© 2012 by Robert C. Phillips

All rights reserved. No part of this Outline may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying and recording, or through any information storage or retrieval system, when done for commercial purposes or for any form of a monetary return or profit, except as expressly permitted by federal copyright law and as indicated below.

This Outline has been prepared and published for the purpose of aiding law enforcement officers, police and private investigators, law enforcement administrators, prosecutors, the judiciary, other attorneys engaged in the practice of criminal law, students, and legal educators and scholars, in accessing, using and understanding the field of Fourth Amendment Search and Seizure Law. As such, permission is expressly granted by the author to the above listed persons, or any other person, to use, reproduce, cite, and/or employ in the field of law enforcement, education or instruction any or all of this Outline, provided the source is properly and correctly identified, and except where done for commercial purposes or profit as described above.

The information provided in this Outline is a summary of various aspects of Fourth Amendment Search and Seizure Law, and in many respects represents no more than the author’s opinions, interpretation and conclusions concerning the various topics discussed. Readers are advised not to rely upon the information provided in this publication without first researching and verifying the legal rules and issues intended to be used. This Outline is not intended to be a substitute for the reader’s own professional judgment and legal research. The author accepts no legal responsibility or liability for a user’s failure to properly research and verify the continued validity or correctness of any of the rules, conclusions, or opinions contained in this Outline.

Comments concerning errors, misinterpretations, and/or other suggestions for correcting, expanding, or improving the information provided in this Outline are respectfully solicited, and should be directed to the author.

Robert C. Phillips
Deputy District Attorney (Retired)
San Diego District Attorney’s Office
RCPhill808@aol.com
858-395-0302

How To Use This Manual: To locate the law on any particular subject of interest to you, it is suggested that you first note the general description of the subject under “Chapter Summary,” on page iii, below. This will guide you to the correct page of the Table of Contents under “Topics,” beginning on page iv. There you will find a more detailed description of the various legal issues. This in turn will note for you the specific page in the expanded Outline where you will find all the relevant cases on that topic.
## Table of Contents

### Chapter Summary:

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The Fourth Amendment, United States Constitution</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>Consensual Encounters</td>
<td>13</td>
</tr>
<tr>
<td>3</td>
<td>Detentions</td>
<td>23</td>
</tr>
<tr>
<td>4</td>
<td>Arrests</td>
<td>99</td>
</tr>
<tr>
<td>5</td>
<td>Searches and Seizures</td>
<td>216</td>
</tr>
<tr>
<td>6</td>
<td>Searches with a Search Warrant</td>
<td>251</td>
</tr>
<tr>
<td>7</td>
<td>Warrantless Searches</td>
<td>412</td>
</tr>
<tr>
<td>8</td>
<td>Searches of Persons</td>
<td>434</td>
</tr>
<tr>
<td>9</td>
<td>Searches of Vehicles</td>
<td>506</td>
</tr>
<tr>
<td>10</td>
<td>Searches of Residences and Other Buildings</td>
<td>541</td>
</tr>
<tr>
<td>11</td>
<td>New Law Enforcement Technology</td>
<td>587</td>
</tr>
<tr>
<td>12</td>
<td>Open Fields</td>
<td>600</td>
</tr>
<tr>
<td>13</td>
<td>Searches of Containers</td>
<td>602</td>
</tr>
<tr>
<td>14</td>
<td>Border Searches</td>
<td>623</td>
</tr>
<tr>
<td>15</td>
<td>Fourth Waiver Searches</td>
<td>636</td>
</tr>
<tr>
<td>16</td>
<td>Consent Searches</td>
<td>661</td>
</tr>
</tbody>
</table>
### Topics:

**Chapter 1: The Fourth Amendment, United States Constitution:**

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

The Fourth Amendment:  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

California Constitution, Art I, § 13  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

**Scope:**  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

“Due Process” and the Fourteenth Amendment  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
</tr>
</tbody>
</table>

**The Exclusionary Rule:**  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
</tr>
</tbody>
</table>

History  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
</tr>
</tbody>
</table>

The Primary Purpose of the Exclusionary Rule  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
</tr>
</tbody>
</table>

The Rule of Reasonableness  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
</tr>
</tbody>
</table>

Private Persons and the Exclusionary Rule  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
</tr>
</tbody>
</table>

Limited Use of the Exclusionary Rule  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
</tr>
</tbody>
</table>

**Rule of Exclusion:**  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
</tr>
</tbody>
</table>

Benjamin Cardozo  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
</tr>
</tbody>
</table>

Verbal Evidence  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
</tr>
</tbody>
</table>

Illegal Detention  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
</tr>
</tbody>
</table>

Fruit of the Poisonous Tree  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
</tr>
</tbody>
</table>

Federal Rules of Evidence, Rule 402  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
</tr>
</tbody>
</table>

**Exceptions:**  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
</tr>
</tbody>
</table>

California’s Exclusionary Rule  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
</tr>
</tbody>
</table>

Defendant and His Identity  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
</tr>
</tbody>
</table>

Impeachment Evidence  
<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
</tr>
</tbody>
</table>
Mere police questioning 15
Walking along with or driving next to a person 15
Asking to step out of the vehicle 16
Asking a person to remove his hands from his pockets 16
Flashlighting or spotlighting a person 16
Inquiring into the contents of a subject’s pockets 16
A consensual transportation 16
Inquiring into possible illegal activity 16
Displaying a badge, or being armed 16
Contacts on buses 17
During a knock and talk 17
Consensual Encounters vs. Detentions 17
Specific Issues: 18
Contacts on Buses 18
Flight 19
Photographing Subjects 20
Knock and Talks 21

Chapter 3: Detentions: 23
General Rule 23
Test 24
Detentions vs. Arrests: 25
General Rule 25
Indicators of an Arrest: 26
The Use of Firearms 26
The Use of Handcuffs 26
A Locked Patrol Car 26
Show of Force 26
Physical Touching 27
Transporting a Detainee 27
Exceptions: 27
In General 27
Examples 28
Case Law 28
Non-Consensual Transportation Exceptions 31
Reasonable Suspicion: 32
Defined 32
Detention of a Victim or Witness 33
Articulable Objective Suspicion 33
A Hunch 34
The Totality of the Circumstances 35
The Officer’s Subjective Conclusions 35
A Seizure 35
Probable Cause vs. Reasonable Suspicion 35
Various Factors: 35
In General 36
A “High Crime” or “High Narcotics” Area 36
Types of Detentions: 37

Traffic Stops: 37

Detention vs. Arrest 37

No Law Enforcement Involvement 38

Moving Violations 38

Vehicle Code Registration Violations 39

Vehicle Code Equipment Violations 42

Weaving Within the Lane 44

Community Caretaking Function 45

Parking Tickets 46

Gang-Related Investigations 46

Narcotics-Related Traffic Stops Using a Controlled Tire Deflation Device (CTDD) 46

Checking the Vehicle for a Wanted Suspect 47

Mistake of Law vs. Mistake of Fact 47

Pretext Stops 49

Motor Vehicle Passengers: 52

To Arrest a Passenger 52

To Detain a Passenger 52

Ordering Out 55

Ordering In 56

Demanding Identification 57

Flight 58

Search Incident to Citation 59
To Identify a Suspect in a Criminal Offense 60

Detention of Residents During the Execution of a Search Warrant 60

Prolonged Detentions 61

Enlarging the Scope of the Original Detention 64

Taking Fingerprints 66

Driving Under the Influence Cases:

   Weaving 66

   DUI (and Other Regulatory “Special Needs”) Checkpoints 67

   Other Regulatory Checkpoints 69

   Duel Purpose Checkpoints 70

   Multiple Agency Checkpoints 71

   Drug Interdiction Checkpoints 71

   On Indian Land by Indian Authorities 72

A Field Interview 72

During Execution of a Search or Arrest Warrant, or Fourth Waiver Search 74

Pending the Obtaining of a Search Warrant 75

Detentions Away from the Place being Searched 76

Anonymous Information:

Rule:

   Pat Down for Weapons 76

   Contraband in a Vehicle 77
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific Physical Description</td>
<td>78</td>
</tr>
<tr>
<td>Further Examples</td>
<td>78</td>
</tr>
<tr>
<td>Looking for Exceptions</td>
<td>79</td>
</tr>
<tr>
<td><strong>Corroboration:</strong></td>
<td>82</td>
</tr>
<tr>
<td>Rule</td>
<td>82</td>
</tr>
<tr>
<td>To Establish Probable Cause</td>
<td>83</td>
</tr>
<tr>
<td>Examples</td>
<td>83</td>
</tr>
<tr>
<td>In Prison or Jail</td>
<td>84</td>
</tr>
<tr>
<td><strong>Minors:</strong></td>
<td>85</td>
</tr>
<tr>
<td>School Officials</td>
<td>85</td>
</tr>
<tr>
<td>A School Resource Officer</td>
<td>86</td>
</tr>
<tr>
<td>Minors Violating Curfew</td>
<td>87</td>
</tr>
<tr>
<td><strong>Miranda</strong></td>
<td>87</td>
</tr>
<tr>
<td><strong>Use of Force:</strong></td>
<td>88</td>
</tr>
<tr>
<td>Factors</td>
<td>88</td>
</tr>
<tr>
<td>Refusal to Submit</td>
<td>88</td>
</tr>
<tr>
<td>Use of Firearms, Handcuffs, Locked Patrol Car, or a Show of Force</td>
<td>88</td>
</tr>
<tr>
<td>Detentions in a Residence During the Execution of a Search Warrant</td>
<td>89</td>
</tr>
<tr>
<td>Narcotics-Related Traffic Stops Using a Controlled Tire Deflation Device (CTDD)</td>
<td>89</td>
</tr>
<tr>
<td>Deadly Force</td>
<td>90</td>
</tr>
<tr>
<td>Demanding Identification</td>
<td>90</td>
</tr>
</tbody>
</table>
Detentions of Employees in the Workplace (or Students at School) 93

Seizure of Firearms During a Detention 94

Detention Examples, in General 95

Merchants, Library Employees and Theater Owners 98

Chapter 4: Arrests: 99

Defined 99

Standard of Proof; Probable Cause: 99

Defined 99

When Probable Cause Exists 99

The Collective Knowledge Doctrine 103

Miscellaneous Rules 104

Examples 105

Test 107

Unlawful Arrest 108

Statutory Elements of an Arrest 110

Use of Force: 110

Reasonable Force 110

Factors 113

Examples 113

Duty to Warn 116

Applicable Statutes 117

Use of Deadly Force: 119

Causing Death 119
Legal Requirements of an Arrest:

Felonies

Misdemeanors and Infractions:

“In the Presence” Requirement:

“In the Presence,” Defined

Exceptions:

Juvenile Arrests

Driving While Under the Influence Arrests

Battery on School Grounds

Carrying a Loaded Firearm

Assault or Battery Against the Person of a Firefighter, Emergency Medical Technician or Paramedic

Domestic Violence Restraining Orders

Domestic Violence Assaults or Batteries

Elder Abuse

Carrying a Concealed Firearm at an Airport
Operating a Vessel or Recreational Vessel or Manipulation of Water Skis, Aquaplane or Similar Device While Under the Influence  157

Operating a Vessel While Under the Influence of Alcohol and/or Drugs with an Accident  157

Vehicle Code Violations, Exceptions  157
Vehicle Code Parking Citations  158
Stale Misdemeanor Rule  158
Sanctions for Violations  159

Arrests for an Infraction or Misdemeanor:  162
Release Requirement  162
Exceptions  162
V.C. § 40302  163
Other Satisfactory Evidence of His Identity  163
V.C. § 40303: Arrestable Offenses  164
V.C. § 12801.5(e): The Unlicensed Driver  165
V.C. § 40305: Non-Residents  165
V.C. § 40305.5: Traffic Arrest Bail Bond Certificate  166
P.C. § 853.6(i): Misdemeanor Citations  166
With an Existing Warrant of Arrest  168

Arrest Warrants:  169
Defined  169
Content  169
Other Types of Arrest Warrants: 170

   Bench Warrant 170

   Telephonic Arrest Warrant 170

   Ramey Warrant 170

   A “DNA, John Doe” Warrant 171

Necessity of an Arrest Warrant 171

Service and Return: 172

   Felony Arrest Warrants 172

   Misdemeanor Arrest Warrants: 172

      Night Service 172

Necessity for Having a Copy of the Arrest Warrant 172

Knock and Notice 173

Procedure After Arrest: 173

      Disposition of Prisoner: 173

         In-County Arrest Warrants 173

         Out-of-County Arrest Warrants 173

      Arrests without a Warrant 174

Necessity of Having Probable Cause 174

The Steagald Warrant 176

Statute of Limitations 176

Expiration 176

Effect of an Arrest Warrant on the Exclusion of Evidence after an Illegal Detention 176
A defective Arrest Warrant

Statutory Limitations:

Daytime and Nighttime Arrests:

Felony Arrests:

Without an Arrest Warrant

With an Arrest Warrant

Misdemeanor (and Infraction) Arrests:

Without an Arrest Warrant

With an Arrest Warrant

Penal Code § 964: Victim and Witness Confidential Information:

Live Lineups

Case Law Limitations:

Ramey:

General Rule

Exceptions:

Consent

Exigent Circumstances

Already Lawfully Inside

Standing in the Threshold

While Serving a Search Warrant

A Parolee

Inviting Defendant Outside
Sufficiency of Evidence that the Suspect is Inside 189
Within a Third Person’s Home 191
Consequences of a Ramey/Payton Violations 192
Knock and Notice 193
Problems: 194
Arresting for the Wrong Offense 194
Mistaken Belief in Existence of an Arrest Warrant or Fourth Waiver: 195
Problem 195
Rule 196
Extension of Rule 196
Reasoning 196
Law Enforcement vs. Non-Law Enforcement Source: 196
Law Enforcement Sources: 197
Police Computer Records 197
Parole 197
Probation 197
Exception; DMV Hearings 198
Non-Law Enforcement Source: 198
Courts 198
Reversed Prior Conviction 199
Legislature 199
Dept. of Motor Vehicles 199
When the Purposes of the Exclusionary Rule are not Served 222
Statutory-Only Violations 223
Doctrine of Inevitable Discovery 227
An Injured Person 227
Evidence of identity 227
Impeachment Evidence 228
Asset Forfeiture Proceedings 229

Standing: 229
Defined 229
Reasonable Expectation of Privacy 229
Test 230
Prior California Rule 231

Rules for Determining Standing: 231
Burden of Proof 231
Factors to Consider 232
On Appeal 233

Standing; Examples: 233
Vehicles 233
Residential Visitors 235
Personal Property 237
Outside Common Areas 239
Businesses 240
Motion to Quash 251
Motion to Traverse 251
Benefit of the Doubt 254
Presumption of Unlawfulness Without a Warrant 255
Good Faith: 255
The Exclusionary Rule 255
Exceptions to Good Faith Rule: 257
Magistrate Misled 258
Magistrate Abandoned Judicial Role 258
Lack of Indicia of Probable Cause 258
Warrant Deficient 259
Affidavit Based on Illegally Collected Information 259
Wiretap Statutes Violation 260
Exigent Circumstances 260
Examples 260
Ramey Inapplicable 261
Consensual Searches 261
Informants 261
Acting in the Performance of His Duties 261
Mental Patients Detained per W&I § 5150: Seizure of Weapons 261
W&I § 8102(a) and the confiscation of weapons 261
P.C. § 1524(a)(10); Search Warrants 261

xxii

© 2012 Robert C. Phillips. All rights reserved.
Exigent Circumstances 262

Non-Standard Types of Warrants: 262

Telephonic Search Warrants 262

Anticipatory Search Warrants 263

Sneak and Peek Warrants 266

AIDs Testing 267

Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services, per P.C. § 1524.2 267

Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services in Misdemeanor cases, per P.C. § 1524.3 269

Requirement of a “Neutral and Detached” Magistrate: 269

Rule 269

Violations 270

Composition of a Search Warrant: 270

The Warrant Itself: 270

Contents 270

Statutory Grounds for Issuance 271

Case Law 274

The Affidavit to the Search Warrant: 274

Defined 274

Probable Cause 274

Minimum Contents 277
The “Reasonable Particularity” Requirement;  
The Persons, Places, Things and  
Vehicles to be Searched 280

The “Reasonable Particularity” Requirement;  
The Property to be Seized 284

Supplementation to the Affidavit 294

Combined Affidavit with Warrant 294

Multiple Affiants/Affidavits 295

Staleness 295

Fingerprints 297

Description of the Facts 298

Good Faith 298

Use of Hearsay 298

Miranda 299

Third Party’s Fourth Amendment Violation 299

Privileged Information 299

Nighttime Searches 301

Leaving a Copy at the Scene 302

P.C. § 964: Victim and Witness  
Confidential Information 302

The Receipt and Inventory 302

Sources of Information Establishing Probable Cause: 303

Other Police Officers 303

Citizen Informants 304

Reliable (“Tested”) Informants 305
Unreliable ("Untested") Informants 307
Anonymous Informants 308
Confidential Informants:
  Problem 309
  Rule 310
  Restrictions 310
  Revealing an Informant’s Identity 310
  Luttenberger Motions 311
An Informant Sworn Before A Magistrate; A Skelton Warrant 312
P.C. § 1111.5; Uncorroborated In-Custody Informants 313
Probable Cause Issues:
  Anonymous Information 313
  Searches of a Residence:
    Stolen Property 313
    The Cleland Warrant; Narcotics 313
  Trashcan Searches 314
  Computer Searches 314
Use of a Search Warrant:
  Rule 316
  Exceptions:
    Exigent Circumstances 316
    Consent 316
    Inevitable Discovery 317
Searches of Vehicles 317
Searches of Persons with Probable Cause 318
Searches Incident to Arrest 318
Administrative/Regulatory Searches 318
Crime Scene Searches 319
Bank Records: 319
Customer Authorization 319
Administrative Subpoena or Summons 319
Search Warrant 319
Judicial Subpoena or Subpoena Duces Tecum 320
Police Request 320
Victimized Financial Institution 320
Mortgage Fraud Records: 321
P.C. § 532f(a): Mortgage Fraud 321
Credit Card Information 321
Telephone Records: 321
Unlisted Numbers 321
Telephone Calls Made 322
Certification for Non-Disclosure 322
Pen Registers and Trap and Trace 322
P.C. § 1524.2: Out-of-State Electronic Communications Information 325
P.C. § 1524.3: Out-of-State Electronic Communications Information in Misdemeanor Cases  327

Wiretaps and Eavesdropping:  328


Statement of Legislative Purpose  328

Prisoner Telephone Conversations  329

Wiretapping:  330

Prohibitions  330

Punishment  330

Exceptions  330

Prisoner Visitors  331

Non-Admissibility  331

Similar Restrictions  331

A Controlled Phone Call  331

P.C. § 633.8: Eavesdropping in Hostage or Barricading Situations  332

P.C. §§ 629.50 through 629.98; Implementation of wiretaps:  333

Requirements for a Wiretap Order:  333

Application for a Wiretap Order  333

Definitions:  339

Wire Communication  339

Electronic Pager Communication  340
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electronic Cellular Telephone Communication</td>
<td>340</td>
</tr>
<tr>
<td>Aural Transfer</td>
<td>340</td>
</tr>
<tr>
<td>Authority to Issue a Wiretap Order</td>
<td>340</td>
</tr>
<tr>
<td>Judicial Guidelines</td>
<td>345</td>
</tr>
<tr>
<td>Contents of the Wiretap Order</td>
<td>345</td>
</tr>
<tr>
<td>Oral Approval in Lieu of Court Order</td>
<td>346</td>
</tr>
<tr>
<td>Duration of a Wiretap Order</td>
<td>346</td>
</tr>
<tr>
<td>Progress Report</td>
<td>348</td>
</tr>
<tr>
<td>Report to Attorney General</td>
<td>349</td>
</tr>
<tr>
<td>Annual Report to the Legislature</td>
<td>349</td>
</tr>
<tr>
<td>Recording, Sealing and Retaining Intercepted Communications</td>
<td>352</td>
</tr>
<tr>
<td>Application and Orders to be Sealed</td>
<td>353</td>
</tr>
<tr>
<td>Notice to Parties to Intercepted Communications</td>
<td>353</td>
</tr>
<tr>
<td>Discovery Prerequisites to Use in Evidence</td>
<td>354</td>
</tr>
<tr>
<td>Motions to Suppress</td>
<td>355</td>
</tr>
<tr>
<td>Disclosure to Other Law Enforcement Agencies</td>
<td>357</td>
</tr>
<tr>
<td>Use of Intercepted Information</td>
<td>357</td>
</tr>
<tr>
<td>Disclosure of Intercepted Information in Testimony</td>
<td>358</td>
</tr>
<tr>
<td>Privileged Communications</td>
<td>358</td>
</tr>
<tr>
<td>Interception of Communications Relating to Crimes Other Than Those Specified in the Authorization Order:</td>
<td>359</td>
</tr>
<tr>
<td>Violent Felonies</td>
<td>359</td>
</tr>
</tbody>
</table>
Retention of the Documents
Mechanics of Preparation
Service and Return:
  To “Any Peace Officer”
  Necessity to Serve
  Night Service
  In-County Service
  Out-of-County Service
  Out-of-State Crimes
  Who May Serve
Knock and Notice:
  General Rule
  Purpose
  Problem
  Exceptions:
    Businesses
    Inner Doors of a Residence
Refusal:
  Implied Refusal
  Reasonable Time
  Exigent Circumstances
  Doctrine of Substantial Compliance
No-Knock Search Warrants
Special Masters:  403

Rule  403

When Not Applicable  403

The “Special Master”  404

Documentary Evidence  404

Procedure  404

The Court Hearing  404

Other Service Conditions  405

Other Warrants:  406

Inspection Warrants  406

Rendition (or Extradition):  407

Art. IV, § 2, Clause 2, U.S. Constitution  407

The Implementing Statute  407

International Extraditions  407

Extradition Between States: The Uniform Criminal Extradition Act:  407

Adoption in California  408

P.C. § 1548.1; The Governor’s Duty  408

Procedure  408

Ignoring Extradition Treaties  409

Unlawful Flight to Avoid Prosecution (“UFAP”):  410

Scope  410

Purpose  410

Procedure  410
Parental Kidnappings 410
Avoiding Custody or Confinement 411
Avoiding Giving Testimony 411
Avoiding Service of Process 411
State Extradition 411
Dismissal of Federal Complaint 411

Chapter 7: Warrantless Searches: 412

General Rule 412

Exceptions to the Search Warrant Requirement 412

Plain Sight Observations: 412

Rule 412

No Search 413

Justification for Seizure 413

No Expectation of Privacy 413

Examples 414

The “Plain Sight Observation” vs. the Right To Enter a Residence 416

Plain View in Computerized Information Search Warrant Cases 416

Plain Hearing 416

Plain Smell: 416

Rule 416

Examples 417

Exceptions 417
Exigent Circumstances: 418

Rule 418

Examples: 419

Destruction of Evidence 419

Officers’ Safety 419

Fresh or Hot Pursuit 420

Search for Additional Suspects 420

Protection of Life and Property 420

To Prevent the Escape of Suspects, or When Suspects Arm Themselves 421

Special Needs Searches: 421

Test 421

Examples: 422

Random Testing of Student Athletes 422

Suspicionless drug testing of teachers and administrators 422

Random Metal Detector Searches of Students 422

Search of a student’s computer 422

Drug Testing for United States Customs Service Employees 422

Searches of Employees’ Backpacks 423

Pre-Departure Airport Screening Procedures 423

Drug and Alcohol Testing for Railway Employees 423

Administrative Inspections of Closely Regulated Businesses 423
Administrative Inspection of Fire-Damaged Premises 423
Administrative Housing Code Inspections 423
Border Patrol Checkpoints 423
Sobriety Checkpoints 423
Entry into a Residence to Enforce a Court Order 423
Fourth Waiver Searches 423
A Search Warrant Issued Pursuant to P.C. § 1524.1 (HIV) 423
Taking of Biological Samples for DNA Databases 424
Search of Luggage in a Subway Facility 424
The search of a high school student’s pockets 424
Fish and Game Regulations 424

