188, 200 [witness’s description “included the assailant’s approximate age, height, weight, complexion, skin texture, build, and voice”]; *People* v. *Lewis* (1966) 240 Cal.App.2d 546, 548 [ID based on defendant’s “build, walk, and mannerisms”].
135. (1986) 180 Cal.App.3d 13, 18.
136. See *People* v. *Fortier* (1970) 10 Cal.App.3d 760, 765 [officers are “trained to notice a suspect’s physical characteristics”]; *U.S.* v. *Duran-Orozco* (9th Cir. 1999) 192 F.3d 1277, 1282 [“[H]e gave them the attention an alert police officer would give to possible suspects”]; *U.S.* v. *Gallo-Moreno* (6th Cir. 2009) 584 F.3d 751, 758 [“Tovar’s status as a DEA agent bolsters our conclusion about his degree of attention”]; *People* v. *Bethea* (1971) 18 Cal.App.3d 930, 934 [liquor store manager “had been the victim of three robberies”]; *U.S.* v. *Sanders* (8th Cir. 1980) 626 F2 1388, 1389 [“the witness’ degree of attention was enhanced by special training for bank personnel”].
137. (1977) 432 U.S. 98, 114.
138. See *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 [“defendant had been a customer of the store before on several occasions”]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 [the witness “had seen him before, four days earlier when he had attempted to open her garage”]; *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 882 [the witness “had seen [the pepetrator] on *two* separate occasions *before* she saw the photograph of him”].
139. (1982) 129 Cal.App.3d 513, 515.
140. See *People* v. *Alexander* (2010) 49 Cal.4th 846, 902-903 [“Bulman’s history as a witness showed he was not susceptible to making a false identification”]; *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 [witness ID’d the defendant “following her examination of hundreds of photographs of various parolees in the area”]; *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839 [“Shortly after the incident she was shown a mug book of some 200 photos and positively stated that none of the pictures was that of her assailant.”]; *People* v. *Nash* (1982) 129 Cal.App.3d 513, 518 [“the victim was shown but did not identify many men before she saw appellant”] *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 [“Each of the witnesses rejected a number of mug shots”]; *People* v. *Sanchez* (1982) 131 Cal.App.3d 718, 731 [witness “declined to identify anyone out of a photo lineup that did *not* contain a photograph of appellant”]; *People* v. *Spencer* (1972) 22 Cal.App.3d 786, 796 [“Miss Lawson did not identify anyone in the first lineup, from which appellant was absent”].
141. (1972) 409 U.S. 188, 201.
142. See *United States* v. *Wade* (1967) 388 U.S. 218, 241; *People* v. *West* (1984) 154 Cal.App.3d 100, 105; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1197.

143. See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115 ["no question whatsoever"]; *Neil* v. *Biggers* (1972) 409 U.S. 188, 200-1 ["no doubt"]; *Simmons* v. *United States* (1968) 390 U.S. 377, 385 ["none of the witnesses displayed any doubt"]; *People* v. *Kennedy* (2005) 36 Cal.4th 595, 611 ["Oh, my God, that's him"]; *People* v. *Greene* (1973) 34 Cal.App.3d 622, 641 ["My God, that's him"]; *People* v. *Jardine* (1981) 116 Cal.App.3d 907, 915 ["That's the two guys right there."]; *People* v. *Wash* (1993) 6 Cal.4th 215, 245 ["no uncertainty"]; *People* v. *Clark* (1992) 3 Cal.4th 41, 137 [ID was "positive and unshaken"]. Also see *People* v. *Brown* (1969) 273 Cal.App.2d 109, 112 [Robbery victim: "I just know that I would always know him if I ever saw him again."]; *People* v. *Guillebeau* (1980) 107 Cal.App.3d 531, 557 [the witness "emphasized that she would never forget appellant's face"].
144. (1966) 240 Cal.App.2d 546, 548. Also see *People* v. *Rist* (1976) 16 Cal.3d 211, 216 ["Confusion, or lack of clarity and positiveness in a witness' identification testimony goes to the weight, not the admissibility of the testimony."]; *People* v. *Prado* (1982) 130 Cal.App.3d 669, 674 ["Hansen's failure to make a positive identification of appellant based on photographic displays merely goes to the weight of the evidence, not its sufficiency."].
145. See *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 ["instantaneous" ID]; *People* v. *Harris* (1971) 18 Cal.App.3d 1, 6 ["immediately"]; *People* v. *Hawkins* (1970) 7 Cal.App.3d 117, 123 ["unhesitatingly"]; *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 ["unhesitantly"]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 793 ["immediately"]; *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072 ["instantaneously"]; *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052 ["immediately"].
146. Also see *People* v. *Arias* (1996) 13 Cal.4th 92, 169 [veteran officer testified "a witness typically selects a photo, if at all, within five minutes or so," but that taking 15 to 20 minutes would indicate indecision which he would include in his report].
147. See *People* v. *Clark* (1992) 3 Cal.4th 41, 137 ["the ability to remember a perceptive experience diminishes over time"].
148. See *People* v. *Farham* (2002) 28 Cal.4th 107, 184 ["Significantly, defendant had given a detailed confession to the police"]; *In re Richard W.* (1979) 91 Cal.App.3d 960, 971 [the other incriminating evidence was "strong and persuasive"]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 ["appellant's fingerprint was found at the crime scene"]; *People* v. *Anthony* (1970) 7 Cal.App.3d 751, 765 ["overwhelming" circumstantial evidence]; *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 ["substantial corroborating evidence"].
149. *Rothgery* v. *Gillespie County* (2008) 554 U.S. 191, 213. Also see *U.S.* v. *States* (7th Cir. 2011) F.3d [2011 WL 2857263] ["the initial appearance marks the point at which interrogations . . . begin to be governed by the Sixth Amendment"].
150. See *United States* v. *Ash* (1973) 413 U.S. 300, 321 ["the Sixth Amendment does not grant the right to counsel at photographic displays"]; *United States* v. *Wade* (1967) 388 U.S. 218, 237; *Gilbert* v. *California* (1967) 388 U.S. 263; *People* v. *Virgil* (2011) 51 Cal.4th 1210, 1256 ["the Sixth Amendment does not guarantee a criminal defendant the right to counsel at a photographic lineup"]; *People* v. *Rist* (1976) 16 Cal.3d 211, 216 ["We have consistently rejected the contention that the constitutional right to counsel extends to photographic identification procedures."]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1197, fn. 15 ["there is no right to counsel at a photographic identification procedure"]; *People* v. *Rhinehart* (1973) 9 Cal.3d 139, 153 ["There is no right to counsel at a photographic identification"]; *People* v. *Hawkins* (1970) 7 Cal.App.3d 117, 121 ["Any suggestive influences present at a photoidentification in large measure are preserved by the photographic evidence, or readily detectable by cross-examination of the participants."]; *U.S.* v. *Gallo-Moreno* (7th Cir. 2009) 584 F.3d 751, 762 ["When a witness makes an identification based on hearing a defendant's recorded voice on tape and that tape is preserved in the record, the defendant can adequately challenge the witness's voice identification at trial through effective cross-examination."]; *U.S.* v. *Gallo-Moreno* (6th Cir. 2009) 584 F.3d 751, 760 [no Sixth Amendment right to counsel unless the suspect was "present in a trial-like confrontation"].
151. See *People* v. *Lawrence* (1971) 4 Cal.3d 273, 278 ["As long as the photographs from which the witness made his identification are preserved and available at trial, counsel for the accused . . . an easily reveal the possibility of prejudice"]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 791 ["the chief difference between a photographic line-up and [the live lineup] is the ability to reproduce much of what transpired by the production of the photographs themselves"].
152. See *Gilbert* v. *California* (1967) 388 U.S. 263, 272-73; *Moore* v. *Illinois* (1977) 434 U.S. 220, 231; *United States* v. *Wade* (1967) 388 U.S. 218, 239-41.
153. See *United States* v. *Wade* (1967) 388 U.S. 218, 242; *Gilbert* v. *California* (1967) 388 U.S. 263, 272; *People* v. *George* (1972) 23 Cal.App.3d 767, 774 [the prosecution "must show that there was a sufficient independent source for the in-court identification"]; *People* v. *Diggs* (1980) 112 Cal.App.3d 522, 528; *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261; *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906.