Exceptions to Exceptions: 425

A Highway Drug Interdiction Checkpoint 425
A State Hospital Blood Testing Program 425

Examples where the “Special Need” fails to outweigh a person’s right to privacy 425

Closely Regulated Businesses or Activities: 427

Pervasively or Closely Regulated Businesses 427

Other California or United States Regulatory/Administrative Searches: 429

Vehicle Code 429
Penal Code 429
Fish and Game Code 430
Chapter 8: Searches of Persons:

Privacy Rights

Rule

Search Incident to Arrest:

Legal Justification

Legal Justification Under Debate

Transportation Requirement:

Anyone Who is Arrested and is to be Transported

Transporting a Minor

Contemporaneous In Time and Place

Other Requirements and Limitations:

Search Incident to a Citation

Searches of Containers

Property of Booked Person

Arrest in the Home

Arrest in a Vehicle

Strip Search

Searches with Probable Cause:

The Exigency
Probable Cause from the Defendant’s Admissions  445
P.C. § 833; Search of an Arrestee  445
Order of Search & Arrest  445
Intrusions Into the Human Body:  446
  Shock the Conscience  446
  Interest of Human Dignity and Privacy  446
  Factors  446
  Driving Under the Influence Cases  447
  Other Examples of Bodily Intrusions  447
Choking:  449
  Rule  449
  Examples  449
Searches with Less Than Probable Cause:  450
  Persons in Pervasively Regulated Industries
  or Sensitive Positions:  450
    Government Employees  450
    Railway Workers  450
    Customs Officers  450
    Candidates for Public Office  450
    A State Hospital’s Drug Testing Policy for
    Expectant Mothers  450
For Students:  450
  Drug Testing: Athletics and Extracurricular
  Activities  450

© 2012 Robert C. Phillips. All rights reserved.
Students in General

Frisks (or Patdowns):

Defined
Constitutionality
For Weapons Only
Reasonable or Rational Suspicion
The Nature of the Crime as a Factor
Vehicle Drivers and Passengers

Procedures:

Limited to Outer Clothing
Removal of Weapons
When Suspect Reaching for a Weapon

P.C. § 833.5; Detentions

Problems:

During Consensual Encounter
During Execution of a Search Warrant or a Fourth Waiver Search

Feeling a Controlled Substance

Frisk Based Upon Uncorroborated Anonymous Tip

Other Situations

Abandoned Property:

General Rule

The “Threatened Illegal Detention”
Searching for Identification 464
Fingerprint Evidence 465
Handwriting (and Other Types of) Exemplars 467
Prisoner Searches: 467
   Inventory Searches 467
   Search Incident to Arrest 468
   Institutional Needs 468
   Other Purposes 468
Booking (and Inventory) Searches 468
Containers 469
Impounded Property 469
Strip Searches of Prisoners 471
Misdemeanor Booking Searches: 475
   Due Process 475
   Restrictions: 475
   For Pre-Arraignment Detainees
      Arrested for Infractions and Misdemeanor Offenses 475
Definitions: 476
   Strip Search 476
   Body Cavity Search 476
   Visual Body Cavity Search 476
   Physical Body Cavity Search 476
   Pat Down, Metal Detector and Clothing Search 476
Limitations on “strip search” or “visual body cavity search” 476

Search Warrant Requirement 477

Touching Prohibited 478

Physical Body Cavity Searches 478

Sex of Searchers 478

Location of Searches 478

Penalties for Violations 478

Civil Remedies for Violations 478

Case Law 478

Jail Cells 479

Monitoring of Jail Visitations and Telephone Calls:

Rule 480

Exceptions 482

Monitoring Jail Mail 483

Regulating Jail/Prison Visitations 484

Retained Constitutional Rights:

Infringement of Rights 487

Rights Retained by Prison Inmates 488

DNA Profiling of Prisoners:

The DNA and Forensic Identification Database and Data Bank Act of 1998 488

Statement of Intent 488
Purpose 488
Identification of Criminal Offenders 488
Biological Samples Limited to “Buccal” Swab Samples 489
Collection of Blood Samples 489
DNA and Forensic Identification Database and Data Bank Program 489
Counties’ Responsibilities 489
Costs 490
DNA Testing Fund 490
The “Jan Bashinski DNA Laboratory.” 490
Offenders Subject to Collection of Specimens, Samples and Print Impressions 490
Applies to All Qualified Persons Regardless of Sentence 492
Applies to All Qualified Persons Regardless of Placement 492
Provisions are Mandatory 492
Duty of a Prosecutor to Notify the Court 494
Duty of a Court to Inquire 494
Collection of Samples For Present and Past Qualifying Offenses 494
Retroactivity of Provisions 498
Procedures for Obtaining Replacement Samples 498
Analysis of Crime Scene Samples 498

© 2012 Robert C. Phillips. All rights reserved.
Procedures for Collection of Samples 498
Sanctions for Failure to Provide Required Samples 499
Use of Force 500
“Reasonable Force,” Defined 500
Written Authorization to Use Force 500
Efforts to Secure Voluntary Compliance 500
Videotaping of “Cell Extractions” 500
Blood Withdrawals in a Medically Approved Manner 500
Expungement of Data 500
Confidentiality Requirements 500
Dissemination of Information to Law Enforcement Agencies 500
Disposal of Samples 502
Construction and Severability 502
Case Law 502

Chapter 9: Searches of Vehicles: 506
General Rule: 506
The “Automobile Exception” to the Warrant Requirement 506
Justification for the Rule 506
Warrantless Searches of Vehicles: 506
Incident to Arrest: 507
The Rationale 507
Containers 507

Probable Cause Not Needed 508

Limitations: 508

The Lunging Area 508

Contemporaneous in Time and Place 508

Limitation of the Chimel/Belton “Bright Line” Test: 509

Rule Criticized 509

Arizona v. Gant 510

Gant’s Alternative Theory 511

Subsequent Case Law 513

Exception 514

Retroactivity 514

Transportation 515

Search Incident to a Citation 515

Searches where Arrestee is a “Recent Occupant:” 516

Search With Probable Cause: 517

General Rule: 517

Problem: Limited Amount of Contraband 519

Problem: Vehicle Already Impounded 520

Problem: Closed Containers 521

Problem: Motorhomes (and Other Vehicles) 522

Problem: Expanding the Scope of the Search 523
Evidence of Probable Cause 523

Vehicle is Itself Evidence 523

Inventory Searches 525

“Pat Down” (or “Protective Search) of a Vehicle 527

Statutory Automobile Inspections:

V.C. § 2805(a): Elements 529

V.C. § 2805(b): Elements 531

Penalties 531

Relevant Definitions 531

Case Law 532

Downloading the Contents of an “Event Data Recorder” 533

Searching for Driver’s License and Vehicle Documentation 534

Impounding Vehicles:

The “Community Caretaking Doctrine” 536

Driving on a Suspended License (or Never Had a License),
per V.C. § 14601.1 (or V.C. § 12500) 539

Impounding a Vehicle Used for Prostitution, per
Local Ordinance 539

V.C. § 2814.1: County Board of Supervisors Authority
to Establish Exhaust checkpoints 540

V.C. § 2814.2: Impoundment of a Vehicle at a
Sobriety Checkpoints 540

Chapter 10: Searches of Residences and Other Buildings:

Private Residence & Expectation of Privacy 541

General Rule 541
Other Buildings and Places: 542

Hotel & Motel Rooms 542
Boarding House 544
Garage 544
Fishing Retreat 545
Hospital Room 545
Jail Cell 545
Military Housing 545
Curtilage of the Home: 545

Temporary or Impermanent Residences 547

Businesses 548

Workplace Searches of Government Employees: 549

Rule 549
Reasonableness 549

Public Restrooms, Adult Bookstores and Dressing Rooms: 550

Pay Toilets 550
Men’s Restroom in a Department Store 550
Doorless Stall in a Public Restroom 550
Curtained Booth in an Adult Bookstore 550
Fitting Room in a Department Store 550
Spying into Bathrooms, Etc., Statutes 551

Problem: When Officers Trespass 551

Securing the Premises: 552
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fourth Amendment</td>
<td>552</td>
</tr>
<tr>
<td>General Rule</td>
<td>552</td>
</tr>
<tr>
<td>Exigency of the Officers’ Own Making:</td>
<td>552</td>
</tr>
<tr>
<td>With Probable Cause</td>
<td>552</td>
</tr>
<tr>
<td>With No Probable Cause</td>
<td>553</td>
</tr>
<tr>
<td>New Rule</td>
<td>554</td>
</tr>
<tr>
<td>Securing Cases</td>
<td>554</td>
</tr>
<tr>
<td>Detention of a Residence</td>
<td>555</td>
</tr>
<tr>
<td>Detaining Residents Outside</td>
<td>556</td>
</tr>
<tr>
<td>Knock and Talk</td>
<td>556</td>
</tr>
<tr>
<td>The Doctrine of “Consent Once Removed”</td>
<td>557</td>
</tr>
<tr>
<td>Observing Contraband from Outside</td>
<td>558</td>
</tr>
<tr>
<td>Using a Ruse to Cause a Suspect to Open his Door:</td>
<td>559</td>
</tr>
<tr>
<td>Split of Authority</td>
<td>559</td>
</tr>
<tr>
<td>Held to be Illegal</td>
<td>559</td>
</tr>
<tr>
<td>Held to Legal</td>
<td>560</td>
</tr>
<tr>
<td>Possible Resolution</td>
<td>562</td>
</tr>
<tr>
<td>Searches Incident to Arrest:</td>
<td>562</td>
</tr>
<tr>
<td>In a Residence</td>
<td>562</td>
</tr>
<tr>
<td>The Protective Sweep:</td>
<td>564</td>
</tr>
<tr>
<td>Defined</td>
<td>564</td>
</tr>
<tr>
<td>Limitation</td>
<td>565</td>
</tr>
<tr>
<td>Arresting Outside</td>
<td>566</td>
</tr>
</tbody>
</table>
Detentions Outside 567
Commercial Establishment 567
Other Situations 567
Plain Sight Observations 568
Preserving the Peace 570
Preventing the Destruction of Evidence 571
Welfare Checks, the “Emergency Aid” Doctrine, and the “Community Caretaking Function” 573
Exigent Circumstances and Officer Safety 580
Emergency Exception and the Odor of Ether 582
Executing an Arrest Warrant 582
Sufficiency of Evidence to Believe the Suspect is Inside 584
Third Party Entries with Police 585
Knock and Notice 585

Chapter 11: New Law Enforcement Technology: 587
The Problem 587
Thermal Imaging Device 587
A Buster 588
Spike Mike 589
Aerial Surveillance 589
Electronic Tracking Devices (Transmitters) 589
Flashlights 592
Binoculars 592
Night Vision Goggles 592
Controlled Tire Deflation Device ("CTDD") 592
Videotaping and Photographing 593
Metal Detectors 594
Dogs: 594
    Used to Search 594
    Used to Track 597
    Use of Dogs in Making Arrests 598

Chapter 12: Open Fields:
    General Rule 600
    Observations Into Private Areas 600

Chapter 13: Searches of Containers:
    General Rule 602
    Exceptions to the Warrant Requirement:
        Incident to Arrest 603
        Incident to Arrest, in a Vehicle 604
        With Probable Cause, in a Vehicle 605
        When One Person in a Vehicle is Subject to a Fourth Waiver 605
        With Defendant’s Admission as to the Contents 606
        Abandoned Property 606
        Special Needs 608
        Other “Expectation of Privacy” Issues 608
        Searches of Cell Phones, Disks, Computers and Other High Tech Containers 609
With Consent of a Third Person
    having Common Authority 614

The “Single Purpose Container” Theory 614

Containers Searched by Non-Law Enforcement 616

Exterior of a Container 618

Customs Inspections 618

“Manipulating,” “Squeezing” or “Poofing” Containers: 618
    At an Airport 619
    At a Bus Station 619
    During a Detention and Pat Down 619

Detention of a Container 619

Chapter 14: Border Searches:

    General Rule 623

    The statutory arrest and search authority 623

    Interdiction Authority 625

Routine vs. Non-Routine Searches:

    Routine Searches 626

    Non-Routine Searches 627

    Destructiveness of the Search 629

    Reaasonableness of the Search 629

The Functional Equivalent of a Border 630

The “Extended Border Search Doctrine” 630

Immigration Checkpoints, Away from the Border 632
Roving Patrols 633

The San Ysidro Port of Entry 635

Chapter 15: Fourth Waiver Searches: 636

“Prior Consents:” Search & Seizure (Fourth Waiver) Conditions: 636

General Rule 636

Parole: 637

Statutory Authorization 637

P.C. § 3067 vs. Cal. Code of Regs, Title 15, § 2511 637

Probation: 638

Statutory Authorization 638

Validity of a Fourth Waiver Condition 638

The Language of the Specific Fourth Waiver Condition 640

Parole vs. Probation 640

A “Special Needs” Search 640

Juvenile Probationers 642

Pre-Trial 643

Constitutionality 643

Expectation of Privacy 643

Standard of Proof Required: 644

Probation 644

Parole 644

Limitation: Searches Conducted for Purposes of Harassment 645
Who May Conduct a Fourth Waiver Search?

California Rule

Federal Rule

Need to Seek Permission:

Probation

Parole

Searching While In Ignorance of a Search Condition:

Issue

Earlier Case Law

Present State of the Rule

Exceptions

Arresting and Searching in Ignorance of an Existing Warrant of Arrest

Parole Hearings

Entering a Residence

Duration of a Fourth Waiver

Good Faith Belief in the Existence of a Search Condition

Rights of Third Parties:

Common Areas

Private Areas

Detention of Third Persons

In a Vehicle

Knock and Notice

Detentions, Patdowns and Arrests:
Detentions 659
Patdowns 659
Arrests 650
Out-of-State Probationer or Parolee 660
AIDS and HIV 660

Chapter 16: Consent Searches:

Rule 661
Why People Consent 661
Limitation; Free and Voluntary Requirement:

Burden of Proof 661
Factors 662
Circumstances Affecting Voluntariness:

Under Arrest 662
Use of Firearms 662
Threatening to Obtain a Warrant 663
Threatening to Use a Drug-Sniffing Dog 663
Implying Guilt 663
Using a Ruse 664
Threats to Take Away One’s Children 664
Other Inducements 664
Combination of Factors 665
During a Consensual Encounter 665
Manner of Inquiry 665
Suspect Under Arrest Giving Consent 677
Consent to Search a Residence with No Suspicion 677
Other Elements of a Consent Search:
  The Right to Refuse 677
  Miranda 678
Written Consent 679
Answering the Telephone 679
Consent by Others:
  General Rule 679
  Examples: 681
    Landlord 681
    Parent 682
    Child 684
    Co-Occupant (Husband and Wife) 684
Evidence of a Defendant’s Refusal to Consent to a Warrantless Search 687
Sanctions for Violations 688
Chapter 1

The Fourth Amendment, United States Constitution:

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.” (Emphasis added)

See also California Constitution, Art I, § 13, with almost identical language.

Scope:

Due Process: Initially intended to control the actions of the federal government only (See Barron ex rel. Tiernan v. Mayor of Baltimore (1833) 7 Pet. 243.), the United States Supreme Court eventually held that a violation of the Fourth Amendment by state (which includes all county and municipal) authorities does in fact constitute a Fourteenth Amendment, “due process” violation, thus imposing compliance with this protection upon the states as well. (Mapp v. Ohio (1961) 367 U.S 643 [6 L.Ed.2nd 1081]; Baker v. McCollan (1979) 443 U.S. 137, 142 [61 L.Ed.2nd 433, 440-441]; People v. Bracamonte (1975) 15 Cal.3rd 394, 400.)

The Fourteenth Amendment provides that no “state” shall deprive its citizens of “life, liberty, or property, without due process of law.”
Also, the **Fourth Amendment** protects against trespassory searches only with regard to those items ("persons, houses, papers, and effects") that it enumerates. (*United States v. Jones* (Jan. 23, 2012) __ U.S. __, __, fn. 8 [132 S.Ct. 945; 181 L.Ed.2nd 911].)

**The Exclusionary Rule:** The **Fourth Amendment** serves as the primary basis for the "Exclusionary Rule;" excluding evidence from the courtroom which would be otherwise admissible, when seized by law enforcement in violation of its terms. (*Weeks v. United States* (1914) 232 U.S. 383 [58 L.Ed. 652].)

*History:* “The exclusionary rule was originally adopted in *Weeks v. United States* (1914) 232 U.S. 383 [58 L.Ed. 652, . . . ], which barred evidence obtained by federal officers in violation of the **Fourth Amendment**. The Supreme Court subsequently held that the rule was not constitutionally imposed upon the states. (*Wolf v. Colorado* (1949) 338 U.S. 25 [93 L.Ed. 1782, . . . ]; see *Breithaupt v. Abram* (1957) 352 U.S. 432, 434 [1 L.Ed.2nd 448, 450, . . . ]). It was not until 1961, when *Wolf* was overruled, that the exclusionary rule was made mandatory in state prosecutions. (*Mapp v. Ohio* (1961) 367 U.S. 643 [6 L.Ed.2nd 1081, . . . ]; see *Schmerber v. California* (1966) 384 U.S. 757, 766 [16 L.Ed.2nd 908, 917, . . . ].)” (*People v. Bracamonte* (1975) 15 Cal.3rd 394, 400, fn. 2.)


“*[T]he “prime purpose” of the [exclusionary] rule, if not the sole one, “is to deter future unlawful police conduct.” [Citations]” (Citations)” (Italics added; *People v. Sanders* (2003) 31 Cal.4th 318, 324.)

It is also the purpose of the **Fourth Amendment** to “safeguard the privacy and security of individuals against arbitrary invasions by government officials.” (*Camera v. Municipal Court* (1967) 387 U.S. 523, 528 [18 L.Ed.2nd 930, 935].)

Use of the exclusionary rule is a preferable sanction over outright dismissal of a case (*United States v. Struckman* (9th Cir. 2010) 611 F.3rd 560, 574-578; noting that dismissal under a court’s “inherent supervisory powers” might be appropriate if necessary to (1) implement a remedy for the violation of a recognized statutory or constitutional right; (2) preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before
a jury; and (3) deter future illegal conduct, but even then, only after the defendant demonstrates sufficient prejudice.

The Rule of Reasonableness:

An otherwise lawful seizure can violate the Fourth Amendment if it is executed in an unreasonable manner. (United States v. Alvarez-Tejeda (9th Cir. 2007, citing United States v. Jacobsen (1984) 466 U.S. 109, 124 [80 L.Ed.2d 85].)

While a parolee is subject to search or seizure without probable cause or even a reasonable suspicion, searching him may still be illegal if done in an unreasonable manner, such as by a strip search in a public place. (See People v. Smith (2009) 172 Cal.App.4th 1354; checking defendant’s crotch area for drugs, while shielded from the public, held not to be a strip search and not unreasonable.)

Private Persons and the Exclusionary Rule:


Even a peace officer, when off-duty and acting in a private capacity, may be found to have acted as a private citizen. (See People v. Wachter (1976) 58 Cal.App.3rd 911, 920, 922.)

A civil rights action pursuant to 42 U.S.C. § 1983 was held to be proper against non-law enforcement employees of a private corporation that operated a federal prison under contract. (Pollard v. GEO Group, Inc. (9th Cir. 2010) 607 F.3rd 583.)

Limited Use of the Exclusionary Rule:

The Exclusionary Rule is not intended to prevent all police misconduct or as a remedy for all police errors. “The use of the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights.” (United States v. Smith (9th Cir. 1999) 196 F.3rd 1034, 1040.)
“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *(Herring v. United States* (2009) 555 U.S. 135 [172 L.Ed.2nd 496]; see also *People v. Leal* (2009) 178 Cal.App.4th 1071, 1064-1065.)*

The exclusionary rule should only be used when necessary to deter “deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systematic negligence.” *(Herring v. United States, supra, at p. 144 [172 L.Ed.2nd at p. 507.]*

But, officers who took 26½ hours to obtain a search warrant for a residence while the residence was “detained” (i.e., the occupant was kept from reentering), failing to recognize that they were required to act with due diligence and to expedite the process, were not excused by the rule of *Herring*. The resulting evidence, therefore, was subject to exclusion. *(United States v. Cho* (9th Cir. 2010) 597 F.3rd 995, 1004-1006.)*

See *United States v. Monghur* (9th Cir. 2009) 576 F.3rd 1008, where a case involving the illegal warrantless search of a container was remanded for a determination of whether the exclusionary rule required the suppression of the gun found in that container.

Illegally collecting blood samples from defendant, mistakenly believing that he qualified under the newly enacted DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. §§ 295 et seq.), even if it was a Fourth Amendment violation to do so, did not require the suppression of the results in that the mistake was not intentional, reckless, the results of gross negligence, nor of recurring or systematic negligence. *(People v. Robinson (2010) 47 Cal.4th 1104, 1124-1129.)*

But by the same token, not all courts are in agreement that the exclusionary rule is reserved exclusively for constitutional violations. *(See discussion in United States v. Lombera-Camorlinga (9th Cir. 2000) 206 F.3rd 882, 886-887, and in the dissenting opinion, p. 893.)*

A civil rights “action under *(42 U.S.C.) section 1983 ‘encompasses violations of federal statutory law as well as constitutional law,’ *(Maine v. Thiboutot* (1980) 448 U.S. 1, 4, . . . 65 L.Ed.2nd 555.) Thus, *section 1983* may be used to enforce rights created by both the United States

While a state may impose stricter standards on law enforcement in interpreting its own state constitution (i.e., “independent state grounds”), a prosecution in federal court is guided by the federal interpretation of the Fourth Amendment and is not required to use the state’s stricter standards. (United States v. Brobst (9th Cir. 2009) 558 F.3rd 982, 989-991, 997.)

Evidence obtained in violation of someone else’s (i.e., someone other than the present defendant’s) Fourth Amendment (search and seizure) rights may be used as part of the probable cause in a search warrant affidavit, unless the defendant can show that he has “standing” (i.e., it was his reasonable expectation of privacy that was violated) to challenge the use of the evidence. (People v. Madrid (1992) 7 Cal.App.4th 1888, 1896.)

See “Searches and Seizures,” “Remedy for Violations; The ‘Exclusionary Rule,’” below.

Rule of Exclusion: “Evidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search.” (United States v. Wanless (9th Cir. 1989) 882 F.2nd 1459, 1465; see “Searches and Seizures,” “Remedies for Violations,” below.)

In the immortal words of the Honorable Justice Benjamin Cardozo: “The criminal is to go free because the constable has blundered.” (People v. Defore (1926) 242 N.Y. 13, 21 [150 N.E. 585, 587].)

This includes “verbal evidence,” (i.e., a suspect’s admissions or confession), when obtained as a direct product of an illegal detention, arrest or search. (See United States v. Crews (9th Cir. 2007) 502 F.3rd 1130, 1135.)

Illegal Detention: As a “seizure” of one’s person, the products of an illegal detention are subject to being suppressed under the exclusionary rule. (See People v. Krohn (2007) 149 Cal.App.4th 1294; detaining defendant for drinking in public, when he was not in a public place, is an illegal detention and requires the
Defendant’s argument that his consent to search was the product of an illegal detention was rejected, although the Court noted that had he been illegally detained, the products of that detention (including his consent to search) would have been subject to suppression. (*People v. Zamudio* (2008) 43 Cal.4th 327, 340-346.)

**Fruit of the Poisonous Tree:** In determining where the line is between the direct products of an illegal search (which will likely be suppressed) and that which is not the “fruit of the poisonous tree” (which will not be suppressed), the Court ruled that the following factors are relevant: (1) The temporal proximity of the Fourth Amendment search and seizure violation to the ultimate procurement of the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy of the official misconduct. (*People v. Rodriguez* (2006) 143 Cal.App.4th 1137.)

Using the above factors, the fact that the defendant had an outstanding arrest warrant may, depending upon the circumstances, be sufficient of an intervening circumstance to allow for the admissibility of the evidence seized incident to arrest despite the fact that the original detention was illegal. (*People v. Brendlin* (2008) 45 Cal.4th 262; an illegal traffic stop.)

But, per the Ninth Circuit, even though the “fruit of the poisonous tree” doctrine does not apply to the lawful search of a residence after the house was “detained” for an unreasonable time while a search warrant was obtained, the resulting evidence recovered from the residence when the home was searched with the warrant will be suppressed anyway in that the officers were not acting reasonably in taking 26½ hours to get the warrant, and some punishment must follow such an unreasonable delay. (*United States v. Cha* (9th Cir. 2010) 597 F.3rd 995, 1003-1004.)

See “Fruit of The Poisonous Tree,” under “Search and Seizure,” below.

**Federal Rules of Evidence, Rule 402:**

“All relevant evidence is admissible, except as otherwise provided by:
• The Constitution of the United States;
• Act of Congress;
• These rules; or
• Other rules prescribed by the Supreme Court pursuant to statutory authority.”

Exceptions:


Defendant and His Identity: It is a rule of law that neither a defendant’s body nor his or her identity is subject to suppression, “even if it is conceded that an unlawful arrest, search, or interrogation occurred.” (Immigration and Naturalization Service v. Lopez-Mendoza (1984) 468 U.S. 1032, 1039-1040 [82 L.Ed.2nd 778].)

For purposes of this rule, it makes no difference that the illegal arrest, search or interrogation was “egregious” in nature. (E.g., the result of “racial profiling.”) (United States v. Gudino (9th Cir. 2004) 376 F.3rd 997.)

It is illegal to resist any arrest or detention by a peace officer, even if it is determined to be an illegal arrest or detention. (Evans v. City of Bakersfield (1994) 22 Cal.App.4th 321.) The person illegally arrested or detained has a civil remedy against the offending officer(s). (See 42 U.S.C. § 1983)

Impeachment Evidence: Also, evidence illegally seized may be introduced for the purpose of impeaching the defendant’s testimony given in both direct examination (Walder v. United States (1954) 347 U.S 62 [98 L.Ed. 503].) and cross-examination, so long as the cross-
examination questions are otherwise proper.  *(United States v. Havens* (1980) 446 U.S. 620 [64 L.Ed.2nd 559].)

California authority prior to passage of Proposition 8 (The “Truth in Evidence Initiative”), to the effect that evidence suppressed pursuant to a motion brought under authority of P.C. § 1538.5 is suppressed for all purposes (i.e., *People v. Belleci* (1979) 24 Cal.3rd 879, 887-888.), was abrogated by Proposition 8. Now, it is clear that suppressed evidence may be used for purposes of impeachment should the defendant testify and lie. *(People v. Moore* (1988) 201 Cal.App.3rd 877, 883-886.)

However, inculpatory statements made by the defendant but suppressed as a product of the defendant’s illegal arrest may not be used to impeach other defense witnesses. *(James v. Illinois* (1990) 493 U.S. 307, 314-316 [107 L.Ed.2nd 676].)

*New Crimes Committed in Response to an Illegal Detention or Arrest*: Whether or not a detention or an arrest is lawful, a suspect is not immunized from prosecution for any new crimes he might commit against the officer in response. A defendant’s violent response to an unlawful detention, such as assaulting a police officer, may still be the source of criminal charges. A suspect has a duty to cooperate with law enforcement whether or not an attempt to detain or arrest him is later held to be in violation of the *Fourth Amendment*. *(In re Richard G.* (2009) 173 Cal.App.4th 1252, 1260-1263.)

*Expectation of Privacy*: Whether a search or seizure is “unreasonable” under the *Fourth Amendment*, and therefore requires the exclusion of evidence obtained thereby, turns on “whether a person has a constitutionally protected reasonable expectation of privacy, that is, whether he or she has manifested a subjective expectation of privacy in the object of the challenged search (or seizure) that society is willing to recognize as reasonable.” *(Emphasis added; People v. Robles* (2000) 23 Cal.4th 789, 794.)

The United States Supreme Court has held: “Our *Fourth Amendment* analysis embraces two questions. First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that ‘he [sought] to preserve [something] as private.’ [Citation.] . . .
Second, we inquire whether the individual’s expectation of privacy is ‘one that society is prepared to recognize as reasonable.’ [Citation, fn. omitted.]” (Bond v. United States (2000) 529 U.S. 334, 338 [120 S. Ct. 1462, 1465, 146 L. Ed. 2d 365, 370]; see also People v. Maury (2003) 30 Cal.4th 342, 384.)

Example: A hotline for citizens to call in tips on criminal activity, advertised as guaranteeing the caller’s anonymity, does not create a constitutionally protected reasonable expectation of privacy in either the caller’s identity or the information provided. It was expected that the information would be passed onto law enforcement. The caller in this case became the suspect in the alleged crimes, thus negating any reasonable expectation to believe that the police would not determine and use his identity in the investigation. (People v. Maury, supra, at pp. 381-403.)

See “Standing,” under “Searches and Seizures,” below.

Juvenile Cases: This same exclusionary rule applies to juvenile proceedings that are filed pursuant to the Welfare and Institutions Code. (In re William G. (1985) 40 Cal.3rd 550, 567, fn. 17; In re Tyrell J. (1994) 8 Cal.4th 68, 75-76.)

On Appeal: Denial of a motion to suppress evidence is reviewed by an appellate court “de novo.” (United States v. Bautista (9th Cir. 2004) 362 F.3rd 584, 588-589.)

Case Authority:

The Courts’ Order of Priority: Federal and California law is cited in this outline. In reviewing the cases listed, it must be remembered that tactical decisions and actions of state and local law enforcement officers, as well as state and local prosecutors, are bound, and must be guided, in order of priority, by the decisions of:

- The United States Supreme Court
- The California Supreme Court
- The various state District Courts of Appeal (Districts 1 through 6)
- The various state Appellate Departments of the Superior Court
- Opinions of the California Attorney General
- The Ninth Circuit Court of Appeal
- All other Federal Circuit Courts of Appeal
- The Federal District Courts
- Decisions from other states.
Decisions from the United States Supreme Court: California’s courts, interpreting the U.S. Constitution, federal statutes, etc., must abide by decisions in prior cases when based upon similar facts as announced by the U.S. Supreme Court. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2nd 450, 454, 456.)

The United States Constitution is the “Supreme Law of the Land, and therefore takes precedence over any contrary rules from the states. (*U.S. Const. Art VI, clause 2:* “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”)

See also *Cal. Const., Art. III, § 1:* “The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.”

“I fully recognize that under the doctrine of stare decisis, I must follow the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my First Amendment right to kick and scream on my way down to the rocks below.” (*People v. Musante* (1980) 102 Cal.App.3d 156, 159; conc. opn. of Gardner, P.J.)

Decisions from lower Federal Courts: Decisions of the Federal District (i.e., trial) Courts, and federal Circuit Courts of Appeal (including the Ninth Circuit Court of Appeal), while entitled to “great weight,” are considered to be “persuasive” only, and are not controlling in California state courts. (*Raven v. Deukmejian* (1990) 52 Cal.3rd 336, 352; *People v. Bradley* (1969) 1 Cal.3rd 80, 86; *In re Tyrell J.* (1994) 8 Cal.4th 68, 79; *Clark v. Murphy* (9th Cir. 2003) 317 F.3rd 1038, 1044.)

State Court Interpretation taking Precedence: For state and local law enforcement officers, a state court interpretation of the various Fourth Amendment rules will take precedence over Federal District (i.e., trial) and Circuit Court of Appeal decisions. (See *People v. Middleton* (2005) 131 Cal.App.4th 732, 738, fn. 3.)

However, federal decisions cannot be ignored. Even purely state cases may eventually end out in a federal court, where federal rules will be applied, through a Writ of Habeas Corpus or in a civil rights lawsuit pursuant to 42 U.S.C. § 1983.
“A federal court may grant habeas relief to a state prisoner if a state court’s adjudication of his constitutional claim was ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” (Middleton v. McNeil (2004) 541 U.S. 433, 436 [158 L.Ed.2nd 701]; citing 28 U.S.C. § 2254(d)(1).)

Title 42 United States Code § 1983: Provides for federal civil liability for “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . .” subjects, or causes to be subjected any person within the United States to the deprivation of any rights, privileges, or immunities secured by the United States Constitution and laws.

Decisions From Other States: California courts are not bound by case decisions from other states (J.C. Penney Casualty Ins. Co. v. M.K. (1991) 52 Cal.3rd 1009, 1027.), although we may consider them.

Opinions of the California Attorney General: A published opinion of the California Attorney General is apparently on about equal footing with federal appellate court decisions, it having been held that these opinions are “entitled to great weight in the absence of controlling state statutes and court decisions” to the contrary. (Phyle v. Duffy (1948) 334 U.S. 431, 441 [92 L.Ed. 1494, 1500].)

Writ of Habeas Corpus: When a defendant claims to be in actual or constructive custody in violation of the United States Constitution (e.g., as the result of a Fourth Amendment violation), a Writ of Habeas Corpus filed in state (P.C. §§ 1473 et seq.) or federal (28 U.S.C. § 2254) court (see Wright v. West (1992) 505 U.S. 277 [120 L.Ed.2nd 225].) is the vehicle by which he or she may test the issue.

When a habeas corpus remedy is sought in federal court, the United States Supreme Court has noted that: “(W)here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.” (fns. omitted; Stone v. Powell (1976) 428 U.S. 465, 494 [49 L.Ed.2nd 1067,
Also, pursuant to 28 U.S.C. § 2254(d), a federal court “may not grant habeas relief from a state court conviction unless the state court proceedings were ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[,]’ or if the state court’s conclusions were ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.’” (Jackson v. Giurbino (9th Cir. 2004) 364 F.3rd 1002, quoting Killian v. Poole (9th Cir. 2002) 282 F.3rd 1204, 1207.)

The Outline: The following, throughout this Outline, are the rules developed by the courts for the purpose of protecting society’s reasonable privacy expectations and effectuating the purposes of the Fourth Amendment.


- Consensual Encounters.
- Detentions.
- Arrests.

Other Topics: Treated separately are issues involving:

- Searches and Seizures.
- Searches with a Search Warrant.
- Searches of Persons.
- Searches of Vehicles.
- Searches of Residences and Other Buildings.
- New Law Enforcement Technology.
- Open Fields.
- Searches of Containers.
- Border Searches.
- Fourth Wavier Searches.
- Consent Searches.
Chapter 2

Consensual Encounters:

**General Rule:** Contrary to a not uncommonly held belief that law enforcement contacts with private citizens require some articulable reason to be lawful, it is a general rule that any peace officer may approach and contact any person in public, or anywhere else the officer has a legal right to be, and engage that person in conversation. (*Wilson v. Superior Court* (1983) 34 Cal.3rd 777.)

No “probable cause” or even a “reasonable suspicion” is needed. (See below)


“(L)aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, (or) by putting questions to him if the person is willing to listen.” (*Florida v. Royer*, supra, at p. 497 [75 L.Ed.2nd at p. 236].)

It does not become a detention (see below) merely because an officer approaches an individual on the street and asks a few questions. (*In re Manual G.* (1997) 16 Cal.4th 805, 821.)

*But:* The person contacted is free to leave and need not respond to an officer’s inquiries. (See below)

**Test:** Would a reasonable person under the same or similar circumstances feel that he or she is free to leave? (*Wilson v. Superior Court*, supra, at p. 790, quoting from *United States v. Mendenhall* (1980) 446 U.S. 544, 554 [64 L.Ed.2nd 497, 509]; *Desyllas v. Bernstine* (9th Cir. 2003) 351 F.3rd 934, 940; *Martinez-Medina v. Holder* (9th Cir 2010) 616 F.3rd 1011, 1015.)

It is not what the defendant himself believes or should believe. (*In re Manual G.*, supra, at p. 821.)

If a reasonable person would not feel like he has a choice under the circumstances, then the person contacted is being detained, and absent sufficient legal cause to detain the person, it is an illegal detention. (*People v. Bailey* (1985) 176 Cal.App.3rd 402.)
“(T)he officer’s uncommunicated state of mind and the individual citizen’s subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. (In re Christopher B. (1990) 219 Cal.App.3rd 455, 460.)” (In re Manual G., supra, at p. 821 see also Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89].)

“The test is necessarily imprecise because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than focus on particular details of that conduct in isolation.” (People v. Verin (1990) 220 Cal.App.3rd 551 556.)


Note: Courts tend to ignore the inherent coerciveness of a police uniform and/or badge, and the fact that most people are reluctant to ignore a police officer’s questions.

Limitations: Obviously, there being no “probable cause” or “reasonable suspicion” to believe any criminal activity is occurring during a consensual encounter, no search, frisk, or involuntary detention is allowed absent additional information amounting to at least a “reasonable suspicion” to believe that the person contacted is involved in criminal activity. (See below)

Consensual Encounters: Elevating a “consensual encounter” into a “detention” without legal cause may result in one or more of the following legal consequences:

Suppression of any resulting evidence under the “Exclusionary Rule.” (See “The Exclusionary Rule,” above.)

Criminal prosecution of the offending law enforcement officer(s) for false imprisonment, pursuant to Penal Code §§ 236 and 237.

Civil liability and/or criminal prosecution for violation of the subject’s civil rights. (E.g.; P.C. § 422.6, C.C. § 52.1, 42 U.S.C. § 1983, 18 U.S.C. §§ 241, 242.)

See “Consensual Encounters vs. Detentions,” below.

No Detention: Consensual encounters may involve investigative functions without necessarily converting the contact into a detention or arrest. Examples:

Obtaining personal identification information from a person and running a warrant check, so long as nothing is done which would have caused a

*However*, a person who has been “consensually encountered” only need not identify himself, nor even talk to a police officer if he so chooses. (*Kolender v. Lawson* (1983) 461 U.S. 352 [75 L.Ed.2nd 903]; *Brown v. Texas* (1979) 443 U.S. 47, 52 [61 L.Ed.2nd 357].)


*But; retaining the identification longer than necessary is a detention, and illegal unless supported by a reasonable suspicion the detainee is engaged in criminal conduct. (*United States v. Chan-Jimenez* (9th Cir. 1997) 125 F.3rd 1324: The consent to search obtained during this illegal detention, therefore, was also illegal.)*

*Tip: Ask for identification, transfer the necessary information to a notebook without leaving the person’s immediate presence, and promptly return the identification to the person.*


Contacting and questioning a person without acting forcefully or aggressively will, in the absence of any other factors which would have indicated to a reasonable person that he was not free to leave, be a consensual encounter only. (*United States v. Summers* (9th Cir. 2001) 268 F.3rd 683, 686.)

*Generally, a conversation that is nonaccusatory, routine, and brief, will not be held to be anything other than a consensual encounter. (*People v. Hughes* (2002) 27 Cal.4th 4th 287, 328.)*

*Walking along with (People v. Capps* (1989) 215 Cal.App.3rd 1112.), or *driving next to (Michigan v. Chesternut* (1988) 486 U.S. 567 [100 L.Ed.2nd 565].), a subject while asking questions, but without interfering with the person’s progress, is not a detention.

Asking a person to remove his hands from his pockets (done for officers’ safety), without exhibiting a “show of authority such that (a person) reasonably might believe he had to comply,” is not, necessarily, a detention. (*People v. Franklin* (1987) 192 Cal.App.3rd 935, 941; *In re Frank V.* (1991) 233 Cal.App.3rd 1232.)

During a lawful search, although commanding a person to show his hands is a “meaningful interference” with a person’s freedom, and thus technically a “seizure” for purposes of the Fourth Amendment, it is such a “de minimus” seizure that, when balanced with the need for a police officer to protect himself, it is allowed under the Constitution. (*United States v. Enslin* (9th Cir. 2003) 315 F.3rd 1205, 1219-1227.)


However, see *People v. Garry* (2007) 156 Cal.App.4th 1100, where it was held to be a detention when the officer spotlighted the defendant and then walked “briskly” towards him, asking him questions as he did so. (See also “Detentions,” below.)

Inquiring into the contents of a subject’s pockets (*People v. Epperson* (1986) 187 Cal.App.3rd 118, 120.), or asking if the person would submit to a search (*People v. Profit* (1986) 183 Cal.App.3rd 849, 857, 879-880; *Florida v. Bostick* (1991) 501 U.S. 429 [115 L.Ed.2nd 389].), does not necessarily constitute a detention, so long as done in a manner that a reasonable person would have understood that he is under no obligation to comply.

A consensual transportation to the police station is not necessarily a detention. (*In re Gilbert R.* (1994) 25 Cal.App.4th 1121.)

Inquiring into possible illegal activity: A consensual encounter does not become a detention just because a police officer inquires into possible illegal activity during an otherwise unintimidating conversation. (*United States v. Ayon-Meza* (9th Cir. 1999) 177 F.3rd 1130.)

Displaying a badge, or even being armed, absent active brandishing of the weapon, will not, by itself, convert a consensual encounter into a
detention. \(\text{\textit{United States v. Drayton}}\) (2002) 536 U.S. 194 [153 L.Ed.2\textsuperscript{nd} 242].

\textit{Contacts on buses}, as long as conducted in a non-coercive manner, do not automatically become a detention despite the relative confinement of the bus. \(\text{\textit{United States v. Drayton, supra; Florida v. Bostick, supra.; see below.}}\)

\textit{During a “knock and talk;”} Contacting a person at the front door of their residence, done in a non-coercive manner, is not a detention. \(\text{\textit{United States v. Crapser}}\) (9\textsuperscript{th} Cir. 2007) 472 F.3\textsuperscript{rd} 1141, 1145-1147.

\textit{Drawing a person out of his residence} by simply knocking at the door and then stepping to the side for purposes of insuring the officer’s safety: No detention when the officers then contacted him outside. \(\text{\textit{People v. Colt}}\) (2004) 118, Cal.App.4\textsuperscript{th} 1404, 1411; “The officers did not draw their weapons. (Defendant) was not surrounded. No one stood between (defendant) and the room door. No one said that (defendant) was not free to leave.”

\textbf{Consensual Encounters vs. Detentions:}

A consensual encounter \textit{may} be inadvertently converted into a detention by “any (or a combination of) the following: . . .

\begin{itemize}
  \item the presence of several officers,
  \item an officer’s display of a weapon,
  \item some physical touching of the person, or
  \item the use of language or of a tone of voice indicating that compliance with the officer’s request might be compelled. \[\text{\textit{Citations}}\]\end{itemize} \(\text{\textit{In re Manual G.}}\) (1997) 16 Cal.4\textsuperscript{th} 805, 821.

The Ninth Circuit Court of Appeals has added several other factors to consider \(\text{\textit{United States v. Washington}}\) (9\textsuperscript{th} Cir. 2007) 490 F.3\textsuperscript{rd} 765, 771-772, citing \textit{Orhorhaghe v. INS} (9\textsuperscript{th} Cir. 1994) 38 F.3\textsuperscript{rd} 488, 494-496.:

Whether the encounter occurred in a public or nonpublic setting.

Whether the officers informed the person of his right to terminate the encounter.

A consensual encounter might also become an unlawful arrest, if done without probable cause. \(\text{\textit{See United States v. Redlightning}}\) (9\textsuperscript{th} Cir.
2010) 624 F.3rd 1090, 1103-1106, adding a consideration of the act of confronting the defendant with evidence of his guilt.)

In United States v. Washington (9th Cir. 2007) 490 F.3rd 765, the Ninth Circuit Court of Appeal found a detention when two white police officers had contact with the Black defendant late at night, and then asked him for consent to search. The consensual encounter, however, reverted to an illegal detention due to the “authoritative” manner of conducting the search, by walking defendant back to the patrol car, having him put his hands on the patrol vehicle while facing away from the officer, during a patdown, with the second officer standing between him and his car. It was also noted that the local “Police Bureau” (in Portland, Oregon) had published a pamphlet telling African-Americans to submit to a search when “ordered” to do so by the police following several instances of white police officers shooting Black citizens during traffic stops.

Never being told that he couldn’t leave, where his car was not blocked in, despite believing that it would be rude to leave while the deputy was talking to him, was not a detention. As such, no suspicion of criminal activity was necessary. (People v. Schmitz (2010) 187 Cal.App.4th 722, 728-729.)

Note: Certiorari was granted by the California Supreme Court on 12/2/10, making this case no longer available for citation pending a decision by the Court.

Specific Issues:

Contacts on Buses:

The United States Supreme Court has repeatedly ruled that law enforcement officers checking buses for immigration or drug interdiction purposes are not detaining the passengers when the officers do no more than “ask questions of an individual, ask to examine the individual’s identification, and request consent to search his or her luggage so long as the officers do not convey a message that compliance with their requests is required.” The fact that the contact took place in the cramped confines of a bus is but one factor to consider in determining whether the encounter was in fact a detention. (Florida v. Bostick (1991) 501 U.S. 429 [115 L.Ed.2nd 389]; United States v. Drayton (2002) 536 U.S. 194 [153 L.Ed.2nd 242].)

However, the Ninth Circuit Court of Appeal held to the contrary in a similar circumstance, without attempting to differentiate the facts from Bostick (the case being decided before Drayton), finding that
the officers should have informed passengers that they were not obligated to speak with the officers.  (*United States v. Stephens* (9th Cir. 2000) 206 F.3rd 914.)

The Supreme Court in *Drayton*, *supra*, however, has specifically held that it is not required that officers inform citizens of their right to refuse when the officer is seeking permission to conduct a warrantless consent search.  (*United States v. Drayton*, *supra*).

*Note*: It is questionable whether *Stephens* is good law in light of *Bostic* and *Drayton*.

**Flight:**

*Rule*: The long-standing rule has always been that “flight alone,” without other suspicions circumstances, is *not* sufficient to justify a detention.  (*People v. Souza* (1994) 9 Cal.4th 224.)

A vehicle driver’s apparent attempt to elude a police officer when there is no legal justification for making a traffic stop, is not illegal in itself in that the driver is under no duty to stop.  (*Liberal v. Estrada* (9th Cir. 2011) 632 F.3rd 1064, 1078.)

*Note*: If a person may walk away from a consensual encounter, he or she may also leave at a full run. The courts, state and federal, have consistently held that this act, by itself, is not suspicious enough to warrant a detention.

**Exceptions:**

However, the U.S. Supreme Court has lowered the bar a little by holding that flight from a “high narcotics area” is sufficient in itself to justify a temporary detention (and patdown for weapons).  (*Illinois v. Wardlow* (2000) 528 U.S. 119 [145 L.Ed.2nd 570].)

Flight of two people is more suspicious than one. Added to this the fact that there appeared to be drug paraphernalia on a table where the two persons had been sitting and that defendant was carrying something in his hand as he fled, the officer had sufficient reasonable suspicion to detain him.  (*People v. Britton* (2001) 91 Cal.App.4th 1112, 1118-1119.)
Stopping, detaining, and patting down a known gang member, observed running through traffic in a gang area, while looking back nervously as if fleeing from a crime (as either a victim or a perpetrator), was held to be lawful. ([In re H.M.](2008) 167 Cal.App.4th 136.)

Observing defendant an three others running down the street, carrying rudimentary weapons (i.e., a brick, rock and part of a lamp), in a gang area with defendant being recognized as a member of that gang, with one of the subjects yelling “He’s over there,” and another pointing up the street, was sufficient probable cause to arrest the subjects for possession of a deadly weapons for the purpose of committing an assault, per P.C. § 12024. ([In re J.G.](2010) 188 Cal.App.4th 1501.)