154. See *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1046 ["defense counsel must not be allowed to interfere with a police investigation"]; *People* v. *Bustamante* (1981) 30 Cal.3d 88, 99 ["At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination or to act in the capacity of a witness"]; *People* v. *Williams* (1971) 3 Cal.3d 853, 856 [the right to counsel was adopted "to enable an accused to detect any unfairness in his confrontation with the witness, and to insure that he will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification."].
155. (1971) 3 Cal.3d 853, 860 (dis. opn. of Mosk, J.).
156. See *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261 ["[T]he attorney's exclusion from the actual identification after the lineup emasculates the lineup and vitiates an in-court identification based upon it."].
157. See *People* v. *Carpenter* (1997) 15 Cal.4th 312, 369 ["The right to counsel extends only to the actual identification, not to postidentification interviews."]; *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1046 ["defense counsel must not be allowed to interfere with a police investigation"].
158. (1986) 184 Cal.App.3d 583.
159. (1992) 1 Cal.4th 1027, 1067.
160. See *Montejo* v. *Louisiana* (2009) U.S. [129 S.Ct. 2079].
161. See *People* v. *Wells* (1971) 14 Cal.App.3d 348, 354 [an "effective waiver" resulted when the suspect "was advised also of his right to counsel at the lineup and waived, in writing, his right to such counsel"]; *People* v. *Banks* (1970) 2 Cal.3d 127, 134 [waiver invalid because officer neglected to tell the defendant that an attorney would be appointed if he wished]; *People* v. *Thomas* (1970) 5 Cal.App.3d 889, 897 [defendant was informed "that he did not have to go through the lineup without counsel unless he wanted to; that an attorney would be provided him if he so desired"].
162. See *People* v. *Banks* (1970) 2 Cal.3d 127, 134-36; *People* v. *Schafer* (1970) 4 Cal.App.3d 554, 560.
163. See *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 784-86 [court rejects argument that a suspect has a right to counsel "of his choice"]; *People* v. *Nichols* (1969) 272 Cal.App.2d 59, 64 [appointment of substitute counsel].
164. (1999) 20 Cal.4th 546, 625.
165. See *Goodwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 221; *People* v. *Huston* (1989) 210 Cal.App.3d 192, 216; *People* v. *Ellis* (1966) 65 Cal.2d 529, 533.
166. See *People* v. *Alexander* (2010) 49 Cal.4th 846, 905 ["The jury reasonably might question why, if he were not involved in the shooting, defendant would not want to appear in the lineup to clear his name despite his attorney's advice."]; *People* v. *Smith* (1970) 13 Cal.App.3d 897, 910; *People* v. *Ellis* (1966) 65 Cal.2d 529, 537 [refusal constituted "circumstantial evidence of consciousness of guilt"]. **NOTE**: Disclosure to jury of refusal to participate was admissible even if the defendant refused to appear on the advice of counsel. See *People* v. *Alexander* (2010) 49 Cal.4th 846, 905-906.
167. See *People* v. *Huston* (1989) 210 Cal.App.3d 192, 217.
168. See *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1223, fn.9; *People* v. *Ellis* (1966) 65 Cal.2d 529, 539.
169. See *Schmerber* v. *California* (1966) 384 U.S. 757, 770-71 [Court notes that a search warrant may authorize the use of force to obtain a blood sample]; *U.S.* v. *Pipito* (7th Cir. 1987) 861 F.2d 1006, 1010 [court may authorize the use of force to obtain palm prints]. Also see *United States* v. *Wade* (1967) 388 U.S. 218, 222 ["We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance."].
170. *In re Maguire* (1st Cir. 1978) 571 F.2d 675, 677.
171. See Pen. Code § 1524(a)(4).
172. See *People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 13-15; Pen. Code § 4004.
173. See *Goodwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 226 ["There is wisdom in a procedure authorizing an ex parte order compelling a suspect who is out of custody to attend a lineup. [But] that procedure does not currently exist in California law." Edited].
174. See *Evans* v. *Superior Court* (1974) 11 Cal.3d 617, 625. COMPARE *People* v. *Redd* (2010) 48 Cal.4th 691, 725 [no reasonable likelihood of misidentification]; *People* v. *Sullivan* (2007) 151 Cal.App.4th 524, 560 ["[Defendant] failed to make the prima facie showing required by *Evans*."]; *People* v. *Farnam* (2002) 28 Cal.4th 107, 183-84. ALSO SEE *People* v. *Vallez* (1978) 80 Cal.App.3d 46, 56 ["Motions made shortly before trial will generally be denied unless good cause is shown for the delay."].

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CHAPTER OVERVIEW

17: Jailhouse Undercover Operations

17.1: United States Supreme Court ILLINOIS v. PERKINS, (1990) No. 88-1972

17.2: A Constitutional Guide to the Use Of Cellmate Informants By Kimberly A. Crawford, J.D.

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17.1: United States Supreme Court ILLINOIS v. PERKINS, (1990) No. 88-1972

Argued: February 20, 1990 / Decided: June 4, 1990

Police placed undercover agent Parisi in a jail cellblock with respondent Perkins, who was incarcerated on charges unrelated to the murder that Parisi was investigating. When Parisi asked him if he had ever killed anybody, Perkins made statements implicating himself in the murder. He was then charged with the murder. The trial court granted respondent's motion to suppress his statements on the ground that Parisi had not given him the warnings required by *Miranda v. Arizona*, 384 U.S. 436 , before their conversations. The Appellate Court of Illinois affirmed, holding that Miranda prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

Held:

An undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The Miranda doctrine must be enforced strictly, but only in situations where the concerns underlying that decision are present. Those concerns are not implicated here, since the essential ingredients of a "police-dominated atmosphere" and compulsion are lacking. It is Miranda's premise that the danger of coercion results from the interaction of custody and official interrogation, whereby the suspect may feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess. That coercive atmosphere is not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate and whom he assumes is not an officer having official power over him. In such circumstances, Miranda does not forbid mere strategic deception by taking advantage of a suspect's misplaced trust. The only difference between this case and *Hoffa v. United States*, 385 U.S. 293 which upheld the placing of an undercover agent near a suspect in order to gather incriminating information is that Perkins was incarcerated. Detention, however, whether or not for the crime in question, does not warrant a presumption that such use of an undercover agent renders involuntary the incarcerated suspect's resulting confession. *Mathis v. United States*, 391 U.S. 1which held that an inmate's statements to a known agent were inadmissible because no Miranda warnings were given is distinguishable. Where the suspect does not [496 U.S. 292, 293] know that he is speaking to a government agent, there is no reason to assume the possibility of coercion. *Massiah v. United States*, 377 U.S. 201, and similar cases which held that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged are inapplicable, since, here, no murder charges had been filed at the time of the interrogation. Also unavailing is Perkins' argument that a bright-line rule for the application of Miranda is desirable, since law enforcement officers will have little difficulty applying the holding of this case. Pp. 296-300.

176 Ill. App. 3d 443, 531 N. E. 2d 141, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, post, p. 300. MARSHALL, J., filed a dissenting opinion, post, p. 303.

Marcia L. Friedl, Assistant Attorney General of Illinois, argued the cause for petitioner. With her on the briefs were Neil F. Hartigan, Attorney General, Robert J. Ruiz, Solicitor General, and

Terence M. Madsen and Jack Donatelli, Assistant Attorneys General.

Paul J. Larkin, Jr., argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Starr, Assistant Attorney General Dennis, and Deputy Solicitor General Bryson.

Dan W. Evers, by appointment of the Court, 493 U.S. 930, argued the cause for respondent. With him on the brief was Daniel M. Kirwan. *

[Footnote *] Briefs of amici curiae urging reversal were filed for Americans for Effective Law Enforcement, Inc., et al. by Gregory U. Evans, Daniel B. Hales, George D. Webster, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt, Bernard J. Farber, and James P. Manak; and for the Lincoln Legal Foundation et al. by Joseph A. Morris, Donald D. Bernardi, Fred L. Foreman, Daniel M. Harrod, and Jack E. Yelverton.

John A. Powell, William B. Rubenstein, and Harvey Grossman filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance. [496 U.S. 292, 294]

JUSTICE KENNEDY delivered the opinion of the Court.

An undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given Miranda warnings by the agent. We hold that the statements are admissible. Miranda warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.

I

In November 1984, Richard Stephenson was murdered in a suburb of East St. Louis, Illinois. The murder remained unsolved until March 1986, when one Donald Charlton told police that he had learned about a homicide from a fellow inmate at the Graham Correctional Facility, where Charlton had been serving a sentence for burglary. The fellow inmate was Lloyd Perkins, who is the respondent here. Charlton told police that, while at Graham, he had befriended respondent, who told him in detail about a murder that respondent had committed in East St. Louis. On hearing Charlton's account, the police recognized details of the Stephenson murder that were not well known, and so they treated Charlton's story as a credible one.

By the time the police heard Charlton's account, respondent had been released from Graham, but police traced him to a jail in Montgomery County, Illinois, where he was being held pending trial on a charge of aggravated battery, unrelated to the Stephenson murder. The police wanted to investigate further respondent's connection to the Stephenson murder, but feared that the use of an eavesdropping device would prove impracticable and unsafe. They decided instead to place an

undercover agent in the cellblock with respondent and Charlton. The plan was for Charlton and undercover [496 U.S. 292, 295] agent John Parisi to pose as escapees from a work release program who had been arrested in the course of a burglary. Parisi and Charlton were instructed to engage respondent in casual conversation and report anything he said about the Stephenson murder.

Parisi, using the alias "Vito Bianco," and Charlton, both clothed in jail garb, were placed in the cellblock with respondent at the Montgomery County jail. The cellblock consisted of 12 separate cells that opened onto a common room. Respondent greeted Charlton who, after a brief conversation with respondent, introduced Parisi by his alias. Parisi told respondent that he "wasn't going to do any more time" and suggested that the three of them escape. Respondent replied that the Montgomery County jail was "rinky-dink" and that they could "break out." The trio met in respondent's cell later that evening, after the other inmates were asleep, to refine their plan. Respondent said that his girlfriend could smuggle in a pistol. Charlton said: "Hey, I'm not a murderer, I'm a burglar. That's your guys' profession." After telling Charlton that he would be responsible for any murder that occurred, Parisi asked respondent if he had ever "done" anybody. Respondent said that he had and proceeded to describe at length the events of the Stephenson murder. Parisi and respondent then engaged in some casual conversation before respondent went to sleep. Parisi did not give respondent Miranda warnings before the conversations.

Respondent was charged with the Stephenson murder. Before trial, he moved to suppress the statements made to Parisi in the jail. The trial court granted the motion to suppress, and the State appealed. The Appellate Court of Illinois affirmed, 176 Ill. App. 3d 443, 531 N. E. 2d 141 (1988), holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

We granted certiorari, 493 U.S. 808 (1989), to decide whether an undercover law enforcement officer must give [496 U.S. 292, 296] Miranda warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response. We now reverse.

II

In Miranda v. Arizona, supra, the Court held that the Fifth Amendment privilege against selfincrimination prohibits admitting statements given by a suspect during "custodial interrogation" without a prior warning. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody . . . ." Id., at 444. The warning mandated by Miranda was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." Id., at 445. That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id., at 467. "Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

Conversations between suspects and undercover agents do not implicate the concerns underlying Miranda. The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. *Rhode Island v. Innis*, 446

U.S. 291, 301 (1980); Berkemer v. McCarty, supra, at 442. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. Miranda, 384 U.S., at 449 ("[T]he `principal psychologica l factor contributing to a successful interrogation is privacy being alone with the person under interrogation'"); id., at 445. There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear [496 U.S. 292, 297] of reprisal for remaining silent or in the hope of more lenient treatment should he confess.

It is the premise of Miranda that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that Miranda warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent. Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist. The state court here mistakenly assumed that because the suspect was in custody, no undercover questioning could take place. When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners. "[W]hen the agent carries neither badge nor gun and wears not `police blue,' but the same prison gray" as the suspect, there is no "interplay between police interrogation and police custody." Kamisar, Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 67, 63 (1978).

Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. As we recognized in Miranda: "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S., at 478. Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns. Cf. *Oregon v. Mathiason*, 429 U.S. 492, 495-496 (1977) (per curiam); *Moran v. Burbine*, 475 U.S. 412 (1986) (where police fail to inform suspect of attorney's efforts to reach him, [496 U.S. 292, 298] neither Miranda nor the Fifth Amendment requires suppression of prearraignment confession after voluntary waiver).