Trying to catch a person who runs from a consensual encounter is not a constitutional issue until he is caught. A person is not actually detained (thus no Fourth Amendment violation) until he is either physically restrained or submits to an officer’s authority to detain him. ([California v. Hodari D.](1991) 499 U.S. 621 [113 L.Ed.2nd 690]; “threatening an unlawful detention,” by chasing a person with whom a consensual encounter had been attempted, is not a constitutional violation in itself. See also [United States v. Smith](9th Cir. 2011) 633 F.3rd 889.)

*Note:* Actions taken by the subject being chased, such as dropping contraband prior to being caught, will, if observed by the pursuing officer, likely justify the detention once the subject is in fact caught.

Defendant who refused to submit to an illegal, suspicionless detention, physically threatening the officer before fleeing, could lawfully be arrested upon the making of the threat. Therefore, arresting him after a foot pursuit was lawful. ([United States v. Caseres](9th Cir. 2008) 533 F.3rd 1064, 1069.)

*Photographing Subjects:*

A person who exposes his facial features, and/or body in general, to the public, in a public place, has no reasonable expectation of privacy in his appearance. ([People v. Benedict](1969) 2 Cal.App.3rd 400.) It is not, therefore, a constitutional violation to photograph him, so long as he is not detained for that purpose.
See also **People v. Maury** (2003) 30 Cal.4th 342, 384-385: “(T)he police surveillance and photographing of defendant entering and exiting the drop-off point is not a subject of **Fourth Amendment** protection since defendant knowingly exposed his whereabouts in public.”

*But, see People v. Rodriguez* (1993) 21 Cal.App.4th 232, 239; stopping and detaining gang members *for the purpose of* photographing them is illegal without reasonable suspicion of criminal activity. Merely being a member of a gang, by itself, is not cause to detain.

See “**Detentions**,” below.

See also “**Videotaping or Photographing**,” under “**Law Enforcement Technology**,” below.

**Knock and Talks:** Where the officer *does not* have probable cause prior to the contact (thus, he is not able to obtain a search warrant), there is no constitutional impediment to conducting what is known as a “*knock and talk*;” i.e., making contact with the occupants of a residence for the purpose of asking for a consent to enter and/or to question the occupants. **(United States v. Cormier** (9th Cir. 2000) 220 F.3rd 1103.)


Contacting a person at the front door of their residence, done in a non-coercive manner, is not a detention. **(United States v. Crapser** (9th Cir. 2007) 472 F.3rd 1141, 1145-1147.)

See also **People v. Michael** (1955) 45 Cal.2nd 751, at page 754, where the California Supreme Court noted that: “It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority.”

The key to conducting a lawful “*knock and talk,*” when there is no articulable suspicion that can be used to justify an “**investigative detention,**” is whether “a reasonable person would feel free ‘to disregard the police and go about his business.’” [Citation] If so,
no articulable suspicion is required to merely knock on the defendant’s door and inquire of him who he is and/or to ask for consent to search. (*People v. Jenkins* (2004) 119 Cal.App.4th 368.)

But see *United States v. Jerez* (7th Cir. 1997) 108 F.3rd 684, where a similar situation was held to constitute an “investigative detention,” thus requiring an “articulable reasonable suspicion” to be lawful, because the officers knocked on the motel room door in the middle of the night continually for a full three minutes, while commanding the occupants to open the door.

An otherwise lawful “knock and talk,” where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, converted the contact into an unlawfully “extended” detention, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (*United States v. Washington* (9th Cir. 2004) 387 F.3rd 1060.)

The information motivating an officer to conduct a knock and talk may be from an anonymous tipster. There is no requirement that officers corroborate anonymous information before conducting a knock and talk. (*People v. Rivera* (2007) 41 Cal.4th 304.)

See “Knock and Talk,” below, under “Searches of Residences and Other Buildings,” below.
Chapter 3

Detentions:

**General Rule:** A police officer has the right to stop and temporarily detain someone for investigation whenever the officer has a “reasonable suspicion” some criminal activity is afoot and that the person was, . . . is, . . . or is about to be involved in that criminal activity.  (*Terry v. Ohio* (1968) 392 U.S. 1, 27 [20 L.Ed.2nd 889, 909].)

“[A]n investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith.” (*In re Tony C.* (1978) 21 Cal.3rd 888, 893.)

A “stop and frisk” is constitutionally permissible if two conditions are met:

- The investigatory stop must be lawful; i.e., when a police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense.

- The police officer must reasonably suspect that the person stopped is armed and dangerous.  (*Arizona v. Johnson* (2009) 555 U.S. 323 [172 L.Ed.2nd 694].)

Detentions are sometimes referred to in the case law as simply an “investigative stop,” particularly by the federal courts.  (See *United States v. Kim* (9th Cir. 1994) 25 F.3rd 1426; *United States v. Summers* (9th Cir. 2001) 268 F.3rd 683.)

**Purpose:** A detention is allowed so a peace officer may have a reasonable amount of time to investigate a person’s possible involvement in an actual or perceived criminal act, allowing the officer to make an informed decision whether to arrest, or to release, the subject.  “An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.  Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”  (*In re Antonio B.* (2008) 166 Cal.App.4th 435, 440.)

The plight and dangers of a police officer on the street on not lost on the courts:
“(E)ven when a police officer is careful, he is still subject to attack. The judiciary should not ‘lightly second guess’ an officer’s decision to conduct a ‘stop and frisk . . . .’ (P)olice officers (are) entitled to protect themselves during a detention: “This is a rule of necessity to which a right even as basic as that of privacy must bow. To rule otherwise would be inhumanely to add another hazard to an already very dangerous occupation. Our zeal to fend off encroachments upon the right of privacy must be tempered by remembrance that ours is a government of laws, to preserve which we require law enforcement—live ones. Without becoming a police state, we may still protect the policeman’s status.” [Citation omitted]” (In re Richard G. (2009) 173 Cal.App.4th 1252, 1255.)

**Test:** A person is detained if a reasonable person, under the circumstances, would have known that he or she is not free to leave. (People v. Rios (2011) 193 Cal.App.4th 584, 592.)

However, the fact that “an encounter is not a seizure when a reasonable person would feel free to leave do(es) not mean that an encounter is a seizure just because a reasonable person would not feel free to leave.” There must be “an intentional acquisition of physical control.” A detention occurs “only when there is a governmental termination of freedom of movement through means intentionally applied.” (United States v. Nasser (9th Cir. 2009) 555 F.3rd 722; defendant stopped his vehicle on his own event though Border Patrol agents had not intended to stop him. Resulting observations, made before defendant was detained, were lawful.)

A detention is a “seizure” for purposes of the Fourth Amendment, and occurs whenever a law enforcement officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen. (Florida v. Bostick (1991) 501 U.S. 429, 434 [115 L.Ed.2nd 389, 398]; People v. Rios, supra.)


“A seizure of the person within the meaning of the Fourth and Fourteenth Amendments occurs when ‘taking into account all the circumstances surrounding the encounter, the police conduct would “have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”’” [Citations]” (Kaupp v. Texas (2003) 538 U.S. 626, 629 [155 L.Ed.2nd 814, 819-820.)
A person is not actually detained (thus no Fourth Amendment issue) until he is either physically restrained or submits to an officer’s authority to detain him. (California v. Hodari D. (1991) 499 U.S. 621 [113 L.Ed.2nd 690]; “threatening an unlawful detention,” by chasing a person upon whom a consensual encounter is attempted, is not a constitutional violation in itself.)

“A person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer ‘by means of physical force or show of authority’ ‘terminates or restrains his freedom of movement.’ (Citations)” (Brendlin v. California (2007) 551 U.S. 249 [168 L.Ed.2nd 132]; People v. Zamudio (2008) 43 Cal.4th 327, 341-342.)

Factors to consider when determining whether a person has been detained include:

- The number of officers involved.
- Whether weapons were displayed.
- Whether the encounter occurred in a public or nonpublic setting.
- Whether the officers’ officious or authoritative manner would imply that compliance would be compelled.
- Whether the offices advised the detainee of his right to terminate the encounter.

(Orhorhaghe v. INS (9th Cir. 1994) 38 F.3rd 488, 494-496; United States v. Washington (9th Cir. 2004) 387 F.3rd 1060, 1068; (United States v. Brown (9th Cir. 2009) 563 F.3rd 410, 415.)

*Note: Brown is also instructive in how removing some of the above listed factors can convert what appeared to be an arrest back into merely a detention or even a consensual encounter; e.g., putting the firearms away, removing the handcuffs, telling the subject that she was not under arrest, and then letting her return to her apartment unaccompanied.*

**Detentions vs. Arrests:** If not handled properly, a “detention” could become an “arrest” which, if not supported by “probable cause” to arrest, would be illegal. (Orozco v. Texas (1969) 394 U.S. 324 [22 L.Ed.2nd 311]; In re Antonio B. (2008) 166 Cal.App.4th 435; United States v. Redlighting (9th Cir. 2010) 624 F.3rd 1090, 1103-1106.)

*General Rule: The use of firearms, handcuffs, putting a person into a locked patrol car, transporting him without his consent,* or simply a “show
of force,” may, under the circumstances, cause the court to later find that an attempted detention was in fact an arrest, and, if made without “probable cause,” illegal. *(United States v. Ramos-Zaragosa* (9th Cir. 1975) 516 F.2nd 141, 144; *New York v. Quarles* (1984) 467 U.S. 649 [81 L.Ed.2nd 550], handcuffs; *Orozco v. Texas*, supra, force.)*

**Indicators of an Arrest:** Other courts have illustrated the relevant factors to an arrest:


**The Use of Handcuffs.** *(New York v. Quarles*, supra; *United States v. Purry* (D.C. Cir. 1976) 545 F.2nd 217, 220.)*

While putting a juvenile in a security office at the border, and frisking her, were not enough to constitute an arrest, handcuffing her shortly thereafter when contraband was found in her car was an arrest. *(United States v. Juvenile (RRA-A) (9th Cir. 2000) 229 F.3rd 737, 743.)*

Whether or not a detention becomes an arrest depends upon “whether the use of handcuffs during a detention was reasonably necessary under all of the circumstances of the detention.” *(In re Antonio B.* (2008) 166 Cal.App.4th 435, 441; defendant found to have been arrested, due to his handcuffing, without probable cause.)*

Handcuffing a person suspected of possible involvement in a narcotics transaction, but where the officer testified only that he was “uncomfortable” with the fact that defendant was tall (6’-6”) and that narcotics suspects sometimes carry weapons (although the officer did not conduct a patdown for weapons), converted a detention into a “de facto” arrest, making the subsequent consent to search involuntary. *(People v. Stier* (2008) 168 Cal.App.4th 21.)


**During an Overwhelming Show of Force.** *(Orozco v. Texas*, supra; *United States v. Ali* (2nd Cir. 1996) 86 F.3rd 275, defendant
was asked to step away from the boarding area at an airport, his travel documents were taken, and he was surrounded by seven officers with visible handguns; and Kaupp v. Texas (2003) 538 U.S. 626, 628-630 [155 L.Ed.2nd 814, 819-820], three officers, with three more in the next room, commanded the 17-year-old defendant to get out of bed at 3:00 a.m., and took him to the police station for questioning.)

The Physical Touching of the person of the suspect. (Kaupp v. Texas, supra, at p. 630 [155 L.Ed.2nd at p. 820].)


As a general rule:  \[ \text{Detention} + \text{nonconsensual transportation} = \text{arrest}. \]

See also People v. Harris (1975) 15 Cal.3rd 384, 390-392; transporting a subject from the site of a traffic stop back to the scene of the crime for a victim identification, absent one of the recognized exceptions, was an arrest.

“(W)e have never ‘sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization.’ [Citation]” Kaupp v. Texas (2003) 538 U.S. 626, 630 [155 L.Ed.2nd 814, 820].

But See “Exceptions,” below.

Exceptions: The use of firearms, handcuffing, a non-consensual transportation, and/or putting a subject into a patrol car, if necessary under the circumstances, particularly if precautions are taken to make sure that the person knows he is only being detained as opposed to being arrested, or when the use of force is necessitated by the potential danger to the officers, may be found to be appropriate and does not necessarily elevate the contact into an arrest. (See People v. Celis (2004) 33 Cal.4th 667, 673-676.)

In general, the investigative methods used should be the least intrusive means reasonably available. Although the use of some force does not automatically transform an investigatory detention into an arrest, any overt show of force or authority should be
justified under the circumstances. (See, e.g., *United States v. Holtzman* (9th Cir. 1989) 871 F.2d 1496, 1502, restraints justified by belief suspect was attempting to flee; *United States v. Buffington* (9th Cir. 1987) 815 F.2d 1292, 1300, given officer’s knowledge of suspect’s history of violence, show of force justified by fear for personal safety. (*In re Ricardo D.* (9th Cir. 1990) 912 F.2nd 337, 340.)

For example:


“(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.” (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062.)


*Case Law:*

*United States v. Meza-Corrales* (9th Cir. 1999) 183 F.3rd 1116; “(W)e allow intrusive and aggressive police conduct (handcuffing, in this case) 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.”

*United States v. Rousseau* (9th Cir. 2001) 257 F.3rd 925, where it was held that using firearms and handcuffs did not convert a detention into an arrest when the use of force was necessitated by the potential danger to the officers.

*Haynie v. County of Los Angeles* (9th Cir. 2003) 339 F.3rd 1071: Handcuffing and putting an uncooperative suspect in the backseat of a patrol car while the officer checked the
vehicle for weapons held *not* to be an arrest. “A brief, although complete, restriction of liberty, such as handcuffing (and, in this case, putting into a patrol car), during a *Terry* stop is not a de facto arrest, if not excessive under the circumstances.” (*Id.*, at p. 1077.)

Referring to *Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2nd 889].

Stopping two suspects suspected of committing felony drug offenses, with the officers displaying their firearms, handcuffing the suspects, and making them sit on the ground while a two-minute check of their house for additional suspects, did not convert what was intended to be a detention into an arrest. (*People v. Celis* (2004) 33 Cal.4th 667, 673-676.)

The California Supreme Court in *Celis* noted the below listed important factors to consider:

- Whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.

- The brevity of the invasion of the individual’s *Fourth Amendment* interests.

Information that defendant had threatened a victim with a firearm and was presently sitting in a described vehicle justified a “*felony stop*,” pulling the defendant and other occupants out of the car at gun point and making him lay on the ground until the car could be checked for weapons. Given the officers’ safety issues, such a procedure amounted to no more than a detention. (*People v. Dolly* (2007) 40 Cal.4th 458.)

“Generally, handcuffing a suspect during a detention (without converting the contact into a de facto arrest) has only been sanctioned in cases where the police officer has a reasonable basis for believing the suspect poses a present physical threat or might flee.” (*People v. Stier* (2008) 168 Cal.App.4th 21, 27.)
Circumstances listed by the *Stier* court (at pp. 27-28) where handcuffing has been found to be reasonably necessary for a detention include when:

- The suspect is uncooperative.
- The officer has information the suspect is currently armed.
- The officer has information the suspect is about to commit a violent crime.
- The detention closely follows a violent crime by a person matching the suspect’s description and/or vehicle.
- The suspect acts in a manner raising a reasonable possibility of danger or flight.
- The suspects outnumber the officers.

**Note:** “Custody” for purposes of *Miranda v. Arizona* (1966) 384 U.S. 436, 445 [16 L.Ed.2nd 694, 708].), under the **Fifth Amendment**, involves a different analysis than “custody” for purposes of a detention or arrest under the **Fourth Amendment**. “In contrast (to Fourth Amendment search and seizure issues, where the reasonableness of the officer’s actions under the circumstances is the issue), Fifth Amendment Miranda custody claims do not examine the reasonableness of the officer’s conduct, but instead examine whether a reasonable person (in the defendant’s position) would conclude the restraints used by police were tantamount to a formal arrest.” (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1406.)

Handcuffing a detained suspect based upon defendant’s size (6 foot, 250 pounds), the fact that he was “real nervous,” and because he began to tense up as if he were about to resist, handcuffing him was held to be reasonable. (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062.)

**Note:** Telling a person that he is not under arrest may not be enough by itself to negate what is otherwise an arrest (See *United States v. Lee* (9th Cir. 1982) 699 F.2nd 466, 467.). But even if it is not, it is at least a factor to consider when considering the “totality of the circumstances.” (*United States v. Bravo* (9th Cir. 2002) 295 F.3rd 1002, 1011.)
Non-Consensual Transportation Exceptions: The Courts have found exceptions to the “detention + transportation = arrest” rule when the following might apply: “(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.” (United States v. Charley (9th Cir. 2005) 396 F.3rd 1074, 1080.)

In Charley, the defendant had just murdered her three children and, after calling police from another location, encouraged law enforcement to go with her to check on their welfare without specifically telling the officer what she had done. She was also told that she was not under arrest, and was transported without handcuffs. (United States v. Charley, supra, at pp. 1077-1082.)

“(T)he police may move a suspect from the location of the initial stop without converting the stop into an arrest when it is necessary for safety or security reasons.” (United States v. Ricardo D. (9th Cir. 1990) 912 F.2nd 337, 340; citing Florida v. Royer (1983) 460 U.S. 491, 504-505 [75 L.Ed.2nd 229, 241-242].)

Non-consensual transportation necessary to continue the detention out of the presence of a gathering, hostile crowd, held to be lawful under the circumstances. (People v. Courtney (1970) 11 Cal.App.3rd 1185, 1191-1192.)

See also Michigan v. Summers (1981) 452 U.S. 692, 702, fn. 16 [69 L.Ed.2nd 340, 349], where it was held that moving the detained suspect from the walkway in front of his home into the house, where he was held while the house was searched pursuant to a search warrant, was not considered constitutionally significant.

Temporarily handcuffing a smuggling suspect stopped at the International Border where escape routes were close by, particularly when the subject is told that he is not under arrest and that the handcuffs were merely for everyone’s safety and would be removed momentarily, and then walking him to a security office about 30 to 40 yards (United States v. Bravo (9th Cir. 2002) 295 F.3rd 1002.) or 35 feet (United States v. Zaragoza (9th Cir. 2002) 295 F.3rd 1025.) away, is reasonable and does not convert a detention into an arrest. (See also United States v. Hernandez (9th Cir. 2002) 314 F.3rd 430.)

An individual is not arrested but merely detained when, at the border, he is asked to exit his vehicle, briefly handcuffed while escorted to the security office, uncuffed, patted down, and required
to wait in a locked office while his vehicle is searched.  *(United States v. Nava* (9th Cir. 2004) 363 F.3rd 942.)

**People v. Soun** (1995) 34 Cal.App.4th 1499; defendants, removed from their vehicle at gunpoint, were forced to lie on the ground, handcuffed, put into police vehicles and transported three blocks to a safer location: Detention only, based upon the circumstances.

**Gallegos v. City of Los Angeles** (9th Cir. 2002) 308 F.3rd 987; where a 2-to-1 majority found that stopping a subject at gunpoint, handcuffing him, and then transporting him back to the scene of a crime to see if the victim could identify him, a procedure which took 45 minutes to an hour, *was not* an arrest, but was no more than an “*investigative stop (that) worked as it should.*”

*Reasonable Suspicion:* Less than “probable cause,” but more than no evidence (i.e., a “hunch.”) at all.

**Defined:** “Reasonable suspicion” is information which is sufficient to cause a reasonable law enforcement officer, taking into account his or her training and experience, to *reasonably believe* that the person to be detained is, was, or is about to be, involved in criminal activity. The officer must be able to articulate more than an “inchoate and unparticularized suspicion or ‘hunch’ of criminal activity.” *(Terry v. Ohio* (1968) 392 U.S. 1, 27 [20 L.Ed.2nd 889, 909].)

“Because the ‘balance between the public interest and the individual’s right to personal security,’ [Citation] tilts in favor of a standard less than probable cause in such cases, the *Fourth Amendment* is satisfied if the officer’s action is supported by reasonable suspicion to believe that criminal activity “‘may be afoot,’” *(United States v. Sokolow* (1989) 490 U.S. 1, 7 [104 L.Ed.2nd 1, 10]; quoting *Terry v. Ohio*, supra, at p. 30 [20 L.Ed.2nd at p. 911]; see also *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1058.)

The “reasonable suspicion” standard is “not a particularly demanding one, but is, instead, ‘considerably less than proof of wrongdoing by a preponderance of the evidence,’” *(People v. Letner and Tobin* (2010) 50 Cal.4th 99, 146; quoting .” *(United States v. Sokolow* (1989) 490 U.S. 1, 7 [104 L. Ed. 2nd 1].)

“In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law
enforcement officers where none exists. Thus, the
determination of reasonable suspicion must be based on
commonsense judgments and inferences about human
behavior.” (Ibid., quoting Illinois v. Wardlow (2000) 528
U.S. 119, 124–125 [145 L. Ed. 2nd 570].)

In People v. Letner and Tobin, supra, a majority of the
Supreme Court found that the unexplained driving at 40
mph in a 55 mph zone, indicating a possible DUI driver,
particularly when combined with the officer’s suspicions
that the car might be stolen when there were water beads on
it from a storm some hours earlier, indicating that it had not
been driven far, and when found in an area known for its
many thefts from the nearby car lots, justified an
investigative traffic stop.

Detention of a Victim or Witness:

While a victim or witness, as a general rule, may not be detained or
forced to cooperate in a police investigation, it is argued by some
that when the governmental need is strong and the intrusion upon
the victim or witness is minimal, a temporary stop or detention of
the victim or witness may be justifiable. (See Illinois v. Lidster
(2004) 540 U.S. 419 [157 L.Ed.2nd 843]; vehicle check point used
to locate witnesses to a previous fatal hit and run.)

See also Metzker v. State (Ak 1990) 797 P.2nd 1219; “It
appears the police are justified in stopping witnesses only
where exigent circumstances are present, such as where a
crime has recently been reported.”

Note: No case law yet upholds the transportation of a victim or
witness without that person’s consent.

Articulable Objective Suspicion: A detention, even if brief, is a
sufficiently significant restraint on personal liberty to require “objective
justification.” (Florida v. Royer (1983) 460 U.S. 491, 498 [75 L.Ed.2nd
229, 236-237].)

Note: Reasons which an officer feels give him or her reasonable
suspcion to detain must be articulated, in detail, in an arrest report
and later recounted in courtroom testimony.

An officer’s inability to articulate those suspicious factors
that give rise to the need to stop and detain a suspect is one
of the more common causes of detentions being found to be illegal.

A prosecutor’s failure to elicit a thorough description of all the suspicious factors by asking the right questions is another common cause.

_A Hunch_: An officer’s decision to detain cannot be predicated upon a mere “_hunch_,” but must be based upon articulable facts describing suspicious behavior which would distinguish the defendant from an ordinary, law-abiding citizen. (_Terry v. Ohio_ (1968) 392 U.S. 1, 27 [20 L.Ed.2nd 889, 909].)

“A _hunch_ 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. A hunch, however, is not a substitute for the necessary specific, articulable facts required to justify a _Fourth Amendment_ intrusion.” (Italics added; _People v. Pitts_ (2004) 117 Cal.App.4th 881, 889; quoting _United States v. Thomas_ (9th Cir. 2000) 211 F.3rd 1186, 1192.)

A stop and detention based upon stale information concerning a threat, which itself was of questionable veracity, and with little if anything in the way of suspicious circumstances to connect the persons stopped to that threat, is illegal. (_People v. Durazo_ (2004) 124 Cal.App.4th 728: Threat was purportedly from Mexican gang members, and defendant was a Mexican male who (with his passenger) glanced at the victim’s apartment as he drove by four days later where the officer admittedly was acting on his “_gut feeling_” that defendant was involved.)

Seemingly innocuous behavior does not justify a detention of suspected illegal aliens unless accompanied by some particularized conduct that corroborates the officer’s suspicions. (_United States v. Manzo-Jurado_ (9th Cir. 2006) 457 F.3rd 928; standing around in their own group, conversing in Spanish, watching a high school football game.)