Miranda was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. This case is illustrative. Respondent had no reason to feel that undercover agent Parisi had any legal authority to force him to answer questions or that Parisi could affect respondent's future treatment. Respondent viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the Stephenson murder, respondent was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril.

The tactic employed here to elicit a voluntary confession from a suspect does not violate the Self-Incrimination Clause. We held in *Hoffa v. United States*, 385 U.S. 293 (1966), that placing an undercover agent near a suspect in order to gather incriminating information was permissible under the Fifth Amendment. In Hoffa, while petitioner Hoffa was on trial, he met often with one Partin, who, unbeknownst to Hoffa, was cooperating with law enforcement officials. Partin reported to officials that Hoffa had divulged his attempts to bribe jury members. We approved using Hoffa's statements at his subsequent trial for jury tampering, on the rationale that "no claim ha[d] been or could [have been] made that [Hoffa's] incriminating statements were the product of any sort of coercion, legal or factual." Id., at 304. In addition, we found that the fact that Partin had fooled Hoffa into thinking that Partin was a sympathetic colleague did not affect the voluntariness of the statements. Ibid. Cf. Oregon v. Mathiason, supra, at 495-496 (officer's falsely telling suspect that suspect's fingerprints had been found at crime scene did not render interview "custodial" under Miranda); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Procunier v. Atchley*, 400 U.S. 446, 453 -454 (1971). The only difference between this case and Hoffa is that the suspect here was incarcerated, but [496 U.S. 292, 299] detention, whether or not for the crime in question, does not warrant a presumption that the use of an undercover agent to speak with an incarcerated suspect makes any confession thus obtained involuntary.

Our decision in *Mathis v. United States*, 391 U.S. 1 (1968), is distinguishable. In Mathis, an inmate in a state prison was interviewed by an Internal Revenue Service agent about possible tax violations. No Miranda warning was given before questioning. The Court held that the suspect's incriminating statements were not admissible at his subsequent trial on tax fraud charges. The suspect in Mathis was aware that the agent was a Government official, investigating the possibility of noncompliance with the tax

laws. The case before us now is different. Where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced. (The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here.)

This Court's Sixth Amendment decisions in *Massiah v. United States*, 377 U.S. 201 (1964), *United States v. Henry*, 447 U.S. 264 (1980), and *Maine v. Moulton*, 474 U.S. 159 (1985), also do not avail respondent. We held in those cases that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel. Moulton, supra, at 176. In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.

Respondent can seek no help from his argument that a bright-line rule for the application of Miranda is desirable. Law enforcement officers will have little difficulty putting into practice our holding that undercover agents need not [496 U.S. 292, 300] give Miranda warnings to incarcerated suspects. The use of undercover agents is a recognized law enforcement technique, often employed in the prison context to detect violence against correctional officials or inmates, as well as for the purposes served here. The interests protected by Miranda are not implicated in these cases, and the warnings are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents.

We hold that an undercover law enforcement officer posing as a fellow inmate need not give Miranda warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The statements at issue in this case were voluntary, and there is no federal obstacle to their admissibility at trial. We now reverse and remand for proceedings not inconsistent with our opinion

JUSTICE BRENNAN, concurring in the judgment.

The Court holds that *Miranda v. Arizona*, 384 U.S. 436 (1966), does not require suppression of a statement made by an incarcerated suspect to an undercover agent. Although I do not subscribe to the majority's characterization of Miranda in its entirety, I do agree that when a suspect does not know that his questioner is a police agent, such questioning does not amount to "interrogation" in an "inherently coercive" environment so as to require application of Miranda. Since the only issue raised at this stage of the litigation is the applicability of Miranda, * I concur in the judgment of the Court. [496 U.S. 292, 301]

This is not to say that I believe the Constitution condones the method by which the police extracted the confession in this case. To the contrary, the deception and manipulation practiced on respondent raise a substantial claim that the confession was obtained in violation of the Due Process Clause. As we recently stated in *Miller v. Fenton*, 474 U.S. 104, 109 -110 (1985):

> "This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. . . .

Although these decisions framed the legal inquiry in a variety of different ways, usually through the `convenient shorthand' of asking whether the confession was `involuntary,' *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960), the Court's analysis has consistently been animated by the view that `ours is an accusatorial and not an inquisitorial system,' *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness." [496 U.S. 292, 302]

That the right is derived from the Due Process Clause "is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." Id., at 116. See *Spano v. New York*, 360 U.S. 315, 320 -321 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves"); see also *Degraffenreid v. McKellar*, 494 U.S.1071, 1072 -1074 (1990) (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari).

The method used to elicit the confession in this case deserves close scrutiny. The police devised a ruse to lure respondent into incriminating himself when he was in jail on an unrelated charge. A police agent, posing as a fellow inmate and proposing a sham escape plot, tricked respondent into confessing that he had once committed a murder, as a way of proving that he would be willing to do so again should the need arise during the escape. The testimony of the undercover officer and a police informant at the suppression hearing reveal the deliberate manner in which the two elicited incriminating statements from respondent. See App. 43-53 and 66-73. We have recognized that "the mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *United states v. Henry*, 447 U.S. 264, 274 (1980). As JUSTICE MARSHALL points out, the pressures of custody make a suspect more likely to confide in others and to engage [496 U.S. 292, 303] in "jailhouse bravado." See post, at 307-308. The State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. Thus, the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses. *Cf. Mincey v. Arizona*, 437 U.S. 385, 399 (1978); *Ashcraft v. Tennessee*, 322 U.S. 143, 153-155 (1944). The testimony in this case suggests the State did just that.

The deliberate use of deception and manipulation by the police appears to be incompatible "with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means," Miller, supra, at 116, and raises serious concerns that respondent's will was overborne. It is open to the lower court on remand to determine whether, under the totality of the circumstances, respondent's confession was elicited in a manner that violated the Due Process Clause. That the confession was not elicited through means of physical torture, see *Brown v. Mississippi*, 297 U.S. 278 (1936) or overt psychological pressure, see *Payne v. Arkansas*, 356 U.S.560, 566 (1958), does not end the inquiry. "[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, [a court's] duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made." Spano, supra, at 321.

[Footnote *] As the case comes to us, it involves only the question whether Miranda applies to the questioning of an incarcerated suspect by an undercover agent. Nothing in the Court's opinion suggests that, had respondent previously invoked his Fifth Amendment right to counsel or right to silence, his statements would be admissible. If respondent had invoked either right, the inquiry would focus on whether he subsequently waived the particular right. See *Edwards v. Arizona*, 451 U.S. 477 (1981): *Michigan v. Mosley* 423 U.S. 96, 104(1975). As the Court made clear in *Moran v. Burbine*, [496 U.S. 292, 301] 475 U.S. 412, 421(1986), the waiver of Miranda rights "must [be] voluntary in the sense that it [must be] the product of a free and deliberate choice rather than intimidation, coercion or deception." (Emphasis added.) Since respondent was in custody on an unrelated charge when he was questioned, he may be able to challenge the admission of these statements if he previously had invoked his Miranda rights with respect to that charge. See *Arizona v. Roberson*, 486 U.S. 675(1988); Mosley, supra, at 104. Similarly, if respondent had been formally charged on the unrelated charge and had invoked his Sixth Amendment right to counsel, he may have a Sixth Amendment challenge to the admissibility of these statements. See *Michigan v. Jackson*, 475 U.S. 625, 629-636 (1986). Cf. Roberson, supra, at 683-685.

JUSTICE MARSHALL, Dissenting.

This Court clearly and simply stated its holding in *Miranda v. Arizona*, 384 U.S. 436(1966): "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., at 444. The conditions that require the police to apprise a defendant of his constitutional rights custodial interrogation conducted by an agent of the police were present in this [496 U.S. 292, 304] case. Because Lloyd Perkins received no Miranda warnings before he was subjected to custodial interrogation, his confession was not admissible.

The Court reaches the contrary conclusion by fashioning an exception to the Miranda rule that applies whenever "an undercover law enforcement officer posing as a fellow inmate . . . ask[s] questions that may elicit an incriminating response" from an incarcerated suspect. Ante, at 300. This exception is inconsistent with the rationale supporting Miranda and allows police officers intentionally to take advantage of suspects unaware of their constitutional rights. I therefore dissent.

The Court does not dispute that the police officer here conducted a custodial interrogation of a criminal suspect. Perkins was incarcerated in county jail during the questioning at issue here; under these circumstances, he was in custody as that term is defined in Miranda. 384 U.S., at 444; *Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (holding that defendant incarcerated on charges different from the crime about which he is questioned was in custody for purposes of Miranda). The United States argues that

Perkins was not in custody for purpose of Miranda because he was familiar with the custodial environment as a result of being in jail for two days and previously spending time in prison. Brief for United States as Amicus Curiae 11. Perkins' familiarity with confinement, however, does not transform his incarceration into some sort of noncustodial arrangement. *Cf. Orozco v. Texas*, 394 U.S. 324 (1969) (holding that suspect who had been arrested in his home and then questioned in his bedroom was in custody, notwithstanding his familiarity with the surroundings).

While Perkins was confined, an undercover police officer. with the help of a police informant, questioned him about a serious crime. Although the Court does not dispute that Perkins was interrogated, it downplays the nature of the 35-minute questioning by disingenuously referring to it as a [496 U.S. 292, 305] "conversatio[n]." Ante, at 295, 296. The officer's narration of the "conversation" at Perkins' suppression hearing, however, reveals that it clearly was an interrogation.

> "[Agent:] You ever do anyone?
>
> "[Perkins:] Yeah, once in East St. Louis, in a rich white neighborhood.
>
> "Informant: I didn't know they had any rich white neighborhoods in East St. Louis. "Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights. . . . "[Agent]: You did a guy in Fairview Heights?
>
> "Perkins: Yeah in a rich white section where most of the houses look the same. "[Informant]: If all the houses look the same, how did you know you had the right house?
>
> "Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.
>
> "[Agent]: How long ago did this happen?
>
> "Perkins: Approximately about two years ago. I got paid $5,000 for that job. "[Agent]: How did it go down?
>
> "Perkins: I walked up [to] this guy['s] house with a sawed-off under my trench coat. "[Agent]: What type gun[?]
>
> "Perkins: A .12 gauge Remmington [sic] Automatic Model 1100 sawed-off." App. 49-50.