Observing defendant sitting in a parked motor vehicle late at night near the exit to a 7-Eleven store parking lot, with the engine running, despite prior knowledge of a string of recent robberies at 7-Elevens, held to be not sufficient to justify a detention and patdown. (_People v. Perrusquia_ (2007) 150 Cal.App.4th 228.)
However, “the possibility of innocent explanations for the factors relied upon by a police officer does not necessarily preclude the possibility of a reasonable suspicion of criminal activity. (People v. Letner and Tobin (2010) 50 Cal. 4th 99, 146; quoting (United States v. Arvizu (2002) 534 U.S. 266, 274 [151 L. Ed. 2nd 740].)

The Totality of the Circumstances: The legality of a detention will be determined by considering the “totality of the circumstances.” (United States v. Arvizu (2002) 534 U.S. 266, 273 [151 L.Ed.2nd 740, 749]; see also People v. Dolly (2007) 40 Cal.4th 458.)

“All relevant factors must be considered in the reasonable suspicion calculus—even those factors that, in a different context, might be entirely innocuous.” (United States v. Fernandez-Castillo (9th Cir. 2003) 324 F.3rd 1114, 1124, citing United States v. Arvizu, supra, at pp. 277-278 [151 L.Ed.2nd at p. 752].)

The Officer’s Subjective Conclusions: Whether or not an officer has sufficient cause to detain someone will be evaluated by the courts on an “objective” basis; or how a reasonable person would evaluate the circumstances. The officer’s own “subjective” conclusions are irrelevant. (Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89].)

A Seizure: Although a detention is a “seizure” under the Fourth Amendment (Terry v. Ohio, supra, at p. 19, fn. 16 [20 L.Ed.2nd at pp. 904-905].), it is allowed on less than probable cause because the intrusion is relatively minimal and is done for a valid and necessary investigative purpose.

Probable Cause vs. Reasonable Suspicion: The occasional inarticulate judicial references to the need to prove “probable cause” (e.g., see United States v. Willis (9th Cir. 2005) 431 F.3rd 709, 715, referring to the U.S. Supreme Court’s ruling in Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89].) was not intended to raise the standard of proof from one of needing only a “reasonable suspicion.” (United States v. Lopez (9th Cir. 2000) 205 F.3rd 1101-1104.)

See Ybarra v. Illinois (1979) 444 U.S. 85 [62 L.Ed.2nd 238], condemning the detention and patdown of everyone at the scene absent individualized evidence connecting each person so detained with the illegal activity being investigated.

Various Factors which, when taken individually or in combination, help contribute to justifying a detention.
In General: Such factors include, but are not limited to, the following (see above and below):

- Whether the suspect resembles a wanted person.
- The suspect is contacted in a wanted vehicle.
- The suspect appears intoxicated or injured.
- The suspect’s suspicious actions.
- The suspect’s erratic or evasive driving, or other suspicious actions.
- The officer’s prior knowledge of criminal activity by the suspect.
- The suspect’s demeanor and/or reaction to seeing the officer.
- The suspect’s nervousness, belligerence, etc.
- The suspect’s evasive replies to questions.
- The time of day.
- Criminal history of the area. (E.g., a “high narcotics area.”)
- The proximity to a recent, or a series of crimes.
- The officer’s expertise, training and/or experience for the type of crime suspected.
- The suspect’s actions consistent with common patterns for the type of crime suspected.
- Informant information.

A “High Crime” or “High Narcotics” Area:

Although being in a so-called “high crime” or “high narcotics activity” area is a factor to be considered; “(a)n ‘officer’s assertion that the location lay in a “high crime” area does not (by itself) elevate . . . facts into a reasonable suspicion of criminality. The “high crime area” factor is not an “activity” of an individual. Many citizens of this state are forced to live in areas that have “high crime” rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas. . . .” (Italics added; People v. Pitts (2004) 117 Cal.App.4th 881, 887; quoting People v. Loewen (1983) 35 Cal.3rd 117, 124; and People v. Bower (1979) 24 Cal.3rd 638, 546.)

“(T)he time and location of an encounter are insufficient by themselves to cast reasonable suspicion on an individual.” (People v. Medina (2003) 110 Cal.App.4th 171, 177; noting that neither the “nighttime factor” nor the “high crime area factor” are “activities” by a person sought to be detained.)

However, note that the United States Supreme Court has held that a subject’s flight on foot from the police when it occurs in a so-
called “high narcotics area” is sufficient in itself to justify a temporary detention (as well as a patdown for weapons).  (*Illinois v. Wardlow* (2000) 528 U.S. 119 [145 L.Ed.2nd 570]; see “Flight” under “Consensual Encounters,” above.)

**Types of Detentions:**

**Traffic Stops:**

*Detention vs. Arrest:* Although issuing a traffic citation is technically an arrest and release on the person’s written promise to appear (see *United States v. Leal-Feliz* (9th Cir. Nov. 30, 2011) __F.3rd__ [2011 DJDAR 17179; 2011 U.S. App. LEXIS 23800].), it is treated as a detention because of the minimal intrusion involved.  (*Berkemer v. McCarty* (1984) 468 U.S. 420, 439 [82 L.Ed.2nd 317, 334]; *Arizona v. Johnson* (2009) 555 U.S. 323 [172 L.Ed.2nd 694]; see also *People v. Hernandez* (2006) 146 Cal.App.4th 773; “Traffic stops are treated as investigatory detentions for which the officer must be able to point to specific and articulable facts justifying the suspicion that a crime is being committed.”)

In that the traffic stop itself (i.e., prior to the issuing of a citation), is considered to be no more than a detention, it only requires a “reasonable suspicion” that a traffic offense had been committed in order to be a lawful stop.  (*United States v. Lopez-Soto* (9th Cir. 2000) 205 F.3rd 1101, 1104-1105; *People v. Miranda* (1993) 17 Cal.App.4th 917, 926 *Brierton v. Department of Motor Vehicles* (2005) 130 Cal.App.4th 499, 509-510; *United States v. Miranda-Guerena* (9th Cir. 2006) 445 F.3rd 1233.)

In establishing the necessary “reasonable suspicion,” the officer is not required to personally “observe all elements of criminal conduct.”  He need only “be able to ‘point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.’” [Citation]  *Brierton v. Department of Motor Vehicles*, supra., at p. 509.)

Then the citation (i.e., the arrest and release) is written based on the “probable cause” to believe a
traffic infraction had been committed by the person being cited. *(Ibid.)*

A random license check on the defendant’s vehicle, resulting in information that the owner had an outstanding traffic warrant, justified the stop of that vehicle. *(People v. Williams* (1995) 33 Cal.App.4th 467.)

**No Law Enforcement Involvement:**

A suspect who stops on his own, even if mistakenly believing he was required to stop, but where law enforcement does nothing affirmatively to cause him to stop, has not been detained for purposes of the Fourth Amendment. A detention requires a “governmental termination of freedom of movement ‘through means intentionally applied.’” *(United States v. Nasser* (9th Cir. 2009) 555 F.3rd 722.)

**Moving Violations:**

A citizen’s report of a vehicle driving erratically, with a specific description of the vehicle (including a personalized license plate, although one digit was wrong), where the officer observed the vehicle shortly thereafter weave outside its lane, was cause to effect a traffic stop. *(People v. Carter* (2005) 36 Cal.4th 1114, 1139-1142.)

A pedestrian crossing diagonally across an intersection without interfering with any traffic is not a violation of V.C. § 21954(a) (Pedestrian’s interference with traffic), and therefore does not justify a detention. *(People v. Ramirez* (2006) 140 Cal.App.4th 849.)

Failure to stop a vehicle before the front bumper crosses a crosswalk’s limit line at an intersection is a violation of V.C. § 22450, justifying a traffic stop. *People v. Binkowski* (2007) 157 Cal.App.4th Supp. 1.)

Defendant stopping on his own, even though maybe under the mistaken belief that an officer wanted him to stop, is not a detention. A detention requires a “governmental termination of freedom of movement ‘through means intentionally applied.’” *(United States v. Nasser* (9th Cir. 2009) 555 F.3rd 722.)
Vehicle Code § 22107 (Failure to signal while turning): Turning without signaling is not a violation of this section unless there is another vehicle close enough to be affected by the defendant’s failure to signal. *(People v. Carmona* (2011) 195 Cal.App.4th 1385; the officer’s vehicle, being the only other car in the vicinity, was headed towards defendant and some 55 feet away when defendant turned off onto a side road without signaling; not a violation.)

See also *In re Jaime P.* (2006) 40 Cal.4th 128, 131; *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1366; and *United States v. Mariscal* (9th Cir. 2002) 285 F.3rd 1127, interpreting a similar Arizona statute.)

Vehicle Code § 22108, requiring that a person signal for at least 100 feet before turning, is not a separate offense that may be charged. It takes affect only if, under section 22107, the driver was required to signal. *(People v. Carmona, supra., at pp. 1391-1393.)*

Turning at an intersection without signaling was held not to be a violation of V.C. § 22108 where there was no evidence of another vehicle that was there that “may be affected by the movement.” *(United States v. Caseres* (9th Cir. 2008) 533 F.3d 1064, 1068-1069.)

However, when an officer is within 100 feet, traveling in the same direction and at the same speed, the defendant’s failure to signal a turn was a movement that could have affected the officer’s vehicle. Failing to signal while changing lanes where “any other vehicle may be affected by the movement,” per V.C. § 22107, applies even though the only affected vehicle is a police car. *(People v. Logsdon* (2008) 164 Cal.App.4th 741.)

*Vehicle Code Registration Violations:* A police officer may make an investigatory traffic stop anytime the officer has a “reasonable suspicion” to believe that the vehicle is in violation of the registration laws. *(People v. Dotson* (2009) 179 Cal.App.4th 1045, 1049.)
A license plate, although only partially obscured by a trailer hitch, violates V.C. § 5201 and justifies a traffic stop and citation. (*People v. White* (2001) 93 Cal.App.4th 1022.)

*Note:* V.C. § 5201 excuses the obstruction of a rear license plate by a wheelchair lift or carrier if by a disabled person with the applicable disabled person plates or placard, and a decal with the license plate number is clearly visible in the rear window.

Mounting a license plate (the front plate, in this case) upside down is also a violation of V.C. § 5201, in that it is not “clearly legible” as required by the statute. (*People v. Duncan* (2008) 160 Cal.App.4th 1014.)

A missing front license plate, a violation of V.C. § 5200, is legal justification upon which to base a traffic stop. (*People v. Saunders* (2006) 38 Cal.4th 1129, 1136; *People v. Vibanco* (2007) 151 Cal.App.4th 1, 8.)

It is not a search to randomly check license plates that are otherwise visible to an officer, and to check law enforcement databases for information about that vehicle. Discovering in the process that a vehicle’s registered owner has a suspended license, and noting that the observed driver resembles the physical description of the registered owner, stopping the car to check the driver’s license status is lawful. (*United States v. Diaz-Castaneda* (9th Cir. 2007) 494 F.3d 1146, 1150-1152.)

A traffic stop for the purpose of checking the validity of a red DMV temporary operating permit displayed in a vehicle’s window (i.e., the red sticker; see V.C. § 4156), when the number on the permit was visible to the officer before the stop and appeared to be current, is a stop based upon no more than a “hunch,” and is illegal. (*People v. Nabong* (2004) 115 Cal.App.4th Supp. 1, vehicle with expired registration tab on plate; *People v. Hernandez* (2008) 45 Cal.4th 295, vehicle with no license plates.)

It is irrelevant that the officer believes, in his experience, that such temporary operating permits are often forged or otherwise invalid. (*People v. Hernandez, supra.,* at p. 299.)
In a case decided by the United States Supreme Court out of California, it was assumed for the sake of argument, without discussing the issue, that stopping a car for the purpose of checking the validity of the temporary operating permit without reason to believe that it was not valid, is illegal. (See *Brendlin v. California* (2007) 551 U.S. 249 [168 L.Ed.2nd 132].)

On remand, the People conceded that a traffic stop made for the purpose of checking the validity of the temporary red sticker visible in the window, absent cause to believe it was invalid, was an illegal traffic stop. (*People v. Brendlin* (2008) 45 Cal.4th 262, 268; expired registration tab on plate.)

*But*, a traffic stop is legal when the vehicle had only one license plate (the front plate being missing) and the registration tab on the rear plate was expired. (*People v. Saunders* (2006) 38 Cal.4th 1129: The missing license plate, a violation of V.C. § 5200, at the very least constitutes a reasonable suspicion to believe that the red temporary operator’s permit, despite a current visible month on the permit, might not be for that vehicle.)

A missing rear license plate and no visible temporary registration displayed in the rear window, even though the temporary registration is later found to be in the front windshield, but not visible to the officer coming up behind the vehicle, is sufficient reasonable suspicion to justify a traffic stop. (*In re Raymond C.* (2008) 45 Cal.4th 303.)

As noted in fn. 2: “A temporary permit is to be placed in the lower rear window. However, if it would be obscured there, it may be placed in the lower right corner of either the windshield or a side window.” (*DMV Handbook of Registration Procedures* (Oct. 2007) ch. 2, § 2.020, p. 7.)

An officer’s observation that a vehicle was missing both license plates, absent some other indication that the vehicle was properly or temporarily registered, was enough by itself to establish a
reasonable suspicion for the officer to believe that defendant was in violation of V.C. § 5200. (People v. Dotson (2009) 179 Cal.App.4th 1045, 1051-1052; rejecting the defendant’s argument, and the Attorney General’s concession, that the officer had a duty to look for a temporary registration in the vehicle’s windows before making the traffic stop.)

Information from DMV that a vehicle’s registration has expired, at least in the absence of any other information to the effect that the vehicle is in the process of being re-registered, justifies a traffic stop despite the visible presence of an apparently valid temporary registration sticker in the window. (People v. Greenwood (2010) 189 Cal.App.4th 742.)

Vehicle Code Equipment Violations:


An inoperable third (rear window) brake light is a Vehicle Code violation (V.C. § 24252(a)), and justifies a traffic stop and citation. (In re Justin K. (2002) 98 Cal.App.4th 695.)

Seat belt violations:

An officer’s determination that defendant was not wearing a seat belt, even where it is reasonably uncertain whether the defendant’s vehicle was even equipped with a shoulder harness, justified a stop to determine whether California’s mandatory seat belt law was being violated. (Kodani v. Snyder (1999) 75 Cal.App.4th 471.)

Police officer had probable cause to arrest a driver for a violation of California’s safety belt statute upon observing the driver wearing his seat belt under his left arm and not across his upper torso, barring the driver’s 42 U.S.C. § 1983 unlawful arrest claim. The driver was not “properly restrained by a safety belt,” as required by V.C. § 27315(d)(1). (Hupp v. City of Walnut Creek (N.D. Cal. 2005) 389 F.Supp.2nd 1229, 1232.)
See also *Collier v. Montgomery* (5th Cir. 2009) 569 F.3rd 214, 218; addressing a similar safety belt statute.

The requirement in *V.C. § 27315(d)(1)* that the driver and all passengers 16 years of age and older be “properly restrained” while the vehicle is in operation requires that both the shoulder harness and the lap belt portions of the safety belt assembly be used. (*People v. Overland* (2011) 193 Cal.App.4th Supp. 9.)

Windshield Obstructions:

An Anchorage, Alaska, Municipal Code ordinance forbidding any item affixed to the windshield (similar to California’s *V.C. § 26708(a)(1)*; see *People v. White* (2003) 107 Cal.App.4th 636, below.) was not violated by an air freshener dangling from the rear view mirror. A traffic stop was found to be illegal. (*United States v. King* (9th Cir. 2001) 244 F.3rd 736, 740.)

A traffic stop was illegal when based upon a perceived violation of *V.C. § 26708(a)(2)*, for obstructing or reducing the driver’s clear view through the windshield, for having an air freshener dangling from the rear view mirror. (*People v. White*, supra.)

However, an air freshener hanging from a car’s rearview mirror was held to be a violation of *V.C. § 26708(a)(2)* in another case where a more thorough foundation was established through testimony of the officer, citing his personal experience and noting that the object was big enough to block out the view of a pedestrian or a vehicle, and where there was no defense-offered expert testimony relevant to the overall size of the air freshener relative to the size of the window. (*People v. Colbert* (2007) 157 Cal.App.4th 1068.)

A traffic stop for an equipment violation in a “high crime” (i.e., gang) area at night is not reasonable suspicion sufficient to justify a detention or patdown for weapons. (*People v. Medina* (2003) 110 Cal.App.4th 171.)
Observing a vehicle with the front windows illegally tinted in violation of V.C. § 26708(a) makes it lawful to stop the vehicle to cite its driver. The arrest of defendant who was a passenger in the vehicle and who resembled the suspect in a robbery just minutes earlier, was lawful. *(People v. Carter* (2010) 182 Cal.App.4th 522, 529-530; also holding that even if the stop had been illegal, discovery of an arrest warrant for defendant would have attenuated the taint of an illegal traffic stop.)*

But see *United States v. Caseres* (9th Cir. 2008) 533 F.3rd 1064, 1069: An officer noting that a person’s vehicle windows are tinted, believing that the windows might have been tinted in violation of V.C. § 26708(a)(1) (i.e., after factory), is not reasonable suspicion of a violation absent other evidence tending to support this belief. “Without additional articulable facts suggesting that the tinted glass is illegal, the detention rests upon the type of speculation which may not properly support an investigative stop.”

Observation of a *Vehicle Code* equipment violation on private property, where it is evident that the vehicle had just come from a public highway, is circumstantial evidence that the violation occurred on public property. *(People v. Branner* (2009) 180 Cal.App.4th 308, 315.)

Review was granted by the California Supreme Court in this case on 3/10/10, making it unavailable for citation.

*Weaving Within the Lane:*

*State Rule:*

Observation of the defendant weaving within his traffic lane for one half of a mile is sufficient cause to stop him to determine whether he is *driving while under the influence* (“DUI”) or the vehicle has some unsafe mechanical defect. *(People v. Bracken* (2000) 83 Cal.App.4th Supp. 1; weaving within his lane for half a mile.)
Weaving within a lane for three quarters of a mile justified a traffic stop for driving while under the influence. (*People v. Perez* (1985) 175 Cal.App.3rd Supp. 8.)

Weaving within a lane, almost hitting the curb, is sufficient reasonable suspicion for driving while under the influence to justify a traffic stop. (*Arburn v. Department of Motor Vehicles* (2007) 151 Cal.App.4th 1480.)

The fact that the weaving was not for a “substantial” or “considerable” distance did not mean that the officer didn’t have reasonable suspicion to justify the stop. (*Id.*, at p. 1485.)

*Federal Rule*: See *United States v. Colin* (9th Cir. 2002) 314 F.3rd 439, where the Ninth Circuit Court of Appeal held that weaving from lane line to lane line for 35 to 45 seconds is neither a violation of the lane straddling statute (V.C. § 21658(a)) nor reasonable suspicion that the driver may be under the influence; a questionable decision, and one that may probably be ignored by state law enforcement officers in light of *Bracken* and *Perez*.

*Weaving Plus*: A single pronounced weave within the lane, plus an experienced Highway Patrol officer’s observation of the defendant sitting up close to the steering wheel, which the officer recognized as something an impaired driver does, was sufficient to corroborate second-hand information concerning defendant’s “erratic driving” from Montana Department of Transportation employees, justifying the stop of the defendant’s car. (*United States v. Fernandez-Castillo* (9th Cir. 2003) 324 F.3rd 1114.)

*Community Caretaking Function*:

Although the “*community caretaking function*” may justify a traffic stop, it will do so only when an officer is acting reasonably in determining that an occupant’s safety or welfare is at risk. (*People v. Madrid* (2008) 168 Cal.App.4th 1050; see also *Cady v. Dombrowski* (1973) 413 U.S. 433 [37 L.Ed.2nd 706].)
Per the Madrid Court (at pg. 1059, citing Wright v. State (Tex.Crim.App. 1999) 7 S.W.3rd 148, 151-152; and Corbin v. State (Tex.Crim.App. 2002) 85 S.W.3rd 272.), four factors are to be considered in determining whether the officer’s actions are reasonable, with the most weight going to the first:

- The nature and level of the distress exhibited by the individual;
- The location of the individual;
- Whether or not the individual was alone and/or had access to assistance independent of that offered by the officer; and
- To what extent the individual—if not assisted—presented a danger to himself or others.

Parking Tickets:

Writing a parking ticket justifies a temporary detention of the vehicle’s occupant. The fact that parking tickets are subject to civil penalties only and governed by civil administrative procedures is irrelevant. (People v. Bennett (July 21, 2011) 197 Cal.App.4th 907; citing Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89]; and United States v. Choudhry (9th Cir. 2006) 461 F.3rd 1097.)

Gang-Related Investigations:

Seeing three vehicles with four Black male occupants each, one of the occupants who is known to be a gang member, driving as if in military formation at 12:30 at night, hours after a prior gang shooting, the vehicles being in one of the warring Black gang’s territory, held to be insufficient to justify a stop and detention. (People v. Hester (2004) 119 Cal.App.4th 376, 385-392.)

Narcotics-Related Traffic Stops Using a “Controlled Tire Deflation Device” (“CTDD”):

The use of a “controlled tire deflation device” to stop a vehicle suspected of being used to smuggle controlled substances over the US/Mexico border held to be a detention only (thus requiring only a reasonable suspicion)
and not excessive force under the circumstances. \textit{(United States v. Guzman-Padilla} (9\textsuperscript{th} Cir. 2009) 573 F.3\textsuperscript{rd} 865.\textit{)}

\textit{Note}: The “controlled tire deflation device,” or “CTDD,” is an accordion-like tray containing small, hollow steel tubes that puncture the tires of a passing vehicle and cause a gradual release of air, bringing the vehicle to a halt within a quarter to half a mile.

\textit{Checking the Vehicle for a Wanted Suspect}:

To serve a warrant, the officer need only know that the registered owner has one outstanding and may stop the vehicle even without seeing the driver or the vehicle’s occupants. \textit{(People v. Dominquez} (1987) 194 Cal.App.3d 1315, 1317-1318; \textit{People v. Williams} (1995) 33 Cal.App.4th 467, 476.)

\textit{Mistake of Law vs. Mistake of Fact}:

An officer making a traffic stop based upon a misapprehension of the law, (i.e., a “mistake of law”), even if reasonable, is an illegal stop. \textit{(United States v. Lopez-Soto} (9\textsuperscript{th} Cir. 2000) 205 F.3\textsuperscript{rd} 1101; \textit{United States v. Morales} (9\textsuperscript{th} Cir. 2001) 252 F.3\textsuperscript{rd} 1070, 1073, fn. 3.)

As a general rule, a mistake of law, whether reasonable or not, cannot be the basis for finding probable cause or a reasonable suspicion. \textit{(People v. Teresinski} (1982) 30 Cal.3\textsuperscript{rd} 822; involving an officer’s mistaken belief that a curfew violation applied. “Courts on strong policy grounds have generally refused to excuse a police officer’s mistake of law.” \textit{(Id., at p. 831.)}

\textit{People v. White} (2003) 107 Cal.App.4\textsuperscript{th} 636, 643-644; police officer unaware that Arizona did not require a front license plate; stop illegal.

There is some authority to the contrary. \textit{(People v. Glick} (1988) 203 Cal.App.3\textsuperscript{rd} 796.) But this is based upon an unusual fact situation; i.e., California police officer did not know that New Jersey doesn’t require registration stickers on their license plates.
This is a minority opinion that most courts will not follow.

An officer’s mistake of law; i.e., his belief that Baja California, Mexico, required motorists to affix a registration sticker on the car so that it would be visible from the rear of the vehicle (the registration sticker is actually supposed to be affixed to the vehicle’s windshield) resulted in a traffic stop made without the necessary reasonable suspicion. The resulting evidence, therefore, should have been suppressed. (United States v. Lopez-Soto (9th Cir. 2000) 205 F.3rd 1101.)

See United States v. Twilley (9th Cir. 2000) 222 F.3rd 1092; California police officer mistakenly believed that Michigan required two plates.