The police officer continued the inquiry, asking a series of questions designed to elicit specific information about the victim, the crime scene, the weapon, Perkins' motive, and his actions during and after the shooting. Id., at 50-52. This interaction was not a "conversation"; Perkins, the officer, and the informant were not equal participants in a free-ranging discussion, with each man offering his views on different topics. Rather, it was an interrogation: Perkins was subjected to express questioning likely to evoke an incriminating response. [496 U.S. 292, 306] *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980).

Because Perkins was interrogated by police while he was in custody, Miranda required that the officer inform him of his rights. In rejecting that conclusion, the Court finds that "conversations" between undercover agents and suspects are devoid of the coercion inherent in station house interrogations conducted by law enforcement officials who openly represent the State. Ante, at 296. Miranda was not, however, concerned solely with police coercion. It dealt with any police tactics that may operate to compel a suspect in custody to make incriminating statements without full awareness of his constitutional rights. See Miranda, supra, at 468 (referring to "inherent pressures of the interrogation atmosphere"); *Estelle v. Smith*, 451 U.S. 454, 467(1981) ("The purpose of [the Miranda] admonitions is to combat what the Court saw as `inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it") (quoting Miranda, 384 U.S., at 467). Thus, when a law enforcement agent structures a custodial interrogation so that a suspect feels compelled to reveal incriminating information, he must inform the suspect of his constitutional rights and give him an opportunity to decide whether or not to talk.

The compulsion proscribed by Miranda includes deception by the police. See Miranda, supra, at 453 (indicting police tactics "to induce a confession out of trickery," such as using fictitious witnesses or false accusations); *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) ("The purposes of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into confessing") (emphasis deleted and added). *Cf. Moran v. Burbine*, 475 U.S. 412, 421 (1986) ("[T]he relinquishment of the right [protected by the Miranda warnings] must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception") (emphasis [496 U.S. 292, 307] added). Although the Court did not find trickery by itself sufficient to constitute compulsion in Hoffa v. United States, 385 U.S. 293(1966), the defendant in that case was not in custody. Perkins, however, was interrogated while incarcerated. As the Court has acknowledged in the Sixth

Amendment context: "[T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *United States v. Henry*, 447 U.S. 264, 274 (1980). See also *Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding, in the context of the Sixth Amendment, that defendant's constitutional privilege against self-incrimination was "more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent") (citation and internal quotation marks omitted).

Custody works to the State's advantage in obtaining incriminating information. The psychological pressures inherent in confinement increase the suspect's anxiety, making him likely to seek relief by talking with others. Dix, Undercover Investigations and Police Rulemaking, 53 Texas L. Rev. 203, 230 (1975). See also Gibbs, The First Cut is the Deepest: Psychological Breakdown and Survival in the Detention Setting, in The Pains of Imprisonment 97, 107 (R. Johnson & H. Toch eds. 1982); Hagel-Seymour, Environmenta l Sanctuaries for Susceptible Prisoners, in The Pains of Imprisonment, supra, at 267, 279; Chicago Tribune, Apr. 15, 1990, p. D3 (prosecutors have found that prisoners often talk freely with fellow inmates).

The inmate is thus more susceptible to efforts by undercover agents to elicit information from him. Similarly, where the suspect is incarcerated, the constant threat of physical danger peculiar to the prison environment may make him demonstrate his toughness to other inmates by recounting or inventing past violent acts. "Because the suspect's ability to select people with whom he can confide is completely within their control, the police have a[496 U.S. 292, 308] unique opportunity to exploit the suspect's vulnerability. In short, the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent." (Footnote omitted.) White, Police Trickery in Inducing Confessions, 127 U. Pa. L. Rev. 581, 605 (1979). In this case, the police deceptively took advantage of Perkins' psychologica l vulnerability by including him in a sham escape plot, a situation in which he would feel compelled to demonstrate his willingness to shoot a prison guard by revealing his past involvement in a murder. See App. 49 (agent stressed that a killing might be necessary in the escape and then asked Perkins if he had ever murdered someone).

Thus, the pressures unique to custody allow the police to use deceptive interrogation tactics to compel a suspect to make an incriminating statement. The compulsion is not eliminated by the suspect's ignorance of his interrogator's true identity. The Court therefore need not inquire past the bare facts of custody and interrogation to determine whether Miranda warnings are required.

The Court's adoption of an exception to the Miranda doctrine is incompatible with the principle, consistently applied by this Court, that the doctrine should remain simple and clear. See, e. g., Miranda, supra, at 441-442 (noting that one reason certiorari was granted was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow"); McCarty, supra, at 430 (noting that one of "the principal advantages of the [Miranda] doctrine . . . is the clarity of that rule"); *Arizona v. Roberson*, 486 U.S. 675, 680(1988) (same). See also *New York v. Quarles*, 467 U.S. 649, 657-658 (1984) (recognizing need for clarity in Miranda doctrine and finding that narrow "public safety" exception would not significantly lessen clarity and would be easy for police to apply). We explained the benefits of a bright-line rule in *Fare v. Michael C.*, 442 U.S. 707 (1979): "Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial [496 U.S. 292, 309] interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." Id., at 718.

The Court's holding today complicates a previously clear and straightforward doctrine. The Court opines that "[l]aw enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give Miranda warnings to incarcerated suspects." Ante, at 299-300. Perhaps this prediction is true with respect to fact patterns virtually identical to the one before the Court today. But the outer boundaries of the exception created by the Court are by no means clear. Would Miranda be violated, for instance, if an undercover police officer beat a confession out of a suspect, but the suspect thought the officer was another prisoner who wanted the information for his own purposes?

Even if Miranda, as interpreted by the Court, would not permit such obviously compelled confessions, the ramifications of today's opinion are still disturbing. The exception carved out of the Miranda doctrine today may well result in a proliferation of departmental policies to encourage police officers to conduct interrogations of confined suspects through undercover agents, thereby circumventing the need to administer Miranda warnings. Indeed, if Miranda now requires a police officer to issue warnings only in those situations in which the suspect might feel compelled "to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess," ante, at 296-297, presumably it allows custodial interrogation by an undercover officer posing as a member of the clergy or a suspect's defense attorney. Although such abhorrent tricks would play on a suspect's need to confide in a trusted adviser, neither would cause the suspect to "think that the listeners have official power over him," ante,

at 297. The Court's adoption of the "undercover agent" exception to the Miranda rule thus is necessarily also the adoption of a substantial loophole in our jurisprudence protecting suspects' Fifth Amendment rights.

I dissent. [496 U.S. 292, 310]

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17.2: A Constitutional Guide to the Use Of Cellmate Informants By Kimberly A. Crawford, J.D.

By Kimberly A. Crawford, J.D., 12/95 [Special Agent Crawford is a legal instructor at the FBI Academy.]

Over the years, legal scholars have debated the legality and propriety of using cellmate informants. While some scholars find the practice a "mere strategic deception [that takes] advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner,"1 others view the use of cellmate informants as being "so offensive to a civilized system of justice that [the practice] must be condemned."2 Despite this debate, law enforcement officers agree that the use of cellmate informants is an investigative technique that works very well in many cases.

In the 1990 case of Illinois v. Perkins,3 the U.S. Supreme Court, while not resolving the debate, answered an important question regarding the constitutionality of using cellmate informants. Specifically, the Court held that the use of cellmate informants does not violate the Miranda4 rule. This decision appeared to clear the way for law enforcement to take advantage of this very effective investigative technique.

However, the permissible use of cellmate informants was again questioned when Perkins subsequently argued successfully in State court that the use of the technique violated his previously invoked Miranda right to counsel.5 Because the Supreme Court refused to hear the case a second time,6 the extent to which cellmate informants can be used lawfully against suspects who have earlier invoked a right to counsel remains open to debate in both lower Federal courts and State courts.

This article reviews the decisions in Perkins and examines subsequent cases dealing with the question left unresolved by the Supreme Court. It then provides a guide to the constitutional use of cellmate informants.

FIFTH AMENDMENT SELF-INCRIMINATION CLAUSE

The Miranda Rule

The fifth amendment to the U.S. Constitution provides in part that "no person...shall be compelled in any criminal case to be a witness against himself...."7 Over two decades ago, the Supreme Court in *Miranda v. Arizona*8 held that custodial interrogation of an individual creates a psychologically compelling atmosphere that works against this fifth amendment protection.9 In other words, the Court in Miranda believed that an individual in custody undergoing police interrogation would feel compelled to respond to police questioning. This compulsion, which is a byproduct of most custodial interrogation, directly conflicts with every individual's fifth amendment protection against self-incrimination.

Accordingly, the Court developed the now-familiar Miranda warnings as a means of reducing the compulsion attendant in custodial interrogation. The Miranda rule requires that these warnings be given, and the rights they embody be waived, prior to the initiation of custodial interrogation. This rule, however, is not absolute.

In *Illinois v. Perkins*,10 the Supreme Court recognized that there are limitations to the rule announced in Miranda. The defendant in Perkins was imprisoned in a State correctional facility on an assault charge, when a former fellow inmate and an undercover officer were placed in his cellblock in an attempt to gather information about a murder Perkins was believed to have committed. When discussing the possibility of a prison break, the undercover officer responded to Perkins' claim that he could smuggle in a gun by asking Perkins whether he had ever "done" anyone. In reply, Perkins described at length a murder for hire he had committed. The following day, Perkins was charged with murder.

Prior to trial, Perkins moved to suppress the statements made to the undercover officer. Because no Miranda warnings had been given to Perkins prior to his conversation with the undercover officer, the trial court granted Perkins' motion to suppress. The Appellate Court of Illinois, holding that all undercover contacts with prisoners that are likely to elicit incriminating responses violate the rule in Miranda, affirmed the suppression order.11

The U.S. Supreme Court reversed the appellate court's decision and expressly rejected the argument that "Miranda warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent."12 Rather, the Court concluded that not every custodial interrogation creates the psychologically compelling atmosphere that Miranda was designed to protect against. When the compulsion is lacking, so is the need for Miranda warnings.