An officer’s misapprehension that a person crossing the street other than in a cross walk was in violation of V.C. § 21954(a), did not justify a detention to cite for that offense when it is later held that the section did not apply. (People v. Ramirez (2006) 140 Cal.App.4th 849.)

An officer’s mistaken belief that defendant’s vehicle, with no front license plate, violated California law (i.e., V.C. § 5202), because it didn’t have a front license plate but had a valid rear Florida license plate, when unknown to the officer Florida does not issue two license plates to automobiles, was an inexcusable mistake of law. (People v. Reyes (2011) 196 Cal.App.4th 856.)

But, an officer making a traffic stop based upon a “mistake of fact,” “held reasonably and in good faith,” will not invalidate the stop.

Sheriff’s deputies stopping defendants’ car based upon a computer check indicating that the vehicle’s registration had expired, when in fact the registration had already been renewed. Absent some reason to believe that the computer information was not accurate, the stop was held to be lawful. (United States v. Miguel (9th Cir. 2004) 368 F.3rd 1150.)
A missing rear license plate and no visible temporary registration displayed in the rear window, even though the temporary registration is later found to be in the front windshield, but not visible to the officer coming up behind the vehicle, is sufficient reasonable suspicion to justify a traffic stop. ([In re Raymond C.](2008) 45 Cal.4th 303.)

As noted in fn. 2: “A temporary permit is to be placed in the lower rear window. However, if it would be obscured there, it may be placed in the lower right corner of either the windshield or a side window.” (DMV Handbook of Registration Procedures (Oct. 2007) ch. 2, § 2.020, p. 7.)

An officer stopping a vehicle for having illegally tinted windows, when the Plaintiff alleges that the windows were rolled down and not visible to the officer, is, at best, an unreasonable mistake of fact, and does not provide the officer with qualified immunity from civil liability. ([Liberal v. Estrada](9th Cir. 2011) 632 F.3rd 1064, 1077-1078.)

**Pretext Stops**: A “pretext stop” is one where law enforcement officers stop a vehicle usually for some minor traffic infraction but where the officers’ true motivation is actually to investigate some more serious offense for which there is no reasonable suspicion.

A prior three-way split of opinion on the legality of such a practice was finally resolved by the U.S. Supreme Court in [Whren v. United States](1996) 517 U.S. 806 [135 L.Ed.2nd 89], upholding the legality of such a practice. (See also [People v. Gomez](2004) 117 Cal.App.4th 531, 537; and [People v. Gallardo](2005) 130 Cal.App.4th 234.)

Per *Whren*, so long as there is some lawful justification for making the stop, the officers’ subjective motivations are irrelevant. ([Ibid.; see also United States v. Miranda-Guerena](9th Cir. 2006) 445 F.3rd 1233.)

*Whren* is based upon the United States Constitution’s [Fourth Amendment], precluding a state’s attempt to impose a stricter standard upon law enforcement, unless the state chooses to employ its own Constitution (under the
theory of “independent state grounds”) (Arkansas v. Sullivan (2001) 532 U.S. 769 [149 L.Ed.2nd 994].); an alternative which is not available in California since passage of Proposition 8, in June, 1982, the so-called “Truth in Evidence” initiative.

The “pretext stop” theory of Whren v. United States applies to civil parking violations as well as any criminal violation. (United States v. Choudhry (9th Cir. 2006) 461 F.3rd 1097.)

Exceptions: The theory of Whren is not without its limitations. For example:

When the pretext used for making a stop is to conduct an “administrative search,” such as inspecting the licensing of a taxicab, per local ordinance, or an inventory vehicle search, making a traffic stop is unlawful, and any direct products of that stop are subject to suppression. (People v. Valenzuela (1999) 74 Cal.App.4th 1202; Whren v. United States, supra, at pp. 811-812, [135 L.Ed.2nd at p. 97].)

An officer’s intent to use the impoundment of a vehicle driven by an unlicensed defendant and an inventory search as a pretext to look for narcotics-related evidence was found not to come within the legally recognized grounds for impounding vehicles pursuant to law enforcement’s community caretaking function. Inventory searches being an exception to the rule of Whren, the officer’s subjective intent in impounding defendant’s car was held to be relevant. (People v. Torres (2010) 188 Cal.App.4th 775, 785-793.)

When a stop or search is not a “run-of-the-mine” case, such as “cases where ‘searches or seizures [were] conducted in an extraordinary manner, usually harmful to an individual’s privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.’ (Citing Whren v. United States, supra, at p. 818.)” (United States v. Ibarra (9th Cir. 2003) 345 F.3rd 711, 715.)
The theory of *Whren* is limited to those circumstances where a police officer is aware of facts that would support an arrest. “(A)lthough *Whren* stands for the proposition that a pretextual seizure based on the illegitimate subjective intentions of an officer may be permissible, it does not alter the fact that the pretext itself must be a constitutionally sufficient basis for the seizure and the facts supporting it must be known at the time it is conducted.” (*Moreno v. Baca* (9th Cir. 2005) 431 F.3rd 633, 640; finding that a belatedly discovered arrest warrant and parole search conditions did not justify a detention and search.)

Contrary to the general rule, an officer’s motivations for conducting a search *do* matter in two limited situations; i.e., in “special needs” and “administrative-search” cases. (*United States v. McCarty* (9th Cir. Sep. 9, 2011) __ F.3rd __, __ [2011 U.S. App. LEXIS 18874]; child pornography observed during a lawful TSA administrative search may lawfully be used to establish probable cause to arrest.)

And query: Does *Whren* validate a traffic stop when the officer’s real motivation is based upon prohibited “racial profiling?” The answer has to be; *No!*

Balancing the constitutional principles involved (e.g., 14th Amendment and Calif. Const. Art I, §§ 7, 15, equal protection and due process), and the state and federal statutes the officer would be violating (18 U.S.C. §§ 241, 242; 42 U.S.C. 1983; P.C. §§ 422.6(a), 13519.4; and C.C. § 52.1), a court will not likely uphold such a stop. (See also *Baluyut v. Superior Court* (1996) 12 Cal.4th 826; equal protection; and *Shapiro v. Thompson* (1969) 394 U.S. 618 [22 L.Ed.2nd 600]; discrimination may be so arbitrary and injurious as to be deemed a due process violation.)
The Supreme Court itself, in *Whren*, specifically noted that; “We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.” (*Whren v. United States*, supra, at p. 813 [135 L.Ed.2nd at p. 98].)

Discrimination by law enforcement officers based upon a person’s race in the providing of both protective and non-protective services is a constitutional equal protection violation. (*Ae Ja Elliot-Park v. Manglona* (9th Cir. 2010) 592 F.3rd 1003.)

Such “racial profiling” would be a *Fourteenth Amendment* “due process” violation. (*Ibid.*; *United States v. Ibarra* (9th Cir. 2003) 345 F.3rd 711, 714.)

*Motor Vehicle Passengers:*

*To Arrest a Passenger:*

The stop of the defendant’s car upon observing a passenger in the car for which there was a known outstanding arrest warrant was upheld. When the stop revealed the defendant/driver was in possession of a billy club, the officer lawfully arrested him as well. (*In re William J.* (1985) 171 Cal.App.3rd 72.)

“A momentary stop of an automobile by police to investigate a passenger reasonably believed to be involved in a past crime is proper. It creates a minimal inconvenience to the driver of that automobile, when balanced against the government's interest in apprehending criminals.” (*Id.*, at p. 77.)

*To Detain a Passenger:* Is a passenger in a vehicle when the driver is stopped and detained also subject to being detained, thus implicating the passenger’s privacy rights?

The United States Supreme Court has recently reversed the California Supreme Court on this issue and held that at least in a private motor vehicle (as
opposed to a taxi, bus, or other common carrier), the passenger, by virtue of being in a vehicle stopped for a possible traffic infraction, is in fact detained, giving him the right to challenge the legality of the traffic stop. (Brendlin v. California (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].)

The test is whether, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Or, in the case where the person has no desire to leave, “whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.’” (127 S.Ct., at pp. 2405-2406.)

If the driver is stopped for a traffic-related offense, a “passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.” If the driver is stopped for something unrelated to his driving, a “passenger will reasonably feel subject to suspicion owning to close association” with the driver. (127 S.Ct., at p. 2407.)

Note also that even if the passenger is illegally detained, any evidence recovered from the vehicle, if not the product of the illegal detention, will be admissible. *(United States v. Pulliam* (9th Cir. 2005) 405 F.3rd 782, 787; a vehicle search was done independent of the defendant’s detention.)*

Although *Brendlin*, on its face, appears to deal only with the right (i.e., “standing”) of the passenger to challenge the legality of the traffic stop (*Brendlin v. California*, *supra*, at pp. 256-259.), and was not intended as authority for the continued detention of a passenger who might choose to walk away, the U.S. Supreme Court subsequently ruled quite clearly that “(t)he police need not have, in addition, cause to believe any occupant of the (lawfully stopped) vehicle is involved in criminal activity” to justify a continued detention for the duration of the traffic stop. *(Arizona v. Johnson* (2009) 555 U.S. 323 [172 L.Ed.2nd 694].)

*Also;* “The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop.” *(Id., at p. 325.)*

And then: “(A) traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will.” *(Ibid.)*

The California Supreme Court is in apparent agreement with this interpretation, holding that upon ordering the passenger out of the vehicle; “there is a social expectation of unquestioned police command, which is at odds with any notion that a passenger would feel free to leave without advance permission.” *(People v. Hoyos* (2007) 41 Cal.4th 872, 892-894; brief, one-minute detention, necessitated for purposes of officer safety, held to be lawful.)
Should additional justification be required to continue the detention of a passenger, prior case law notes that the detention can be justified by a showing that the passenger is in “close association” with persons (e.g., the driver) reasonably suspected of illegal activity. *(People v. Samples* (1996) 48 Cal.App.4th 1197.)*

Otherwise, there must at least be some reason for the officer to believe that his safety will be placed in jeopardy in order to justify a refusal to allow a passenger to walk away from a traffic stop. (See *People v. Vibanco* (2007) 151 Cal.App.4th 1; and “Ordering In,” below.)

*Ordering Out:* The law is clear that upon making a lawful traffic stop, the *driver* may be ordered out of the vehicle without the need for the officer to justify why. *(Pennsylvania v. Mimms* (1977) 434 U.S. 106, 111 [54 L.Ed.2nd 331, 337].)*

Although previously subject to a split of opinion, the U.S. Supreme Court has ruled that the same rules apply to *passengers* other than the driver. If anything, the need to protect the safety of the officers is even greater when he must deal with more than just a lone driver. *(Maryland v. Wilson* (1997) 519 U.S. 408 [137 L.Ed.2nd 41]; see also *Ruvalcata v. City of Los Angeles* (9th Cir. 1995) 64 F.3rd 1323.)*

Prior state law was leaning in that direction anyway, allowing drivers and passengers to be ordered out of a vehicle with very little cause:

To corroborate the driver’s identity, and for officer’s safety. *(People v. Maxwell* (1988) 206 Cal.App.3rd 1004, 1009.)*

Where there is a legitimate need to search the vehicle. *(People v. Webster* (1991) 54 Cal.3rd 411.)*

Less justification than is needed for a patdown will warrant the ordering of a passenger out of a vehicle. *(People v.
Citing *Mimms* and *Wilson*, the California Supreme Court has cited with approval “an officer’s authority to order a passenger to exit a vehicle during a traffic stop as a matter of course.”  (*People v. Saunders* (2006) 38 Cal.4th 1129, 1134.)

The California Supreme Court has further held that it is also lawful to continue to detain the passenger for “at least as long as reasonably necessary for the officer to complete the activity the (lawful ordering out of the car) contemplates.”  (*People v. Hoyos* (2007) 41 Cal.4th 872, 892-893.)

*Ordering In:* A police officer may require the *driver* to remain in his or her vehicle.  (*Pennsylvania v. Mimms*, supra.)

Under the same rationale, some federal courts have ruled that an officer may order a *passenger* to remain in the vehicle, at least where the passenger has not expressed an intent to simply leave the scene, or when the passenger is interfering with the officer’s contact with the driver.  (*Rogala v. District of Columbia* (D.C. Cir. 1998) 161 F.3rd 44; *United States v. Moorefield* (3rd Cir. 1997) 111 F.3rd 10, 13.)

The Ninth Circuit is in accord, finding that the officer’s safety outweighs the minimal intrusion involved in maintaining the status quo by returning the passenger to where he was in the car.  (*United States v. Williams* (9th Cir. 2005) 419 F.3rd 1029.)

See also *Id.*, at p. 1032, fn. 2, for a list of state cases (other than California) that are in accord.

See also *People v. Castellon* (1999) 76 Cal.App.4th 1369, upholding the officer’s order to a *passenger* to remain in the vehicle: “(W)e will not second-guess (the officer’s) reasonable in-the-field call; it was for the officer to decide whether his personal safety was better preserved by ordering Castellon to
stay inside the car or by ordering him out of the vehicle.”

But see People v. Gonzalez (1992) 7 Cal.App.4th 381, where ordering a passenger back into a vehicle was held to be an unlawful detention.

In light of Castellon and Williams, supra, it can be argued that Gonzalez is a minority opinion, and probably not a correct statement of the law.

Gonzalez was also criticized as no longer good law in People v. Vibanco (2007) 151 Cal.App.4th 1, at p. 11, where the court specifically held that: “The possibility of a violent encounter is likely to be even greater still when one or more of the passengers in a stopped car attempts to leave while others stay in the car,” and that “Wilson can therefore reasonably be interpreted to allow officers as a matter of course to order a passenger or passengers either to get out of the car or to remain in the car during a lawful traffic stop if the officers deem it necessary for officer safety.”

And see “To Detain a Passenger,” above.

Demanding Identification: The above case law, however does not answer the question whether an officer may “demand” that the passenger identify himself.

And officer may certainly “ask” for identification, so long as he understands that the passenger may refuse. (See Kolender v. Lawson (1983) 461 U.S. 352 [75 L.Ed.2nd 903]; Brown v. Texas (1979) 443 U.S. 47, 52 [61 L.Ed.2nd 357]; United States v. Diaz-Castaneda (9th Cir. 2007) 494 F.3rd 1146, 1152-1153.)

But in light of the case law, above, to the effect that the passenger is in fact detained along with the driver (see Brendlin v. California (2007) 551 U.S. 249 [127 S.Ct. 2400; 168 L.Ed.2nd 132].), there’s an argument that the officer may also require the passenger to identify himself. (See Hiibel v. Sixth Judicial District Court of Nevada (2004) 542 U.S.
(177 [159 L.Ed.2nd 292].) There’s just no case directly on point yet.

**Query:** Is it not also arguable that a person detained based upon a reasonable suspicion that he is involved in criminal activity, per *Terry v. Ohio*, *supra*, is different than a person detained merely by virtue of being a passenger in a stopped motor vehicle, per *Brendlin v. California*, *supra*? While the former may be required to identify himself, the same rule might not apply to the later. (See *Stufflebeam v. Harris* (9th Cir. 2008) 521 F.3rd 884; finding the arrest of a passenger who refused to identify himself to be illegal; decided after *Brendlin*, but failing to mention the case.)

See “Demanding identification,” below.

**Flight:** While the “flight” of the driver of a vehicle provides probable cause to arrest for various *Vehicle Code* violations (E.g., V.C. §§ 2800 et seq.), and a driver who is subject to citation may not avoid the citation by fleeing on foot (see P.C. § 148(a)), what if the passenger, for whom there is no connection with any illegal activity, chooses to exit the vehicle and run?

The long-standing rule has always been that “flight alone,” without other suspicious circumstances, is not sufficient justification for a detention. (*People v. Souza* (1994) 9 Cal.4th 224.)

However, the United States Supreme Court recently lowered the bar a little by holding that flight from a so-called “high narcotics area” is sufficient in itself to justify a temporary detention. (*Illinois v. Wardlow* (2000) 528 U.S. 119 [145 L.Ed.2nd 570].)

Flight of two people is more suspicious than one. Add to this the fact that there appeared to be drug paraphernalia on a table where the two persons had been sitting, and that the defendant was carrying something in his hand as he fled; the officer had sufficient reasonable suspicion to detain him.

And see “Ordering In,” above.

Search Incident to Citation: Although a traffic citation is technically an arrest and release on one’s promise to appear, it is treated by the courts as a temporary detention only. Temporary detentions do not include the power to conduct a search. Therefore, it is not constitutionally permissible to conduct a non-consensual search of a vehicle incident to a citation, even if authorized by statute. (Knowles v. Iowa (1998) 525 U.S. 113 [142 L.Ed.2nd 492].)

Note: California has no such statute similar to Iowa’s.

A “search incident to arrest” (see below) requires the transportation of the arrestee as a prerequisite to a search, absent probable cause to believe there is something illegal to seize. (United States v. Robinson (1973) 414 U.S. 218 [38 L.Ed.2nd 427]; People v. Brisendine (1975) 13 Cal.3rd 528; United States v. Moto (9th Cir. 1993) 982 F.2nd 1384.) Writing a person a traffic citation, of course, does not normally involve the transportation of the person who is cited. He is therefore not subject to search based upon the writing of a traffic ticket alone.

A traffic stop for an equipment violation in a “high crime” (i.e., gang) area at night is not reasonable suspicion sufficient to justify a detention or patdown for weapons. (People v. Medina (2003) 110 Cal.App.4th 171.)

But see People v. McKay (2002) 27 Cal.4th 601, 607-619, a violation of V.C. § 21650.1 (riding a bicycle on the wrong side of the street); and People v. Gomez (2004) 117 Cal.App.4th 531, 538-539, seat belt violation: U.S. Supreme Court decisions have held that a mere violation of state statutory restrictions on making a custodial arrest for a minor criminal offense (e.g., mere traffic infraction) does not mean that the Fourth Amendment was also violated. (See Atwater v. City of Lago Vista (2001) 532 U.S. 318 [149 L.Ed.2nd 549]; People v. Gallardo (2005) 130 Cal.App.4th 234, 239, fn. 1; People v. Bennett (July 21, 2011) 197 Cal.App.4th 907, 918.) Absent a constitutional Fourth Amendment violation, evidence that is the product of a state statutory violation is not subject to suppression.
To Identify a Suspect in a Criminal Offense:

Stopping and detaining a suspect in a criminal offense, when balancing law enforcement’s interest in identifying criminal suspects with the suspect’s interest in personal security from government intrusion, is lawful. (*United States v. Hensley* (1985) 469 U.S. 221 [83 L.E.2nd 604]; a robbery.)

The same is not true in the case of a misdemeanor, noise violation, not occurring in the officer’s presence, at least where there are possible alternative, less intrusive methods, of identifying the suspect. Stopping the suspect’s vehicle to identify him held to be illegal. (*United States v. Grigg* (9th Cir. 2007) 498 F.3rd 1070.)

Detention of Residents (or Non-Resident) During the Execution of a Search Warrant:

The occupants of a residence may be detained during the execution of a search warrant even though they did not match the description of the suspects (e.g., Caucasian instead of African-American) believed to be living there at the time. (*Los Angeles County v. Rettele* (2007) 550 U.S. 609 [167 L.Ed.2nd 974]; the court noting that until the rest of the house is checked for the suspects, other occupants may be detained.)

It was further held that with knowledge that one of the sought-for suspects had a firearm registered to him, the detainees could be held at gunpoint until the rest of the house could be checked, even though the detainees were unclothed at the time. It was not necessary to allow the detainees to cover us until officers’ safety could be assured. (*Ibid.*)

See also *Muehler v. Mena* (2005) 544 U.S. 93 [161 L.Ed.2nd 299]; detention of a resident lawful while evidence in a gang shooting case is looked for, at least if not “prolonged.”

A non-resident may also be detained when he comes upon the scene during the execution of a search warrant and there is evidence connecting him to the illegal activity at the location of the search. (*United States v. Davis* (9th Cir. 2008) 530 F.3rd 1069, 1080-1081.)
A probation officer may lawfully detain a visitor in a house who is present in the house of a juvenile probationer during a Fourth wavier search long enough to determine whether he is an resident of the house or is otherwise connected to illegal activity. (*People v. Rios* (2011) 193 Cal.App.4th 584, 593-595.)

The Court further determined that a probation officer has the legal authority to detain and patdown a non-probationer pursuant to *P.C. § 830.5(a)(4)* (i.e.; enforcing “violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment.”) (*Id.*, at p. 600.)

**Prolonged Detentions:** A traffic stop (or any other detention) which is reasonable in its inception may become unreasonable if prolonged beyond that point reasonably necessary for the officer to complete the original purposes of the detention. (*People v. McGaughran* (1979) 25 Cal.3rd 577.)

A person may be detained only as long as is reasonably necessary to accomplish the purpose of the original stop, possibly extended by the time needed to investigate any new information justifying a further detention which comes to light during the original detention. (*People v. Russell* (2000) 81 Cal.App.4th 96, 101.)

E.g.: A “reasonable suspicion” of criminal activity developed during a detention that was initiated for other purposes will justify holding the detainee beyond the time it took to accomplish the original purposes of the stop. (*United States v. Thompson* (9th Cir. 2002) 282 F.3rd 673; a Coast Guard boat safety check developed cause to believe the subjects were smuggling drugs, justifying a further detention to investigate that possibility.)

Detaining the defendant for ten minutes, until a radio check came back that the car was stolen, was not excessive, particularly when symptoms of intoxication were noted during the ten minutes. (*People v. Carter* (2005) 36 Cal.4th 1114, 1139-1142.)

Random warrant checks during routine traffic stops are lawful, but the subject must be released when the citation process is completed (*People v. McGaughran, supra*; see also *United States v. Luckett* (9th Cir. 1973) 484 F.2nd 89.), or within a reasonable time thereafter. (*People v. Brown* (1998) 62 Cal.App.4th 493; one
minute delay while awaiting the results of a warrant check was not unreasonable, even though the officer never wrote the ticket.)

Asking defendant for a consent to search, even without any reason to believe there was anything there to search for, is lawful so long as done within the time it would have taken to write the citation which was the original cause of the stop.  (*People v. Gallardo* (2005) 130 Cal.App.4th 234.)

**Note:** Recent authority has called into question the continuing validity of *McGaughran*, noting that U.S. Supreme Court decisions have held that a mere violation of state statutory restrictions on making a custodial arrest for a minor criminal offense (e.g., mere traffic infraction) does not mean that the Fourth Amendment was also violated.  (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [149 L.Ed.2nd 549].)


More to the point, a prolonged detention is not in violation of the Fourth Amendment so long as officers have probable cause to believe that a violation has occurred, even if the violation is for a fine-only offense.  Having probable cause to believe defendant committed a traffic offense, even though pursuant to California statutes defendant should have been cited and released (P.C. § 853.5(a)), because arresting him would not have violated the U.S. Constitution, the rules on “prolonged detention” are inapplicable.  (*People v. Branner* (2009) 180 Cal.App.4th 308, 313, 315-317.)

Review was granted in this case by the California Supreme Court on 3/10/10, making it unavailable for citation.

But if the detention is otherwise unlawful, such as in a traffic stop made without legal justification, then continuing to detain a person to investigate the person’s refusal to stop is also illegal.  (*Liberal v. Estrada* (9th Cir.
Statements taken from a detained criminal suspect held for over 16 hours without probable cause to arrest, are subject to suppression as the product of an unlawfully prolonged detention. (People v Jenkins (2004) 122 Cal.App.4th 1160, 1174-1178.)

An otherwise lawful “knock and talk,” where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, converted the contact into an unlawfully “extended” detention, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (United States v. Washington (9th Cir. 2004) 387 F.3rd 1060.)

Holding onto a suspect (in handcuffs) for over 4½ hours (and maybe as long as 6½ hours) while narcotics officers drove up to a marijuana grow and searched the area to see if there was any evidence connecting him to the grow, was “diligent and reasonable” under the circumstances, and not an illegally prolonged detention. (People v. Williams (2007) 156 Cal.App.4th 949; also finding that the officers had enough to arrest him from the outset had they chosen to do so.)