The Court in Perkins found the facts at issue to be a clear example of a custodial interrogation that created no compulsion. Pointing out that compulsion is "determined from the perspective of the suspect,"13 the Court noted that Perkins had no reason to believe that the undercover officer had any official power over him, and therefore, he had no reason to feel any compulsion. On the contrary, Perkins bragged about his role in the murder in an effort to impress those whom he believed to be his fellow inmates. Miranda was not designed to protect individuals from themselves. Consequently, the Court held there was no violation of Miranda and remanded the case to the Illinois courts for further proceedings.

On remand, Perkins moved once again to have his statements suppressed. Perkins' new motion was based on an allegation that, when arrested on the assault charge, he was advised of his rights and requested an attorney. Therefore, Perkins argued the statements subsequently made to the undercover officer violated his Miranda right to counsel as delineated in *Minnick v. Mississippi*.14

The Minnick Rule

When Miranda warnings are given to individuals in custody who then invoke either their rights to silence or counsel, all interrogation must cease immediately.15 Whether, and under what conditions, law enforcement officers subsequently may attempt to re-interrogate those individuals depends on which rights have been invoked.

In *Michigan v. Mosley*,16 the Supreme Court essentially interpreted the invocation of the right to silence as a request for time so suspects could think clearly about the situation. If that initial request is scrupulously honored, the Court held that attempts to re-interrogate may occur if suspects are afforded the time requested, or if they indicate, by initiating communications, that they have had enough time to think and now wish to talk.

As a result, re-interrogations following an invocation of the right to silence are deemed appropriate if: 1) A reasonable period of time has elapsed;17 or 2) interrogation was initiated by the suspect. In either case, any renewed attempt to interrogate a suspect must be preceded by a waiver of Miranda rights.

An invocation of the right to counsel, on the other hand, necessarily carries with it a different set of procedural safeguards. Obviously, suspects invoking the right to counsel are not simply asking for time to assess the situation; they are, instead, requesting the assistance of an attorney.

In Minnick, the Court concluded that this invocation of the right to counsel is not satisfied by giving the suspect the opportunity to consult with an attorney. Rather, the Court held that any attempt to interrogate a custodial suspect once that individual has invoked the right to counsel is unlawful unless: 1) The suspect's attorney is actually present; or 2) the suspect changes his mind and reinitiates the interrogation.18

Moreover, the protections afforded suspects who invoke their right to counsel remain in effect as long as they remain in custody. These protections are not crime specific 19 because the invocation implies that suspects are not willing to deal with law enforcement on any criminal matter without the benefit of counsel for as long as they remain in custody.20

Claiming a prior invocation of his right to counsel when first arrested on the assault charge, Perkins argued that the undercover officer's question "have your ever 'done' anyone"amounted to re-interrogation in violation of the rule established in Minnick. Agreeing with Perkins, the Illinois courts granted the motion to suppress. When the Supreme Court refused the government's request to hear the case a second time, the question of whether cellmate informants could lawfully be used following an invocation of the right to counsel was relegated, at least temporarily, to the lower courts.

Application of Minnick to Cellmate Informants in Federal Courts Since the Supreme Court decided the first Perkins case, three Federal courts of appeals 21 have addressed the issue raised by Perkins on remand. In direct opposition to the Illinois courts, all three Federal courts concluded that an invocation of the Miranda right to counsel is not a bar to the subsequent use of a cellmate informant. Although unanimous in their decisions, the three Federal courts are not in complete agreement as to the reasons for reaching this conclusion.

Two of the three Federal courts of appeals reached their conclusion by interpreting the Supreme Court's decision in Perkins as excluding the use of cellmate informants from the definition of interrogation for purposes of Miranda.22 The case of *United States v. Stubbs* 23 is illustrative.

In Stubbs, the defendant was arrested when a customs official found cocaine on Edwards, her traveling companion. Following the arrest, defendant was advised of her Miranda rights and immediately invoked the right to counsel. Edwards, on the other hand, immediately confessed and agreed to assist the government in its case against defendant. While incarcerated together, defendant reportedly told Edwards during a conversation that she would have to "take the rap" for defendant, but that defendant would take care of Edward's children. Edwards later testified regarding this conversation, and defendant was convicted.

On appeal, defendant claimed the use of her friend as a cellmate informant was interrogation in violation of her fifth amendment right to counsel invoked when she received her Miranda warnings. In support of her claim, defendant relied on the Supreme Court's language in Rhode Island v. Innis,24 which defined interrogation as "not only...express questioning, but also...any words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect."25 Because law enforcement officers should have known that placing Edwards in her cell was "reasonably likely to elicit an incriminating response," defendant argued that the tactic was re-interrogation in violation of her invoked right to counsel.

The U.S. Court of Appeals for the 11th Circuit, however, noted that any determination of whether law enforcement activity amounts to interrogation must "focus primarily upon the perceptions of the suspect, rather than the intent of the police."26 Reading the Supreme Court's decision in Perkins as a further refinement of the definition of interrogation, the court of appeals concluded that the use of cellmate informants does not amount to interrogation because no compulsion is perceived by the suspect.27

A third Federal court of appeals reached the conclusion that an invocation of the Miranda right to counsel is not a bar to the use of cellmate informants by a more direct approach. In *Alexander v. State*,28 the Court of Appeals for the Second Circuit, when confronted with defendant's claim that he had invoked his Miranda right to counsel prior to the government's use of a cellmate informant, regarded the claim as irrelevant and made the following statement:

Regardless of whether Alexander properly invoked his right to counsel, there is no support for the concept of a fifth amendment right to counsel which bars conduct not prohibited by Miranda itself. It is the fifth amendment's prohibition against compelled self-incrimination which provides the constitutional underpinning for the prophylactic Miranda rules, including notice of the right to counsel. Absent a police dominated interrogation, the fifth amendment right to counsel does not attach.29

Despite the fact that the Federal courts are not in agreement as to why the invocation of the Miranda right to counsel does not bar the subsequent use of cellmate informants, the logic of their conclusion is sound. Knowing, as a result of Perkins, that the use of a cellmate informant does not violate Miranda, it would be incongruous to hold that the technique violates Minnick, which is merely an interpretation of the rights guaranteed in Miranda.

When considering the use of a cellmate informant, however, law enforcement officers should be mindful that this issue remains unresolved by the Supreme Court and may be deemed unlawful by State courts following the reasoning of the Illinois court in Perkins. Therefore, the use of cellmate informants after an invocation of the right to counsel should be reviewed by a legal advisor or prosecutor to ensure the technique is legal in a particular jurisdiction.

Fifth Amendment--Due Process

In addition to the self-incrimination clause, the fifth amendment to the U.S. Constitution also provides that "no person shall be...deprived of life, liberty, or property, without the due process of law."30 The due process clause has been interpreted by the Supreme Court as requiring that all defendants in criminal prosecutions be treated with fundamental fairness.31

With respect to confessions, the Court has held that to be fair, a confession must be voluntary.32 To coerce a suspect into making an involuntary statement or confession would be unfair, and thus, the use of that statement against the suspect would constitute a violation of due process.

On the other hand, no unfairness or due process violation would result from the use of an uncoerced statement voluntarily made by the suspect. By their very nature, cell-mate informants are not generally considered coercive. The very reason suspects confide in cellmate informants is because suspects feel comfortable with them.

However, it is conceivable that an overzealous cellmate informant may violate a suspect's due process rights by gathering information through the use of threats or abuse.33 To avoid due process problems, law enforcement officers should select cellmate informants carefully and provide those individuals with clear instructions to ensure that nothing is done to coerce the suspect into making an involuntary statement.

Sixth Amendment--Right To Counsel

Another constitutional concern confronting law enforcement officers contemplating the placement of a cellmate informant is whether the use of the informant will violate the suspect's sixth amendment right to counsel. The sixth amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense."34

The Supreme Court has interpreted the sixth amendment as guaranteeing not merely the right to counsel, but more important, the right to the effective assistance of counsel.35 To be effective, an attorney must be permitted to form a relationship with the accused some time prior to trial,36 and the government cannot interfere needlessly with that relationship. Thus, to resolve all sixth amendment concerns, law enforcement officers contemplating the use of a cellmate informant must determine two things: 1) Did the suspect's right to counsel attach? and 2) if so, what can a cellmate informant do without interfering with that right?

Right to Counsel Attaches at Critical Stage

Determining whether a suspect's right to counsel has attached simply requires the law enforcement officer to discover whether the suspect has reached a critical stage in the prosecution. The Supreme Court has defined the critical stage as the filing of formal charges (i.e. an indictment or an information) or the initiation of adversarial judicial proceedings. If no formal charges have been filed against the suspect and no initial appearance before the court has been conducted, no critical stage in the prosecution has been reached, and a cellmate informant can be used without concern for the suspect's sixth amendment right to counsel. If, on the other hand, a critical stage has been reached, the suspect's sixth amendment right to counsel has attached, and extreme caution must be used to ensure that the cellmate informant does not interfere with that right.

Postcritical Stage Uses for Cellmate Informants

Once it is determined that a suspect's sixth amendment rights have attached, the law enforcement officer must realize that there are only two functions a cellmate informant can perform lawfully without interfering with that suspect's right to counsel. These two functions are: 1) Gathering information regarding an unrelated crime,38 or 2) acting as a listening post.

Unrelated Crimes

Even though the suspect's right to counsel has attached, a cellmate informant may gather information about an unrelated crime because the sixth amendment is crime-specific.40 Under the sixth amendment, a suspect only has the right to the assistance of counsel with respect to the crimes formally charged against him.41 If a cellmate informant is used to elicit information from a suspect that pertains to some unrelated, uncharged crime, there is no unlawful interference with the suspect's right to counsel.

Listening Post

If a cellmate informant is placed with the intent of gathering information about a crime that is the subject of formal charges against the suspect, the only role the cellmate informant may play is that of a listening post. The Supreme Court has determined that simply placing an informant in the cell of a suspect who has been formally charged does not, in and of itself, constitute a sixth amendment violation.42 Rather, there must be some deliberate attempt to elicit information regarding those charges from the suspect.43

It is the act of deliberate elicitation that creates the sixth amendment violation. Consequently, a law enforcement officer who places an informant in a cell of a formally charged suspect in an attempt to obtain information relating to those charges should be prepared to demonstrate that there was no deliberate elicitation on the part of the informant.44

Conclusion

Confined suspects often have an overwhelming desire to talk about their criminal activities with those they consider their peers. Law enforcement officers can take advantage of this phenomenon by placing an informant in the prison population. When doing so, however, officers must be ever mindful of the boundaries set by the fifth and sixth amendments. Thoughtful selection, careful planning, and detailed instruction can ensure that an informant operates within those boundaries and conforms to fifth and sixth amendment standards.

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CHAPTER OVERVIEW

18: Constitutional Rights of the Accused

18.1: Constitutional Rights of the Accused

18.2: United States v. Wade

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18.1: Constitutional Rights of the Accused

The Framers of the Constitution had fresh memories of a government that accused people of crimes they did not commit and then convicted them in unfair trials. Consequently, they went to great lengths to assure that the new government they established would not engage in such practices. Toward that end, the Constitution and the Bill of Rights guarantee a series of important protections for individuals accused of committing crimes in the United States.

Given the high rates of crime in this nation, some have suggested that the rights of the accused be curtailed. There have been, in fact, several efforts at the national level and in the states to enact "victims' rights" laws, to limit the number of appeals that can be brought by convicted criminals and to make the penalties for crime more severe. In terms of balancing liberty and order, these efforts are clearly aimed at promoting more order. The Constitution, however, keeps the balances tipped decidedly in favor of the accused. In this nation's criminal judicial system, the assumption is that mistakes will be made. Instead of erring on the side of punishing the innocent, however, it is a system that is more likely to let a guilty person go unpunished.

Search and Seizure

The rights of those accused of a crime are spelled out in four of the ten constitutional amendments that make up the Bill of Rights (Amendments Four, Five, Six, and Eight). For the most part, these amendments have been held to apply to both the federal and the state governments. The Fourth Amendment says in part that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Although there are numerous and tricky exceptions to the general rule, ordinarily the police may not break into a person’s house or confiscate his papers or arrest him unless they have a warrant to do so. This means, for instance, that a policeman cannot simply stop you on a street corner and ask to see what is in your pockets (a power the police enjoy in many other countries), nor can your home be raided without probable cause to believe that you have committed a crime. What if the police do search or seize unreasonably?

The courts have devised a remedy for the use at trial of the fruits of an unlawful search or seizure. Evidence that is unconstitutionally seized is excluded from the trial. This is the so-called exclusionary rule, first made applicable in federal cases in 1914 and brought home to the states in 1961. The exclusionary rule is highly controversial, and there are numerous exceptions to it. But it remains generally true that the prosecutor may not use evidence willfully taken by the police in violation of constitutional rights generally, and most often in the violation of Fourth Amendment rights. (The fruits of a coerced confession are also excluded.)

Double Jeopardy

The Fifth Amendment prohibits the government from prosecuting a person twice for the same offense. The amendment says that no person shall be “subject for the same offence to be twice put in jeopardy of life or limb.” If a defendant is acquitted, the government may not appeal. If a defendant is convicted and his conviction is upheld on appeal, he may not thereafter be reprosecuted for the same crime.

Self-Incrimination

The Fifth Amendment is also the source of a person’s right against self-incrimination (no person “shall be compelled in any criminal case to be a witness against himself”). The debate over the limits of this right has given rise to an immense literature. In broadest outline, the right against self-incrimination means that the prosecutor may not call a defendant to the witness stand during trial and may not comment to the jury on the defendant’s failure to take the stand. Moreover, a defendant’s confession must be excluded from evidence if it was not voluntarily made (e.g., if the police beat the person into giving a confession). In *Miranda v. Arizona*, the Supreme Court ruled that no confession is admissible if the police have not first advised a suspect of his constitutional rights, including the right to have a lawyer present to advise him during the questioning.*Miranda v. Arizona*, 384 US 436 (1966). These so-called Miranda warnings have prompted scores of follow-up cases that have made this branch of jurisprudence especially complex.

Speedy Trial

The Sixth Amendment tells the government that it must try defendants speedily. How long a delay is too long depends on the circumstances in each case. In 1975, Congress enacted the Speedy Trial Act to give priority to criminal cases in federal courts. It

requires all criminal prosecutions to go to trial within seventy-five days (though the law lists many permissible reasons for delay).

Cross-Examination

The Sixth Amendment also says that the defendant shall have the right to confront witnesses against him. No testimony is permitted to be shown to the jury unless the person making it is present and subject to cross-examination by the defendant's counsel.

Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to have the assistance of defense counsel. During the eighteenth century and before, the British courts frequently refused to permit defendants to have lawyers in the courtroom during trial. The right to counsel is much broader in this country, as the result of Supreme Court decisions that require the state to pay for a lawyer for indigent defendants in most criminal cases.

Cruel and Unusual Punishment

Punishment under the common law was frequently horrifying. Death was a common punishment for relatively minor crimes. In many places throughout the world, punishments still persist that seem cruel and unusual, such as the practice of stoning someone to death. The guillotine, famously in use during and after the French Revolution, is no longer used, nor are defendants put in stocks for public display and humiliation. In pre-Revolutionary America, an unlucky defendant who found himself convicted could face brutal torture before death.

The Eighth Amendment banned these actions with the words that "cruel and unusual punishments [shall not be] inflicted." Virtually all such punishments either never were enacted or have been eliminated from the statute books in the United States. Nevertheless, the Eighth Amendment has become a source of controversy, first with the Supreme Court's ruling in 1976 that the death penalty, as haphazardly applied in the various states, amounted to cruel and unusual punishment. Later Supreme Court opinions have made it easier for states to administer the death penalty. As of 2010, there were 3,300 defendants on death row in the United States. Of course, no corporation is on death row, and no corporation's charter has ever been revoked by a US state, even though some corporations have repeatedly been indicted and convicted of criminal offenses.

Presumption of Innocence

The most important constitutional right in the US criminal justice system is the presumption of innocence. The Supreme Court has repeatedly cautioned lower courts in the United States that juries must be properly instructed that the defendant is innocent until proven guilty. This is the origin of the "beyond all reasonable doubt" standard of proof and is an instruction given to juries in each criminal case. The Fifth Amendment notes the right of "due process" in federal proceedings, and the Fourteenth Amendment requires that each state provide "due process" to defendants.

KEY TAKEAWAY

The US Constitution provides several important protections for criminal defendants, including a prohibition on the use of evidence that has been obtained by unconstitutional means. This would include evidence seized in violation of the Fourth Amendment and confessions obtained in violation of the Fifth Amendment.

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18.2: United States v. Wade

PETITIONER	RESPONDENT
United States	Billy Joe Wade

LOCATION

Residence of Gates

DOCKET NO.	DECIDED BY
334	Case pending

LOWER COURT

United States Court of Appeals for the Fifth Circuit

CITATION

388 US 218 (1967)

ARGUED

Feb 16, 1967

DECIDED

Jun 12, 1967

GRANTED

Oct 10, 1966

ADVOCATES

Beatrice Rosenberg *for the petitioner*

Weldon Holcomb *for the respondent*

Facts of the case

Billy Joe Wade was arrested and indicted for robbing a federally-insured bank. Without giving notice to Wade's counsel, an FBI officer set up a lineup for two bank employees including Wade and several other prisoners. The officer had each prisoner put strips of tape on their face and say, "Put the money in the bag," like the robbers did. The employees identified Wade as the robber. At trial, the employees identified him again. Wade's counsel moved to strike the identifications because the lineup violated Wade's Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. The trial court denied the motion, but the U.S. Court of Appeals for the Fifth Circuit reversed, holding that the lineup without counsel violated the Sixth Amendment.

Question

Does a lineup conducted without notifying a suspect'scounsel require exclusion of an in-court identification of a suspect by a witness be excluded from trial?

Conclusion

5–4 Decision

Majority Opinion by William J. Brennan, Jr.

FOR	AGAINST
Douglas Fortas Warren Brennan Clark	Black White Stewart Harlan

Maybe. In a 5-4 decision, Justice William J. Brennan vacated the lower judgment and remanded to determine whether the employees based their trial identifications solely on the lineup. The Supreme Court affirmed that the lineup did not violate Wade's privilege against self-incrimination. To decide the Sixth Amendment issue, courts must decide whethercounsel's presence at a pre-trial confrontation of the accused will preserve the accused's right to a fair trial. In this case, Wade was entitled to counsel at the lineup. The Court held that the identifications should not be excluded if they were based on observations other than the lineup.

Justice Hugo L. Black dissented in part and concurred in part, expressing that the lineup violated Wade's Fifth and Sixth Amendment rights. Justice Black would affirm the conviction, though, because the prosecution did not use evidence of the lineup at trial. Justice Byron R. White dissented in part and concurred in part, stating that Wade was not entitled to counsel at the lineup. Justice John M. Harlan and Justice Potter Stewart joined in the opinion. Justice Abe Fortas concurred in part and dissented in part, stating that the lineup violated Wade's privilege against self-incrimination. Chief Justice Earl Warren and Justice William O. Douglas joined in the opinion.

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18.3: Kirby v. Illinois

PETITIONER	RESPONDENT
Thomas Kirby	Illinois

LOCATION

Maxwell Street Police Station

DOCKET NO.	DECIDED BY
70-5061	Burger Court

LOWER COURT

State appellate court

CITATION

406 US 682 (1972)

ARGUED

Nov 11, 1971

REARGUED

Mar 19 – 20, 1972

DECIDED

Jun 7, 1972

GRANTED

May 24, 1971

ADVOCATES

Michael P. Seng *for petitioner*

James B. Zagel *for respondent*

Jerold S. Solovy *for petitioner on reargument*

Facts of the case

William Shard reported to the Chicago police that two men stole his wallet. The wallet contained traveler'schecksand his social security card, among other things. The next day, two police officers stopped Thomas Kirby and his friend, Ralph Bean. When asked for identification, Kirby produced Shard's wallet. The officers arrested Kirby and Bean and brought them to the Maxwell Street Police Station. Once there, the officers learned about Shard's robbery and sent a car to pick up Shard and bring him to the station. Without an attorney present, police asked Shard if Kirby and Bean were his robbers. Shard instantly gave a positive identification. Kirby and Bean were not indicted until almost 6 weeks later. At trial, Kirby unsuccessfully attempted to suppress Shard's identification. The jury found Kirby guilty and the Appellate Court of Illinois, First District affirmed.

Question

Does due process require that an accused be advised of his right to counsel before an identification that takes place before the accused has been charged formally?