“Lawfully Prolonged Detentions:” The Ninth Circuit Court of Appeal has held that a minimally prolonged detention (e.g., a couple of minutes), at least when motivated by other newly discovered information even though that new information by itself might not constitute a reasonable suspicion, does not make the prolonging of the detention unreasonable. Under such circumstances, a minimally prolonged detention is not unlawful. (United States v. Turvin et al. (9th Cir. 2008) 517 F.3rd 1097.)

See also People v. Brown (1998) 62 Cal.App.4th 493, where a one minute delay while awaiting the results of a warrant check was held to be reasonable, even though the officer never wrote the ticket.

Over-Detention in Jail: Another form of illegal detention is when a jail fails to release a prisoner when he is due to be released. Such an act potentially constitutes grounds for a federal civil suit, per 42 U.S.C. § 1983. However, in order to prove such a constitutional violation, the plaintiff/prisoner must be able to prove that the defendant officers personally participated in his over-detention or that the over-detention was the result of a pattern or custom on
their part of the defendant law enforcement agency. (Avalos v. Baca (9th Cir. 2010) 596 F.3d 583, 587.)

**Enlarging the Scope of the Original Detention:**

If the person voluntarily consents to having his vehicle searched after he is free to leave, there is no prolonged detention, at least where a reasonable person should have understood that the purposes of the traffic stop were done. The officer is under no obligation to advise him that he is no longer being detained or that he has a right to refuse to allow the officer to search. (Robinette v. Ohio (1996) 519 U.S. 33 [136 L.Ed.2nd 347].)

The Federal Ninth Circuit Court of Appeal: Up until recently, the Ninth Circuit Court of Appeal has had difficulty accepting the idea that a police officer, during an otherwise lawful detention, and so long as that detention is not unlawfully prolonged (see above), may question the detained person about other possible criminal activity absent some “particularized suspicion” relevant to that other criminal activity:

See United States v. Chavez-Valenzuela (9th Cir. 2001) 268 F.3rd 719, amended at 279 F.3rd 1062, where the Ninth Circuit Court of Appeal found a consent search, obtained after the purposes of the traffic stop had been satisfied, was invalid as a product of an illegally prolonged detention, the extended detention being the result of the officer’s unnecessary inquiries made during the traffic stop. Robinette was not discussed by the Court. The defendant’s nervousness was held to be irrelevant to the detention issue, per the Court. (See also People v. Lusardi (1991) 228 Cal.App.3rd Supp. 1, making a similar argument.)

Note United States v. Turvin et al. (9th Cir. 2008) 517 F.3rd 1097, discussing the invalidity of the primary holdings of the Chavez-Valenzuela decision, as it related to the issue of prolonged detentions.

See also United States v. Murillo (9th Cir. 2001) 255 F.3rd 1169, 1174, where the Ninth Circuit Court of Appeal held that an officer must be able to “articulate suspicious factors that are particularized and objective” in order to “broaden the scope of questioning” beyond the purposes of the initial traffic stop.” (United States v. Murillo (9th Cir. 2001) 255 F.3rd 1169, 1174; a questionable rule in light of Robinette.)

© 2012 Robert C. Phillips. All rights reserved
And see *United States v. Mendez* (9th Cir. 2006) 467 F.3rd 1162 (Superseded by *United States v. Mendez* (9th Cir. 2007) 476 F.3rd 1077.), where it was held that questioning a detainee about possible criminal activity not related to the cause of the detention, and without a “particularized suspicion” to support a belief that the detainee is involved in that activity, is a Fourth Amendment violation.

The Ninth Circuit has since overruled its decisions in *Chavez-Valenzuela* and *Murillo*, finally recognizing the Supreme Court’s rulings to the contrary. (*United States v. Mendez* (9th Cir. 2007) 476 F.3rd 1077.)

Questioning defendant/truck driver and asking for consent to search the vehicle, when the truck was initially stopped for no more than an administrative check of its paperwork, is not unconstitutional. (*United States v. Delgado* (9th Cir. 2008) 545 F.3rd 1195, 1205.)

In other cases, the Supreme Court has held: “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.” (*United States v. Drayton* (2002) 536 U.S. 194 [153 L.Ed.2nd 242.]; citing *Florida v. Bostic* (1991) 501 U.S. 429, 434-435 [115 L.Ed.2nd 389, 398-399].)

Most recently, in *Illinois v. Caballes* (2005) 543 U.S. 405 [160 L.Ed.2nd 842], the U.S. Supreme Court rejected the argument that allowing a narcotics-sniffing dog to sniff around the outside of a vehicle that was lawfully stopped for a traffic offense “unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation.” Per the Supreme Court: No expectation of privacy is violated by this procedure, and therefore does not implicate the Fourth Amendment.

Also, the U.S. Supreme Court recently rejected the Ninth Circuit’s unsupported conclusion that, absent “a particularized reasonable suspicion that an individual is not a citizen,” it is a Fourth Amendment violation to ask him or her about the subject’s citizenship. (See *Mena v. City of Simi Valley* (9th Cir. 2003) 332 F.3rd 1255, 1264-1265; reversed by the U.S. Supreme Court in *Muehler v. Mena* (2005) 544 U.S. 93 [161 L.Ed.2nd 299].)
It is not unlawful to ask about a firearm during a detention even if there is otherwise no evidence of the illegal use of a gun, so long as it does not prolong the detention. *(United States v. Basher* (9th Cir. 2011) 629 F.3rd 1161, 1166, fn. 3.)

California courts seem to be in line with these latest Supreme Court pronouncements on the issue: “Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a Fourth Amendment violation. Mere questioning is neither a search nor a seizure. [Citation.] While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. [Citation.]” *(People v. Brown* (1998) 62 Cal.App.4th 493, 499-500; see also *People v. Gallardo* (2005) 130 Cal.App.4th 234, 239; asking for consent to search during the time it would have taken to write the citation that was the original cause of the stop is legal, despite the lack of any evidence to believe there was something there to search for.)

*Taking Fingerprints:* It is lawful to detain and fingerprint a particular suspect on less than probable cause, at least if done at the scene and without transportation to a police station. *(Davis v. Mississippi* (1969) 394 U.S. 721 [22 L.Ed.2nd 676]; *Hayes v. Florida* (1985) 470 U.S. 811 [84 L.Ed.2nd 705]; *Virgle v. Superior Court* (2002) 100 Cal.App.4th 572.)

*Driving Under the Influence ("DUI") (alcohol and/or drugs) Cases:*

*Weaving:* Observation of the defendant weaving within his traffic lane is sufficient cause to stop him to determine whether he is DUI or the vehicle has some unsafe mechanical defect. *(People v. Bracken* (2000) 83 Cal.App.4th Supp. 1, weaving within his lane for half a mile; see also *People v. Perez* (1985) 175 Cal.App.3rd Supp. 8; weaving within his lane for three quarters of a mile.)

*But see United States v. Colin* (9th Cir. 2002) 314 F.3rd 439, where the Ninth Circuit Court of Appeal held that weaving from lane line to lane line for 35 to 45 seconds is neither a violation of the lane straddling statute (V.C. § 21658(a)), nor reasonable suspicion that the driver may be under the influence; a questionable decision, and one than may probably be ignored by state law enforcement officers in light of *Bracken* and *Perez.*

A single pronounced weave within the lane, plus an experienced Highway Patrol officer’s observation of the defendant sitting up close to the steering wheel, which the
officer recognized as something an impaired driver does, was sufficient to corroborate second-hand information concerning defendant’s “erratic driving” from Montana Department of Transportation employees, justifying the stop of the defendant’s car.  (United States v. Fernandez-Castillo (9th Cir. 2003) 324 F.3rd 1114.)

DUI (and Other Regulatory “Special Needs”) Checkpoints: Are they legal?

Yes, if conducted according to specified criteria, and involve a “special needs,” “regulatory” area of the law. (Ingersoll v. Palmer (1987) 43 Cal.3rd 1321; Michigan State Police Dept. v. Sitz (1990) 496 U.S. 444 [110 L.Ed.2nd 412].)

Whether or not a “DUI” (or other regulatory) roadblock or checkpoint is lawful depends upon whether it meets the federal standard for reasonableness.

“The federal test for determining whether a detention or seizure is justified balances the public interest served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty. (Brown v. Texas (1979) 443 U.S. 47, 50-51 [61 L.Ed.2nd 357, 361-362, . . .].)” (Emphasis added; People v. Banks (1994) 6 Cal.4th 926; holding that failure to publicize a DUI roadblock was not necessarily fatal to its lawfulness, under Brown v. Texas.)

While standardless and unconstrained discretion on the part of government officers is prohibited; “stops and inspections for regulatory purposes, although without ‘individualized suspicion,’ may be permitted if undertaken pursuant to predetermined specified neutral criteria.” (Italics added; Ingersoll v. Palmer, supra, at p. 1335.) The factors identified in Ingersoll (at pp. 1341-1347) are whether:

- The decision to establish a sobriety checkpoint, the selection of the site, and the procedures for the operation of the checkpoint, are made and established by supervisory law enforcement personnel.
• Motorists are stopped according to a neutral formula, such as every third, fifth or tenth driver.

• Adequate safety precautions are taken, such as proper lighting, warning signs, and signals, and whether clearly identifiable official vehicles and personnel are used.

• The location of the checkpoint was determined by a policy-making official, and was reasonable; i.e., on a road having a high incidence of alcohol-related accidents or arrests.

• The time the checkpoint was conducted and its duration reflect “good judgment” on the part of law enforcement officials.

• The checkpoint exhibits indicia of its official nature (to reassure the public of the authorized nature of the stop).

• The average length and nature of the detention is minimized.

• The checkpoint is preceded by publicity.

A DUI checkpoint was upheld where the existence of supervisory control was indicated by documentary evidence that a sobriety checkpoint was planned for that date and by the fact that the checkpoint was staffed by seven police officers. Testimony that an officer was unaware of a neutral formula for stopping vehicles was not affirmative evidence overcoming the presumption of lawfulness. All 519 vehicles passing through the checkpoint were stopped, thus a neutral mathematical formula of 100 percent applied. The fact that the checkpoint was operated at a different location than given in a media advisory was insufficient to overcome the presumption as to decision making at the supervisory level or reasonable location. (Arthur v. Department of Motor Vehicles (2010) 184 Cal. App. 4th 1199.)

A DUI checkpoint was struck down where the People failed to sustain their burden of proof as to (i) the role of supervisory personnel in prescribing the procedures to be

© 2012 Robert C. Phillips. All rights reserved
used at the checkpoint, (ii) the rationale for selecting the particular location used for the checkpoint, (iii) the length of detentions, and (iv) advance publicity. (*People v. Alvarado* (2011) 193 Cal.App.4th Supp. 13.)

**Other Regulatory Checkpoints:** Other than for DUI deterrence, roadblocks, checkpoints, and similar “administrative, special needs” searches have been approved in the following cases:


- *Security checkpoint at military bases.* (*United States v. Hawkins* (9th Cir. 2001) 249 F.3rd 876, Air Force; *United States v. Hernandez* (9th Cir. 1984) 739 F.2nd 484, Marines.)

- A forest service checkpoint for identification and registration, targeting what in the past has been a “uniquely disruptive event,” is not per se illegal. (Park v. Forest Service (8th Cir. 2000) 205 F.3rd 1034, 1040.)

- Traffic safety checkpoints. (United States v. Trevino (7th Cir. 1996) 60 F.3rd 333.)

- Checkpoints at the entrance to a prison parking lot. (Romo v. Champion (10th Cir. 46 F.3rd 1013.)

- Checkpoint to “thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.” (see below; City of Indianapolis v. Edmond, infra.)

- Checkpoints set up for the purpose of collecting information from the public concerning a prior criminal act (i.e., a fatal “hit and run” in this case), when set up at the location of the prior criminal act, and exactly one week after it occurred. Such a roadblock was differentiated from the attempt to discovery “ordinary criminal wrongdoing,” as condemned in Indianapolis v. Edmond, infra. (Illinois v. Lidster (2004) 540 U.S. 419 [157 L.Ed.2nd 843].)

- An “information station” set up to provide park visitors with information concerning the rules of the park and be given a litter bag, where every vehicle was stopped. (United States v. Faulkner (9th Cir. 2006) 450 F.3rd 466.)

- A checkpoint set up for the purpose of preventing illegal hunting in a national park, justified by a legitimate concern for preservation of park wildlife, when confined to the park gate where visitors would expect to briefly stop anyway. (United States v. Fraire (9th Cir. 2009) 575 F.3rd 929.)

- Warrantless searching of luggage and other packages at selected entrances to New York’s subway system, in response to the possibility of terrorists entering the system with explosives. (MacWade v. Kelly (2nd Cir. 2006) 460 F.3rd 260.)

- V.C. § 2814.1: A County Board of Supervisors is authorized by statute to establish a vehicle-inspection
checkpoint to check for violations of V.C. §§ 27153 and 27153.5 (exhaust and excessive smoke violations).

Checkpoints may also have a **dual-purpose**, such as the *interdiction of drugs* (but see below) and *enforcement of driver’s license and registration laws*. *(Merrett v. Moore* *(11th Cir. 1995) 58 F.3rd 1547.)*

Checkpoints may be attended by more than one law enforcement agency, despite the different interests involved. *(United States v. Barajas-Chavez* *(10th Cir. 1999) 162 F.3rd 1285, New Mexico DUI checkpoint* with Border Patrol present in case the police discovered illegal aliens; *United States v. Galindo-Gonzales* *(10th Cir. 1998) 142 F.3rd 1217, aliens found at state driver’s license and vehicle registration roadblock.)*

**Drug Interdiction (or “Ordinary Criminal Wrongdoing”)**

*Checkpoints:*

Earlier cases from lower appellate courts upheld the validity of drug interdiction checkpoints upon the same reasoning as above. *(See Merrett v. Moore* *(11th Cir. 1995) 58 F.3rd 1547; and Missouri v. Damask* *(1996) 936 S.W.2nd 565.)*

However, the U.S. Supreme Court has since determined that “drug interdiction” checkpoints are *not* lawful. The difference is that *drug interdiction checkpoints*, rather than being “regulatory,” or involving some “special need,” are set up for the purpose of detecting “ordinary criminal wrongdoing.” As such, *drug interdiction checkpoints* require the standard *Fourth Amendment* “individualized” or “particularized” suspicion to be lawful. *(City of Indianapolis v. Edmond* *(2000) 531 U.S. 32 [146 L.Ed.2nd 333].)*

The Supreme Court in *Edmond* intimated strongly that roadblocks in unusual circumstances of criminal wrongdoing might be constitutionally acceptable. “(T)here are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control. For example, as the Court of Appeals noted (see *Edmond v. Goldsmith* *(7th Cir. 1999) 183 F.3rd 659, 662-663; reversed), the *Fourth Amendment* would almost certainly permit an appropriately tailored roadblock set up to thwart
an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.” (Italics added; City of Indianapolis v. Edmond, supra, at p. 44 (146 L.Ed.2nd at p. 345].)

See Illinois v. Lidster (2004) 540 U.S. 419 [157 L.Ed.2nd 843]: A checkpoint set up for the purpose of collecting information from the public concerning a prior criminal act (i.e., a fatal “hit and run” in this case), when set up at the location of the prior criminal act, and exactly one week after it occurred. Such a roadblock was differentiated from the attempt to discover “ordinary criminal wrongdoing,” as condemned in Indianapolis v. Edmond, supra.

On Indian Land by Indian Authorities:

A roadblock set up on a public right-of-way within tribal territory, lawful under Indian law and established on tribal authority, is permissible only to the extent that the suspicionless stop of non-Indians is limited to the amount of time, and the nature of the inquiry, that can establish whether or not the person stopped is an Indian. (Bressi v. Ford (9th Cir. 2009) 575 F.3rd 891, 896-897.)

Indian law enforcement officers, when also certified to enforce state laws, may set up DUI or other regulatory roadblocks (as opposed to merely checking other Indians pursuant to Tribal law) on Indian land. But such roadblocks must meet the constitutional requirements set by the Supreme Court (see above). (Id., at p. 897.)

A Field Interview (“F.I.”) of a person suspected of criminal activity:

Note: A field interviews is a standard law enforcement tactic used to identify individuals and document their presence at a particular location at a particular time, discourage planned criminal activity, and note companions with whom the person is associating; information which sometimes becomes important and relevant in later investigations or prosecutions. Field interviews may be handled as a consensual encounter or, if a reasonable suspicion exists, a detention.

General Rule: Temporarily detaining a person for the purpose of verifying (or negating) the person’s possible connection with some criminal activity, based upon an articulable “reasonable suspicion”
that the person may be involved in criminal activity, is lawful. *(Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2nd 889]; *In re Tony C.* (1978) 21 Cal.3rd 888.)

Absent the necessary “reasonable suspicion,” a detention is unlawful unless the contact is handled as a “consensual encounter.” (See above)


The *Rodriguez* court noted that; “While this policy (of stopping and questioning all suspected gang members) may serve the laudable purpose of preventing crime, it is prohibited by the *Fourth Amendment.*” *(Id., at p. 239; citing Brown v. Texas* (1979) 443 U.S. 47, 52 [61 L.Ed.2nd 357, 363.]

Being in the area of a house for which there is only a speculative belief that it might be involved in drug activity, even when it is known that the person to be detained has a prior drug-related record and that there exists prior untested, unreliable information that the person might be involved in the sale of drugs, is insufficient cause to detain. *(People v. Pitts* (2004) 117 Cal.App.4th 881.)

Spotlighting the defendant in a high narcotics area and then walking up to him “briskly” while asking questions held to be a detention under the circumstances. *(People v. Garry* (2007) 156 Cal.App.4th 1100.)

Handcuffing a suspect after he gave an implausible explanation as to why he was in the area of a marijuana grow at 5:30 a.m., and finding clothing in his backpack that smelled like growing marijuana, was a lawful detention even though the detention lasted at least 4½ hours while officers attempted to find physical evidence at the scene connecting him to the marijuana grow. *(People v. Williams* (2007) 156 Cal.App.4th 949.)
During Execution of a Search or Arrest Warrant, or during a Fourth Waiver Search:

An occupant of a house being subjected to a search pursuant to a search warrant may be detained during the search (1) in order to prevent flight, (2) to minimize the risk of harm to the officers, and (3) to facilitate an orderly search through cooperation of the residents. (Michigan v. Summers (1981) 452 U.S. 692, 702-703 [69 L.Ed.2nd 340, 349-350].)

Note, however, Ybarra v. Illinois (1979) 444 U.S. 85 [62 L.Ed.2nd 238], condemning the detention and patdown of everyone at the scene absent individualized evidence connecting each person so detained with the illegal activity being investigated.

And, using an otherwise lawful detention as a tool with which to coerce the employees of a business to submit to interviews, conditioning their release on answering questions, is unlawful and a violation of the Fourth Amendment. (Ganwich v. Knapp (9th Cir. 2003) 319 F.3rd 1115.)

Officers acted reasonably by detaining a female occupant of a residence in handcuffs for two to three hours while search was in progress, even though she was not the suspect the officers were looking for, given the fact that the search warrant sought weapons and evidence of gang membership. (Muehler v. Mena (2005) 544 U.S. 93 [161 L.Ed.2nd 299].)

The justifications for detaining the occupants include:

- Preventing flight in the event that incriminating evidence is found;
- Minimizing the risk of harm to the officers; and
- Facilitating the orderly completion of the search while avoiding the use of force.

(Id., at p. 98.)

Recognizing the inherent dangerousness in serving narcotics-related search warrants and the common use of weapons, particularly firearms, in such cases, if for no other reason than the officers’ safety, anyone present at the scene of the execution of such a warrant who appears to have a “close physical and functional association” with the subjects of the search, may be temporarily detained while the person is identified and that
possible association is investigated. *(People v. Samples* (1996) 48 Cal.App.4th 1197; defendant driving the car listed in the search warrant, in the company of two people listed in the warrant, lawfully detained.)

The same rules apply to detaining occupants of a residence while serving an *arrest warrant*. *(People v. Hannah* (1997) 51 Cal.App.4th 1335.)

Also, police may lawfully detain visitors to a probationer’s home while executing a “*Fourth Waiver*” *search* for purposes of identifying the visitors (as possible felons) and for the officers’ safety. *(People v. Matelski* (2000) 82 Cal.App.4th 837.)

A person merely approaching a house being searched, at least in the absence of any indication that the person has some connection with the illegal activity occurring in the house, may *not* be detained. *(People v. Gallant* (1990) 225 Cal.App.3rd 200, 203-204.)

*But,* a person who approaches a house being searched pursuant to a search warrant under circumstances either indicating some connection with the residence, or when his possible connection cannot be determined without a brief detention, may be detained long enough to investigate his connection with the illegal activity at the house and to ensure police safety during the search. *(People v. Glaser* (1995) 11 Cal.4th 354, 363-374.)

**Pending the Obtaining of a Search Warrant:**

Securing a home from the outside, detaining the occupant on his own porch pending the obtaining of a warrant, was upheld by the United States Supreme Court. *(Illinois v. McArthur* (2001) 531 U.S. 326 [148 L.Ed.2nd 838].)

It is proper for the police to temporarily “*detain a residence*” from the outside, preventing people from entering, when there is a *reasonable suspicion* that contraband or evidence of a crime is inside, at least until the officers can determine through their investigation whether to seek a search warrant. *(People v. Bennett* (1998) 17 Cal.4th 373.)

It is also lawful to *detain packages* and other containers. *(United States v. Hernandez* (9th Cir. Dec. 23, 2002) 313 F.3rd 1206.) The rules generally parallel the requirements for detaining a person
When the container is a package that has been mailed, and the personal intrusion upon the intended recipient is less, the length of time the package may be detained is considerably longer than if taken from the defendant’s person. In Place, for instance, the container was the defendant’s luggage taken from him at an airport. The Supreme Court held that 90 minutes was too long. In contrast, the Hernandez case, where a 22-hour delay was upheld, cites prior authority where holding onto a mailed package for up to six days was approved.

Detentions Away from the Place being Searched:

The reasons for detaining the occupants of a residence (See Michigan v. Summers, supra) do not apply once the occupant has left the residence. However, the majority of the federal courts that have considered the issue have allowed the detention of an occupant who has already left the residence so long as the detention is done as soon as practical. Officer safety and to avoid alerting other occupants of the residence have been cited as the two primary reasons for this rule. In some cases, avoiding the destruction of evidence might also be a factor. (United States v. Bailey (2nd Cir. 2011) 652 F.3rd 197; United States v. Cochran (6th Cir. 1991) 939 F.2nd 337; United States v. Cavazos (5th Cir. 2002) 288 F.3rd 706; United States v. Bullock (7th Cir. 2011) 632 F.3rd 1004.

Two federal circuits disagree, finding such detentions to be unlawful: United States v. Sherrill (8th Cir. 1994) 27 F.3rd 344; United States v. Edwards (10th Cir. 1996) 103 F.3rd 90.)

Neither the Ninth Circuit nor California have ruled on this issue.

Anonymous Information:


Patdown for Weapons: An anonymous tip concerning a person carrying a firearm does not justify a patdown for weapons (nor a
detention for that purpose). There is no such thing as a “firearms exception” to this rule. *(Florida v. J.L.* (2000) 529 U.S. 266 [146 L.Ed.2nd 254]; see also *People v. Jordan* (2004) 121 Cal.App.4th 544, 562-564.)