Conclusion

5–4 Decision

Plurality Opinion by Potter Stewart

FOR	AGAINST
Stewart Powell Blackmun Burger Rehnquist	Douglas Brennan Marshall White

No. Justice Potter Stewart, writing for a four justice plurality, delivered the judgment of the court. The plurality expressed that there is no constitutional right to counsel for an identification that takes place before the accused is indicted or formally charged. For this reason, the Exclusionary Rule does not apply, and the identification can be admitted at trial. Chief Justice Warren E. Burger concurred, emphasizing that the right to counsel does not attach until an accused is formally charged. Justice Lewis F. Powell concurred in the judgment, agreeing that the Exclusionary Rule does not apply.

Justice William J. Brennan dissented, arguing that prior Supreme Court Exclusionary Rule precedent just happened to cover post-indictment identifications, but the reasons for using the Rule are the same in preindictment cases. Justice William O. Douglas and Justice Thurgood Marshall joined in the dissent. Justice Byron R. White dissented, arguing that the Exclusionary Rule applies in this case.

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CHAPTER OVERVIEW

19: Sentencing

19.1: General Guidelines

19.2: Different Types of Sentences

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19.1: General Guidelines

Sentencing

In most jurisdictions, the judge holds the responsibility of imposing criminal sentences on convicted offenders. Often, this is a difficult process that defines the application of simple sentencing principles. The latitude that a judge has in imposing sentences can vary widely from state to state. This is because state legislatures often set the minimum and maximum punishments for particular crimes in criminal statutes. The law also specifies alternatives to incarceration that a judge may use to tailor a sentence to an individual offender.

Sentencing Statutes and Guidelines

In the United States, most jurisdictions hold that criminal sentencing is entirely a matter of statute. That is, legislative bodies determine the punishments that are associated with particular crimes. These legislative assemblies establish such sentencing schemes by passing **sentencing statutes** or establishing *sentencing guidelines*. These sentences can be of different types that have a profound effect on both the administration of criminal justice and the life of the convicted offender.

Indeterminate Sentences

Indeterminate sentencing is a type of criminal sentencing where the convict is not given a sentence of a certain period in prison. Rather, the amount of time served is based on the offender's conduct while incarcerated. Most often, a broad range is specified during sentencing, and then a parole board will decide when the offender has earned release.

Determinate Sentences

A **determinate sentence** is of a fixed length, and is generally not subject to review by a parole board. Convicts must serve all of the time sentenced, minus any **good time** earned while incarcerated.

Mandatory Sentences

Mandatory sentences are a type of sentence where the absolute minimum sentence is established by a legislative body. This effectively limits judicial discretion in such cases. Mandatory sentences are often included in habitual offender laws, such as repeat drug offenders. Under federal law, prosecutors have the powerful plea bargaining tool of agreeing not to file under the prior felony statute.

Sentencing Guidelines

The **Sentencing Reform Act of 1984** was passed in response to congressional concern about fairness in federal sentencing practices. The Act completely changed the way courts sentenced federal offenders. The Act created a new federal agency, the U.S. Sentencing Commission, to set sentencing guidelines for every federal offense. When federal sentencing guidelines went into effect in 1987, they significantly altered judges' sentencing discretion, probation officers' preparation of the presentence investigation report, and officers' overall role in the sentencing process. The new sentencing scheme also placed officers in a more adversarial environment in the courtroom, where attorneys might dispute facts, question guideline calculations, and object to the information in the presentence report. In addition to providing for a new sentencing process, the Act also replaced parole with "supervised release," a term of community supervision to be served by prisoners after they completed prison terms (Courts, 2015).

When the Federal Courts began using sentencing guidelines, about half of the states adopted the practice. Sentencing guidelines indicate to the sentencing judge a narrow range of expected punishments for specific offenses. The purpose of these guidelines is to limit judicial discretion in sentencing. Several sentencing guidelines use a grid system, where the severity of the offense runs down one axis, and the criminal history of the offender runs across the other. The more serious the offense, the longer the sentence the offender receives. The longer the criminal history of the offender, the longer the sentence imposed. Some systems allow judges to go outside of the guidelines when *aggravating* or *mitigating* circumstances exist.

Presentence Investigation

Many jurisdictions require that a presentence investigation take place before a sentence is handed down. Most of the time, the presentence investigation is conducted by a probation officer, and results in a **presentence investigation report**. This document describes the convict's education, employment record, criminal history, present offense, prospects for rehabilitation, and any

personal issues, such as addiction, that may impact the court's decision. The report usually contains a recommendation as to the sentence that the court should impose. These reports are a major influence on the judge's final decision.

Victim Impact Statements

Many states now consider the impact that a crime had on the victim when determining an appropriate sentence. A few states even allow the victims to appear in court and testify. **Victim impact statements** are usually read aloud in open court during the sentencing phase of a trial. Criminal defendants have challenged the constitutionality of this process on the grounds that it violates the **Proportionality Doctrine** requirement of the Eighth Amendment, but the Supreme Court has rejected this argument and found the admission of victim statements constitutional.

The Sentencing Hearing

Many jurisdictions pass final sentences in a phase of the trial process known as a **sentencing hearing**. The prosecutor will recommend a sentence in the name of the people, or defend the recommended sentence in the presentence investigation report, depending on the jurisdiction. Defendants retain the right to counsel during this phase of the process. Defendants also have the right to make a statement to the judge before the sentence is handed down.

Influences on Sentencing Decisions

The severity of a sentence usually hinges on two major factors. The first is the seriousness of the offense. The other, which is much more complex, is the presence of aggravating or mitigating circumstances. In general the more serious the crime, the harsher the punishment.

Concurrent versus Consecutive Sentences

It is not uncommon for a person to be indicted on multiple offenses. This can be several different offenses, or a repetition of the same offense. In many jurisdictions, the judge has the option to order the sentences to be served **concurrently** or **consecutively**. A concurrent sentence means that the sentences are served at the same time. A consecutive sentence means that the defendant serves the sentences one after another.

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19.2: Different Types of Sentences

A **sentence** is the punishment ordered by the court for a convicted defendant. Statutes usually prescribe punishments at both the state and federal level. The most important limit on the severity of punishments in the United States is the Eighth Amendment.

The Death Penalty

The death penalty is a sentencing option in thirty-eight states and the federal government. It is usually reserved for those convicted of murders with aggravating circumstances. Because of the severity and irrevocability of the death penalty, its use has heavily circumscribed by statutes and controlled by case law. Included among these safeguards is an automatic review by appellate courts.

Incarceration

The most common punishment after fines in the United States is the deprivation of liberty known as *incarceration*. *Jails* are short-term facilities, most often run by counties under the auspices of the sheriff's department. Jails house those awaiting trial and unable to make bail, and convicted offenders serving short sentences or waiting on a bed in a prison. *Prisons* are long-term facilities operated by state and federal governments. Most prison inmates are felons serving sentences of longer than one year.

Probation

Probation serves as a middle ground between no punishment and incarceration. Convicts receiving probation are supervised within the community, and must abide by certain rules and restrictions. If they violate the conditions of their probation, they can have their probation revoked and can be sent to prison. Common conditions of probation include obeying all laws, paying fines and restitution as ordered by the court, reporting to a probation officer, not associating with criminals, not using drugs, submitting to searches, and submitting to drug tests.

The heavy use of probation is controversial. When the offense is nonviolent, the offender is not dangerous to the community, and the offender is willing to make restitution, then many agree that probation is a good idea. Due to prison overcrowding, judges have been forced to place more and more offenders on probation rather than sentencing them to prison.

Intensive Supervision Probation (ISP)

Intensive Supervision Probation (ISP) is similar to standard probation, but requires much more contact with probation officers and usually has more rigorous conditions of probation. The primary focus of adult ISP is to provide protection of the public safety through close supervision of the offender. Many juvenile programs, and an increasing number of adult programs, also have a treatment component that is designed to reduce recidivism.

Boot Camps

Convicts, often young men, sentenced to **boot camps** live in a military style environment complete with barracks and rigorous physical training. These camps usually last from three to six months, depending on the particular program. The core ideas of boot camp programs are to teach wayward youths discipline and accountability. While a popular idea among some reformers, the research shows little to no impact on recidivism.

House Arrest and Electronic Monitoring

The Special Curfew Program was the federal courts' first use of home confinement. It was part of an experimental program-a cooperative venture of the Bureau of Prisons, the U.S. Parole Commission, and the federal probation system-as an alternative to Bureau of Prisons Community Treatment Center (CTC) residence for eligible inmates. These inmates, instead of CTC placement, received parole dates advanced a maximum of 60 days and were subject to a curfew and minimum weekly contact with a probation officer. **Electronic monitoring** became part of the home confinement program several years later. In 1988, a pilot program was launched in two districts to evaluate the use of electronic equipment to monitor persons in the curfew program. The program was expanded nationally in 1991 and grew to include offenders on probation and supervised release and defendants on pretrial supervision as those who may be eligible to be placed on home confinement with electronic monitoring (Courts, 2015).

Today, most jurisdictions stipulate that offenders sentenced to house arrest must spend all or most of the day in their own homes. The popularity of house arrest has increased in recent years due to monitoring technology that allows a transmitter to be placed on the convict's ankle, allowing compliance to be remotely monitored. House arrest is often coupled with other sanctions, such as

fines and community service. Some jurisdictions have a work requirement, where the offender on house arrest is allowed to leave home for a specified window of time in order to work.

Fines

Fines are very common for violations and minor misdemeanor offenses. First time offenders found guilty of simple assaults, minor drug possession, traffic violations and so forth are sentenced to fines alone. If these fines are not paid according to the rules set by the court, the offender is jailed. Many critics argue that fines discriminate against the poor. A $200 traffic fine means very little to a highly paid professional, but can be a serious burden on a college student with only a part-time job. Some jurisdictions use a sliding scale that bases fines on income known as **day fines**. They are an outgrowth of traditional fining systems, which were seen as disproportionately punishing offenders with modest means while imposing no more than "slaps on the wrist" for affluent offenders.

This system has been very popular in European countries such as Sweden and Germany. Day fines take the financial circumstances of the offender into account. They are calculated using two major factors: The seriousness of the offense and the offender's daily income. The European nations that use this system have established guidelines that assign points ("fine units") to different offenses based on the seriousness of the offense. The range of fine units varies greatly by country. For example, in Sweden the range is from 1 to 120 units. In Germany, the range is from 1 to 360 units.

The most common process is for court personnel to determine the daily income of the offender. It is common for family size and certain other expenses to be taken into account.

Restitution

When an offender is sentenced to a fine, the money goes to the state. *Restitution* requires the offender to pay money to the victim. The idea is to replace the economic losses suffered by the victim because of the crime. Judges may order offenders to compensate victims for medical bills, lost wages, and the value of property that was stolen or destroyed. The major problem with restitution is actually collecting the money on behalf of the victim. Some jurisdictions allow practices such as wage garnishment to ensure the integrity of the process. Restitution can also be made a condition of probation, whereby the offender is imprisoned for a probation violation is the restitution is not paid.

Community Service

As a matter of legal theory, crimes harm the entire community, not just the immediate victim. Advocates see community service as the violator paying the community back for the harm caused. **Community service** can include a wide variety of tasks such as picking up trash along roadways, cleaning up graffiti, and cleaning up parks. Programs based on community service have been popular, but little is known about the impact of these programs on recidivism rates.

"Scarlet-letter" Punishments

While exact practices vary widely, the idea of **scarlet-letter punishments** is to shame the offender. Advocates view shaming as a cheap and satisfying alternative to incarceration. Critics argue that criminals are not likely to mend their behavior because of shame. There are legal challenges that of kept this sort of punishment from being widely accepted. Appeals have been made because such punishments violate the Eighth Amendment ban on cruel and unusual punishment. Others have been based on the idea that they violate the First Amendment by compelling defendants to convey a judicially scripted message in the form of forced apologies, warning signs, newspaper ads, and sandwich boards. Still other appeals have been based on the notion that shaming punishments are not specifically authorized by State sentencing guidelines and therefore constitute an abuse of judicial discretion (Litowitz, 1997).

Asset Forfeiture

Many jurisdictions have laws that allow the government to seize property and assets used in criminal enterprises. Such a seizure is known as **forfeiture**. Automobiles, airplanes, and boats used in illegal drug smuggling are all subject to seizure. The assets are often given over to law enforcement. According to the FBI, "Many criminals are motivated by greed and the acquisition of material goods. Therefore, the ability of the government to forfeit property connected with criminal activity can be an effective law enforcement tool by reducing the incentive for illegal conduct. Asset forfeiture takes the profit out of crime by helping to eliminate the ability of the offender to command resources necessary to continue illegal activities" (FBI, 2015).

Asset forfeiture can be both a criminal and a civil matter. Civil forfeitures are easier on law enforcement because they do not require a criminal conviction. As a civil matter, the standard of proof is much lower than it would be if the forfeiture was a criminal penalty. Commonly, the standard for such a seizure is probable cause. With criminal asset forfeitures, law enforcement cannot take control of the assets until the suspect has been convicted in criminal court.

Appeals

An **appeal** is a claim that some procedural or legal error was made in the prior handling of the case. An appeal results in one of two outcomes. If the appellate court agrees with the lower court, then the appellate court **affirms** the lower court's decision. In such cases the appeals court is said to **uphold** the decision of the lower court. If the appellate court agrees with the plaintiff that an error occurred, then the appellate court will **overturn** the conviction. This happens only when the error is determined to be substantial. Trivial or insignificant errors will result in the appellate court affirming the decision of the lower court. Winning an appeal is rarely a "get out of jail free" card for the defendant. Most often, the case is **remanded** to the lower court for rehearing. The decision to retry the case ultimately rests with the prosecutor. If the decision of the appellate court requires the exclusion of important evidence, the prosecutor may decide that a conviction is not possible.

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CHAPTER OVERVIEW

20: Victims Rights

20.1: Crime Victims, Survivors, And Witnesses

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20.1: Crime Victims, Survivors, And Witnesses

The rights of victims is currently legislated at the state level and debated at the federal level. Many states have different legislation protecting victims.

Below is Washington State Legistalture chapter 7.96 RCW on proctections for crime victims, survivors, and witnesses.

Crime Victims, Survivors, And Witnesses

Intent

In recognition of the severe and detrimental impact of crime on victims, survivors of victims, and witnesses of crime and the civic and moral duty of victims, survivors of victims, and witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system. The legislature further intends to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.

Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

1. "Crime" means an act punishable as a felony, gross misdemeanor, or misdemeanor under the laws of this state or equivalent federal or local law.
2. "Survivor" or "survivors" of a victim of crime means a spouse or domestic partner, child, parent, legal guardian, sibling, or grandparent. If there is more than one survivor of a victim of crime, one survivor shall be designated by the prosecutor to represent all survivors for purposes of providing the notice to survivors required by this chapter.
3. "Victim" means a person against whom a crime has been committed or the representative of a person against whom a crime has been committed.
4. "Victim impact statement" means a statement submitted to the court by the victim or a survivor, individually or with the assistance of the prosecuting attorney if assistance is requested by the victim or survivor, which may include but is not limited to information assessing the financial, medical, social, and psychological impact of the offense upon the victim or survivors.
5. "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action, or who by reason of having relevant information is subject to call or likely to be called as a witness for the prosecution, whether or not an action or proceeding has been commenced.
6. "Crime victim/witness program" means any crime victim and witness program of a county or local law enforcement agency or prosecutor's office, any rape crisis center's sexual assault victim advocacy program as provided in chapter **70.125** RCW, any domestic violence program's legal and community advocate program for domestic violence victims as provided in chapter **70.123** RCW, or any other crime victim advocacy program which provides trained advocates to assist crime victims during the investigation and prosecution of the crime.

Rights of Victims, Survivors, and Witnesses

There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court and/or juvenile court proceeding:

1. With respect to victims of violent or sex crimes, to receive, at the time of reporting the crime to law enforcement officials, a written statement of the rights of crime victims as provided in this chapter. The written statement shall include the name, address, and telephone number of a county or local crime victim/witness program, if such a crime victim/witness program exists in the county;
2. To be informed by local law enforcement agencies or the prosecuting attorney of the final disposition of the case in which the victim, survivor, or witness is involved;

3. To be notified by the party who issued the subpoena that a court proceeding to which they have been subpoenaed will not occur as scheduled, in order to save the person an unnecessary trip to court;
4. To receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available;
5. To be informed of the procedure to be followed to apply for and receive any witness fees to which they are entitled;
6. To be provided, whenever practical, a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families or friends of defendants;
7. To have any stolen or other personal property expeditiously returned by law enforcement agencies or the superior court when no longer needed as evidence. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within ten days of being taken;
8. To be provided with appropriate employer intercession services to ensure that employers of victims, survivors of victims, and witnesses of crime will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearance;
9. To access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having such assistance administered. However, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance. Victims of domestic violence, sexual assault, or stalking, as defined in RCW **49.76.020**, shall be notified of their right to reasonable leave from employment under chapter **49.76** RCW;
10. With respect to victims of violent and sex crimes, to have a crime victim advocate from a crime victim/witness program, or any other support person of the victim's choosing, present at any prosecutorial or defense interviews with the victim, and at any judicial proceedings related to criminal acts committed against the victim. This subsection applies if practical and if the presence of the crime victim advocate or support person does not cause any unnecessary delay in the investigation or prosecution of the case. The role of the crime victim advocate is to provide emotional support to the crime victim;
11. With respect to victims and survivors of victims, to be physically present in court during trial, or if subpoenaed to testify, to be scheduled as early as practical in the proceedings in order to be physically present during trial after testifying and not to be excluded solely because they have testified;
12. With respect to victims and survivors of victims, to be informed by the prosecuting attorney of the date, time, and place of the trial and of the sentencing hearing for felony convictions upon request by a victim or survivor;
13. To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution;
14. With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions; and
15. With respect to victims and survivors of victims, to entry of an order of restitution by the court in all felony cases, even when the offender is sentenced to confinement, unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment.

Right to make statement before postsentence release of offender

1. The legislature recognizes the significant concerns that many victims, survivors of victims, and witnesses of crimes have when offenders are considered for postsentence release from confinement. Therefore, it is the intent of the legislature to ensure that victims, survivors of victims, and witnesses of crimes are afforded the opportunity to make a statement that will be considered prior to the granting of postsentence release from confinement for any offender under the jurisdiction of the indeterminate sentence review board or its successor, or by the governor regarding an application for pardon or commutation of sentence.
2. Victims, survivors of victims, and witnesses of crimes have the following rights:
    a. With respect to victims, survivors of victims, and witnesses of crimes, to present a statement to the indeterminate sentence review board or its successor, in person or by representation, via audio or videotape or other electronic means, or in writing, prior to the granting of parole or community custody release for any offender under the board's jurisdiction.
    b. With respect to victims and survivors of victims, to present a statement to the clemency and pardons board in person, via audio or videotape or other electronic means, or in writing, at any hearing conducted regarding an application for pardon or

commutation of sentence.

Protection of witnesses who testify against criminal gang members

The legislature recognizes that witnesses are often fearful of testifying against criminal gang members. Witnesses may be subject to harassment, intimidation, and threats. While the state does not ensure protection of witnesses, the state intends to provide resources to assist local prosecutors in combating gang-related crimes and to help citizens perform their civic duty to testify in these cases.

Representation of incapacitated or incompetent victim

For purposes of this chapter, a victim who is incapacitated or otherwise incompetent shall be represented by a parent or present legal guardian, or if none exists, by a representative designated by the prosecuting attorney without court appointment or legal guardianship proceedings. Any victim may designate another person as the victim's representative for purposes of the rights enumerated in RCW **7.69.030**.

Construction of chapter

Nothing contained in this chapter may be construed to provide grounds for error in favor of a criminal defendant in a criminal proceeding, nor may anything in this chapter be construed to grant a new cause of action or remedy against the state, its political subdivisions, law enforcement agencies, or prosecuting attorneys. The failure of a person to make a reasonable effort to ensure that victims, survivors, and witnesses under this chapter have the rights enumerated in RCW **7.69.030** shall not result in civil liability against that person. This chapter does not limit other civil remedies or defenses of the offender or the victim or survivors of the victim.

At the federal level there have been attempts to legislate a Victims Rights Amendment. There are pros and cons to such an amendment and many legal professionals find themselves on different sides of the debate. Explore opposing sides of the debate below as legal professionals offer their side of the debate.

Victims Rights Amendment

For

Against

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5.3: Arrests

O

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9.1: Oliver v. United States

P

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5.2: Probable Cause to Arrest

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