*But note:* The U.S. Supreme Court, in dicta, hints that had the anonymous tipster warned of something more dangerous, such as a bomb, a patdown based upon this tip alone might be upheld. The Court also indicated that certain areas where there is a lessened expectation of privacy, such as in an airport or on school grounds, may also be an exception to this rule. *(Florida v. J.L., supra, at p. 273-274 [146 L.Ed.2nd at p. 262].)*

Noting this, California’s Fifth District Court of Appeal ruled that officers lawfully stopped defendant on information from an anonymous tipster who reported that defendant was driving to his wife’s house for the purpose of shooting her. The lawfulness of the stop was based upon the dangerousness of the situation when combined with some weak corroboration which, by itself, might not have been enough to justify stopping defendant’s vehicle. *(People v. Castro* (2006) 138 Cal.App.4th 486.)

See also *People v. Wells* (2006) 38 Cal.4th 1078, at page 1087, where the California Supreme Court differentiated *J.L.* from a DUI case noting that among other factors: “(A) report of a possibly intoxicated highway driver, ‘weaving all over the roadway,’ poses a far more grave and immediate risk to the public than a report of mere passive gun possession.”

The Court also discussed briefly “predictive information” which may supply the necessary corroboration, such as being able to correctly describe future actions of the suspect. Also, unconnected anonymous informants, or anything that would add the element of credibility to the information, might sufficiently corroborate the anonymous informant. *(Florida v. J.L., supra, at p. 271(concurring opinion), 275-276 [146 L.Ed.2nd 260, 263-264].)*

*An uncorroborated tip concerning contraband in a vehicle without any indication of “inside personal knowledge” is insufficient to*
justify a traffic stop of that vehicle (*United States v. Morales* (9th Cir. 2001) 252 F.3rd 1070.) or a detention of its driver. (*People v. Saldana* (2002) 101 Cal.App.4th 170; tip that the driver had a gun and cocaine in the vehicle.)

The fact that the physical description of a suspect who is reported by an anonymous tipster to have a gun in his pocket is very specific does not corroborate the tipster’s information. Absent at least some suspicious circumstances observed by the responding police officers, finding the person described by the tipster does not create a reasonable suspicion justifying a detention or a patdown for weapons. (*People v. Jordan* (2004) 121 Cal.App.4th 544, 553-652; the quick confirmation of the physical description of the defendant and his location, by itself, is legally insufficient.)

*Further Examples:*

A tip forwarded by FBI agents to a local law enforcement officer “that he ‘might want to pay particular attention to a certain house’ in Tucson because there was ‘suspicion that there was a possibility that there might be some narcotics’ there” did not constitute sufficient reasonable suspicion to justify a stop of a vehicle coming from that house even though the tip had been corroborated by hearing “thumps” from the garage which the officer believed was someone loading something into the vehicle. Neither the source nor the specifics of the FBI’s tip were ever identified or explained. (*United States v. Thomas* (9th Cir. 2000) 211 F.3rd 1186.)

An anonymous tip, even when corroborated by a generally matching (albeit unique) suspect description (i.e., 6’1”, 200-pound black male with the same first name), was found to be not enough for a finding in civil court that, “as a matter of law,” there was a “reasonable belief” a wanted suspect was both a co-resident and was presently at a particular residence. (*Watts et al. v. County of Sacramento et al.* (9th Cir. 2001) 256 F.3rd 886.)

An anonymous 911-hangup call, traceable to a particular motel, but without sufficient information to determine which room the call may have come from, did not allow for the non-consensual entry into the defendant’s room merely because of the suspicious attempts by the person who answered the door to keep the officers from looking inside,
and her apparent lies concerning no one else being there.  
*(United States v. Deemer* (9th Cir. 2004) 354 F.3rd 1130.)

Looking for Exceptions: Some courts are clearly troubled by the blanket rule of *Florida v. J.L.*, and have been working hard to find exceptions. *For example:*

The victim of an assault by a person with a deadly weapon called 911, gave his name (that could not be verified), but claimed to not know the phone number from which he was calling and hesitated to give his location. Under these circumstances, it was held to be sufficient reasonable suspicion to detain and pat defendant down for weapons. The Court held that this was not “truly anonymous” in that he gave a name, called 911 concerning a crime that had just occurred, likening it to a “spontaneous declaration,” and reported a crime about which he had obvious firsthand knowledge, all giving the information the “*indicia of reliability*.” *(United States v. Terry-Crespo* (9th Cir. 2004) 356 F.3rd 1170.)

An anonymous call concerning a DUI driver weaving all over the road, the tipster correctly providing a detailed description of the vehicle, its location and direction of travel, given the dangerousness of leaving a drunk driver on the street, held to be sufficient “*reasonable suspicion*” to stop the vehicle and check its driver. *(People v. Wells* (2006) 38 Cal.4th 1078, citing *United States v. Wheat* (8th Cir. 2001) 278 F.3rd 722, and noting, among other factors (see below), the exigency involved in a DUI case.)

In *Wells*, the California Supreme Court listed four factors to consider, justifying the stop of a DUI suspect based upon anonymous information:

- The exigency of a DUI driver loose on the road, with all the damage they do, justifies an immediate law enforcement response. “(A) report of a possibly intoxicated highway driver, ‘weaving all over the roadway,’ poses a far more grave and immediate risk to the public than a report of mere passive gun possession (as occurred in *Florida v. J.L.*).”
A report from a citizen describing a contemporaneous event of reckless driving, presumably viewed by the caller, adds to the reliability of the information and reduces the likelihood that the caller is merely harassing an enemy.

The level of intrusion upon one’s personal privacy (in a place with a reduced expectation of privacy) and the inconvenience involved in a brief vehicle stop is considerably less than an “embarrassing police search” on a public street (as occurred in Florida v. J.L.).

Reliability is added by the relatively precise and accurate description given by the tipster regarding the vehicle type, color, location and direction of travel.

An anonymous tipster describing defendant’s reckless driving, giving a specific location and a detailed description of the car, the driver and the driver’s actions, was held to be sufficient to provide the necessary indicia of reliability to justify a traffic stop. (Lowry v. Gutierrez (2005) 129 Cal.App.4th 926.)

Note: The Court, however, also noted that the defendant’s liability here was no more than a driver’s license suspension, as opposed to a criminal prosecution, allowing for a lesser standard of “reasonable suspicion.” It is unknown whether the Court would have applied the same standards had the consequences been a potential criminal prosecution and conviction instead.

A stop and detention of a suspect based upon an anonymous call was held to be justified where the tipster alleged a dangerous or potentially violent situation, the alleged crime had just occurred, the suspect would have left if not detained, and there is no reason to doubt the tipster’s veracity. (People v. Rodgers (2005) 131 Cal.App.4th 1560.)

Officers lawfully stopped defendant on information from an anonymous tipster who reported that defendant was
driving to his wife’s house for the purpose of shooting her. The lawfulness of the stop was based upon the dangerousness of the situation when combined with some weak corroboration which, by itself, might not have been enough to justify stopping defendant’s vehicle. (People v. Castro (2006) 138 Cal.App.4th 486.)

An anonymous tipster calling in, in an excited state, to report that defendant had just pointed a gun at him, giving detailed information concerning the defendant’s description and his location, was held to be sufficient where the call was recorded, he called back a second time to correct the color of the car in which defendant was sitting, gave a first name, and stuck around long enough to insure that defendant was still there. The officers responded within 2 to 3 minutes and found the scene as the tipster described it. Defendant’s detention and the warrantless search of the vehicle for the gun was upheld. (People v. Dolly (2007) 50 Cal.4th 458; i.e., “[A] firsthand, contemporaneous description of the crime as well as an accurate and complete description of the perpetrator and his location, the details of which were confirmed within minutes by the police when they arrived.”)

Anonymous information reporting a dangerous circumstance involving a gun, then occurring, with an accurate description of the suspect and his location which is quickly verified, constitutes sufficient reasonable suspicion to stop, detain, and patdown the suspect. (People v. Lindsey (2007) 148 Cal.App.4th 1390.)

A late night radio call concerning two specifically described males causing a disturbance, with one possibly armed, in a known gang area at an address where a call concerning a daytime shooting days earlier resulted in the recovery of two firearms, and where the described males are found within minutes of the call, is sufficient to justify a detention. (In re Richard G. (2009) 173 Cal.App.4th 1252, 1257-1258.)

The information motivating an officer to conduct a residential knock and talk may be from an anonymous tipster. There is no requirement that officers corroborate anonymous information before conducting a knock and talk. (People v. Rivera (2007) 41 Cal.4th 304.)
Corroboration:

Rule: Corroboration of an anonymous tip sufficient to justify a detention and/or patdown for weapons can take various forms, such as:

- An accurate prediction of a suspect’s future activity (i.e., “predictive information;” see above) by the tipster.
- Seemingly innocent activity when the anonymous tip casts the activity in a suspicious light.
- Presence of the person about whom the tip relates in a “high crime area.”
- Verification of details provided by the tipster through police observation or other sources. (People v. Ramirez (1996) 41 Cal.App.4th 1608.)

Potential “accountability:”

Potential “accountability” may help to corroborate an informant’s information as well, such “accountability” being in the form of:

- The ability of authorities to identify the informant;
- The consequences the informant is likely to experience as a result of providing false information; and
- The informant’s perception of these factors.


An in-person informant, even though unidentified, supplies the necessary indicia of reliability for two reasons:

- An in-person informant risks losing anonymity and being held accountable for a false tip.
- When a tip is made in-person, an officer can observe the informant’s demeanor and determine whether the informant seems credible enough to justify immediate police action without further questioning.
To Establish Probable Cause:

Anonymous information demonstrating a knowledge of inside information, describing ongoing criminal activity, and sufficiently corroborated, will justify the issuance of a search warrant. *(United States v. Jennen* (9th Cir. 2010) 596 F.3rd 594, 598-600; where an anonymous tip corroborated by a controlled buy was sufficient to establish probable cause for a search warrant.)

To corroborate the anonymous tip, there must be found to be additional evidence that shows the tip is reliable. For instance:

- The tip must provide a “range of details,” and
- The future movements of the suspect must be corroborated by independent police observation. *(Id., at p. 598.)*

*In Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2nd 527], anonymous information reflecting inside, predictive behavior, corroborated in numerous respects through a police follow-up investigation, was determined to constitute probable cause (referred to as a “fair probability”) when considering the “totality of the circumstances,” justifying the issuance of a search warrant.

**Examples:**

Sufficient corroboration was found, justifying a patdown for weapons, when the anonymous information came from two separate informants, where the tips were close in time, the informants contacted the officer personally (thus putting their anonymity at risk), and the setting was a crowded throng of celebrants at a New Year’s Eve street party, thus increasing the dangerousness of the situation. *(People v. Coulombe* (2001) 86 Cal.App.4th 52.)
Being familiar with the tipster’s voice, and knowing that he has provided reliable information in the past, might be enough. (People v. Jordan (2004) 121 Cal.App.4th 544, 560-661.)

A single pronounced weave within the lane, plus an experienced Highway Patrol officer’s observation of the defendant sitting up close to the steering wheel, which the officer recognized as something an impaired driver does, was sufficient to corroborate second-hand information concerning defendant’s “erratic driving” from Montana Department of Transportation employees, justifying the stop of the defendant’s car. (United States v. Fernandez-Castillo (9th Cir. 2003) 324 F.3rd 1114.)

An anonymous tip of drug dealing occurring from a particularly described vehicle at a particular location was corroborated by a trained law enforcement officer’s observation of what appeared to be a hand-to-hand drug transaction, justifying a detention of the vehicle’s occupant. (People v. Butler (2003) 111 Cal.App.4th 150, 159-162.)

Note: In Illinois v. Gates (1983) 462 U.S. 213 [76 L.Ed.2nd 527], anonymous information reflecting inside, predictive behavior, corroborated in numerous respects through a police follow-up investigation, was determined to constitute probable cause (referred to as a “fair probability”) when considering the “totality of the circumstances,” justifying the issuance of a search warrant. See also United States v. Jennen (9th Cir. 2010) 596 F.3rd 594, 598-600, where an anonymous tip corroborated by a controlled buy was sufficient to establish probable cause for a search warrant.

In Prison or Jail: An anonymous tip that a particular prisoner is in possession of contraband was held to be sufficient cause to do a visual, clothed or unclothed, body cavity search. (People v. Collins (2004) 115 Cal.App.4th 137.)

California Code of Regulations, Title 15, § 3287(b), allows for a visual search of an inmate, clothed or unclothed, whenever there is a “substantial reason to believe the inmate may have unauthorized or dangerous items concealed on his or her person.” (Italics added) Judicial authorization (i.e., a search warrant), and the use of “medical personnel in a medical setting,” is only required in the
case of a “physical (as opposed to a non-contact visual) body cavity search.” In Collins, a visual inspection of the defendant’s rectal area was intended, for which it is generally accepted that the rigorous requirements of the more intrusive “physical body cavity search” is not required.

Minors:

School officials have the power to stop a minor/student on campus in order to ask questions or conduct an investigation even in the absence of a reasonable suspicion of criminal activity or a violation of school rules, so long as this authority is not exercised in an arbitrary, capricious, or harassing manner. (In re Randy G. (2001) 26 Cal.4th 556.)

California follows the federal rule on this issue, as described in New Jersey v. T.L.O. (1985) 469 U.S. 325 [83 L.Ed.2nd 720], when applying the protections of the California Constitution. (In re William G. (1985) 40 Cal.3rd 550, 564.)

New Jersey v. T.L.O., supra, allows for warrantless searches by school officials so long as the search is “reasonable.” (e.g., a “reasonable suspicion?”)

In re William G., supra, at p. 564, specifically defines this standard as a “reasonable suspicion,” holding that searches by school officials are lawful so long as the official has “a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute).”

The search of a student by a school administrator requires only that there be a reasonable suspicion of criminal activity or a violation of school rules. The extent of law enforcement’s involvement, evaluating the totality of the circumstances, must be considered when determining whether law enforcement’s probable cause standards apply. Finding that; “the police role in the search of appellant was at all times clearly subordinate to the role of the vice-principal, who made the decision to search and conducted the search,” a vice principal’s search of a student’s locker was upheld under the T.L.O. standard despite the fact that the information came from law enforcement and officers stood by for safety reasons as the vice principal conducted the search. (In re K.S. (2010) 183 Cal.App.4th 72.)
Random metal detector searches of students, without any individualized suspicion, are justified by the “special needs” of keeping weapons off campuses. The Fourth Amendment is not violated by such searches where the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion is unworkable. (In re Latasha W. (1998) 60 Cal.App.4th 1524.)

Detaining a person on school grounds for purposes of investigating the lawfulness of his presence there, as an “administrative search,” is lawful. (In re Joseph F. (2000) 83 Cal.App.4th 501.)

See In re Cody S. (2004) 121 Cal.App.4th 86, holding that upon requiring the minor, pursuant to school rules, to vacate his gym locker when pulled out of gym class at the request of the “school safety officer,” the minor lost any expectation of privacy in the gym locker, and that this procedure did not constitute a search of that locker. Also, admitting that he had a knife in his backpack supplied the necessary “reasonable suspicion” for a warrantless search of his backpack.

The suspicionless search of a student was upheld where it was conducted pursuant to an established policy applying to all students and was consistent with the type of action on the part of a school administrator that fell well within the definition of “special needs” of a governmental agency. The search was of a limited nature, being told only to empty out his pockets, as he was not subjected to physical touching of his person nor was he exposed to the intimate process required for a urine sample necessary for drug testing. The purpose of the search was to prevent the introduction of harmful items (weapons and drugs) into the school environment. Given the general application of the policy to all students engaged in a form of rule violation that could easily lend itself to the introduction of drugs or weapons into the school environment (i.e., leaving during the school day without permission and returning later), further individualized suspicion was not required. (In re Sean A. (2010) 191 Cal.App.4th 182, 186-190.)

But see the dissent (pgs. 191-198) criticizing the decision as a non-particularized, suspicionless search of a student in violation of the principles of New Jersey v. T.L.O. (1985) 469 U.S. 325 [83 L.Ed.2nd 720], where the Supreme Court held that a reasonable suspicion is required. (See above)

A “school resource officer,” although employed by a municipal police department, need only comply with the relaxed search and seizure

A Los Angeles Police Department officer, assigned to a high school, detaining and patting down minors on the school campus who were unable to satisfactorily identify themselves is lawful despite the lack of even a reasonable suspicion that the minors may be armed. (*In re Jose Y.* (2006) 141 Cal.App.4th 748.)

*Minors violating curfew* may be stopped, detained, and transported to a curfew center, the police station, or other facility where the minor can await the arrival of a parent or other responsible adult. A search of the minor prior to placing him in a curfew center with other children is also reasonable. (*In re Ian C.* (2001) 87 Cal.App.4th 856.)


**Miranda:** People who have been temporarily detained for investigation are generally not “in custody” for purposes of *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2nd 694].), at least as a general rule, and do not have to be warned of their constitutional rights prior to questioning. (*People v. Manis* 1969) 268 Cal.App.2nd 653, 669; *People v. Breault* (1990) 223 Cal.App.3rd 125, 135; *People v. Clair* (1992) 2 Cal.4th 629, 675.)

But see *People v. Pilster* (2006) 138 Cal.App.4th 1395, at page 1406, where it was noted that “custody” for purposes of *Miranda*, under the **Fifth Amendment**, involves a different analysis than “custody” for purposes of a detention or arrest under the **Fourth Amendment**. “In contrast (to **Fourth Amendment**, search and seizure issues), **Fifth Amendment Miranda** custody claims do not examine the reasonableness of the officer’s conduct, but instead examine whether a reasonable person (in the defendant’s position) would conclude the restraints used by police were tantamount to a formal arrest.”

Refusal to answer questions during a detention does not, by itself, establish probable cause to arrest, but may be one factor to consider, so long as the refusal to answer questions is not interpreted as a **Fifth Amendment**, self-incrimination invocation. (See *People v. Clair*, supra, at p. 662.)
Use of Force: A peace officer may use that amount of force that is reasonably necessary under the circumstances in order to enforce a lawful detention. (In re Tony C. (1978) 21 Cal.3d 888, 895; In re Gregory S. (1980) 112 Cal.App.3d 764, 778.)

Factors: In determining the reasonableness of using force during a detention, the court must take into consideration the following factors:

- The severity of the suspected crime;
- Whether the suspect poses an immediate threat to the safety of the officers or others;
- Whether the suspect is actively resisting arrest or attempting to evade the officers by flight;
- Whether the detention during a search was unnecessarily painful, degrading or prolonged (Graham v. Connor (1989) 490 U.S. 386, 395-396 [104 L.Ed.2d 443, 455-456].), or whether it involved an undue invasion of privacy. (Franklin v. Foxworth (9th Cir. 1994) 31 F.3d 873, 876.)

Refusal to Submit to a lawful detention is probable cause to arrest, pursuant to Penal Code § 148(a) (Interfering with a peace officer in the performance of his or her duties). (In re Gregory S., supra, at p. 780.)

Even when the detention is illegal, every person has a legal duty to submit (Evans v. City of Bakersfield (1994) 22 Cal.App.4th 321.), although declining to do so is not a violation of P.C. § 148 in that a peace officer is not acting in the “performance of his (or her) duties” by unlawfully detaining someone.

But the force used must be tailored to the circumstances. The initial detention must be lawful and then the amount of force used must be reasonable under the circumstances. Yanking a person out of his vehicle, pushing him up against his car, and handcuffing him when that person is not attempting to escape nor resisting the officers in anyway other than being “verbally confrontational,” may be excessive. (Liberal v. Estrada (9th Cir. 2011) 632 F.3d 1064, 1078-1079.)

The use of firearms, handcuffs, putting a person into a locked patrol car, or simply a “show of force,” may, under the circumstances, cause the court to later find that an attempted detention was in fact an arrest, and, if made without “probable cause,” illegal. (United States v. Ramos-Zaragosa (9th Cir. 1975) 516 F.2d 141, 144; New York v. Quarles (1984) 467 U.S. 649 [81 L.Ed.2d 550]; handcuffs; Orozco v. Texas (1969) 394 U.S. 324 [22 L.Ed.2d 311]; force; United States v. Ricardo D. (9th Cir. 1990) 912 F.2d

But there are exceptions: See “Detentions vs. Arrests,” above.

**Detentions in a Residence During the Execution of a Search Warrant:**

The occupants of a residence may be detained during the execution of a search warrant even though they did not match the description of the suspects (e.g., Caucasian instead of African-American) believed to be living there at the time. (*Los Angeles County v. Rettele* (2007) 550 U.S. 609 [167 L.Ed.2nd 974]; the court noting that until the rest of the house is checked for the suspects, other occupants may be detained.)

It was further held that with knowledge that one of the sought-for suspects had a firearm registered to him, the detainees could be held at gunpoint until the rest of the house could be checked, even though the detainees were unclothed at the time. It was not necessary to allow the detainees to cover us until officers’ safety could be assured. (*Ibid.*

See also *Muehler v. Mena* (2005) 544 U.S. 93 [161 L.Ed.2nd 299]; detention of a resident lawful while evidence in a gang shooting case looked for, at least if not “prolonged.”

**Narcotics-Related Traffic Stops Using a “Controlled Tire Deflation Device” (“CTDD”):**

The use of a “controlled tire deflation device” to stop a vehicle suspected of being used to smuggle controlled substances over the US/Mexico border held to be a detention only (thus requiring only a reasonable suspicion) and not excessive force under the circumstances. (*United States v. Guzman-Padilla* (9th Cir. 2009) 573 F.3rd 865, 886-889.)

*Note:* The “controlled tire deflation device,” or “CTDD,” is an accordion-like tray containing small, hollow steel tubes that puncture the tires of a passing vehicle and cause a gradual release of air, bringing the vehicle to a halt within a quarter to half a mile.
Deadly Force: Deadly force (i.e., force likely to cause death or great bodily injury) may not be used to enforce a detention, unless the officer is attacked and must defend him or herself against the use of deadly force by the suspect. (See People v. Ceballos (1974) 12 Cal.3rd 470, 478; Tennessee v. Garner (1985) 471 U.S. 1, 12-15 [85 L.Ed.2nd 1, 10-12].)


Demanding Identification:

While it is clear that a person who has been “consensually encountered” (see above) need not identify himself, nor even talk to a police officer (See Kolender v. Lawson (1983) 461 U.S. 352 [75 L.Ed.2nd 903]; Brown v. Texas (1979) 443 U.S. 47, 52 [61 L.Ed.2nd 357].), there is nothing improper with a peace officer “demanding” that a detained person properly identify himself. (United States v. Christian (9th Cir. 2004) 356 F.3rd 1103; not discussing whether the officer can enforce the demand.)

A passenger in a lawfully stopped vehicle may be “asked” for his identification. (United States v. Diaz-Castaneda (9th Cir. 2007) 494 F.3rd 1146, 1152-1153.)

The Fourth Amendment is not implicated by asking a detained individual for identification, at least so long as the detention is not unnecessarily prolonged in the process. (People v. Vibanco (2007) 151 Cal.App.4th 1, 13-14.)

The only issue left hanging by Christian and Vibanco is whether a detained suspect must properly identify himself, or be subject to arrest for refusing to do so. The Court seemed to hint, however, that he cannot be forced to identify himself.

However, the United States Supreme Court ruled in Hiibel v. Sixth Judicial District Court of Nevada (2004) 542 U.S. 177 [159 L.Ed.2nd 292], that a person who is lawfully “detained” may be charged with a criminal violation for refusing to identify himself. Such an identification requirement violates neither the Fourth nor Fifth Amendment (self-incrimination) rights of the detained person.

Note, however, that the Court, in Hiibel, conceded that “a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense,” thus implicating the
Fifth Amendment right against self-incrimination. (Id., at p. 191.)

Also note that Nevada has a specific statute making it a misdemeanor to refuse to identify oneself when lawfully detained. California does not have such a specific statute, although arguably, a person in such a circumstance can be charged with P.C. § 148(a)(1), for delaying an officer in the performance of his or her duties, or P.C. § 148.9 when the subject provides a fictitious name.

An argument can be made that despite the lack of a statute requiring a detainee to identify himself, the right to conduct a “Terry stop” on less than probable cause carries with it the inherent right to require a detainee to identify himself so long as some statute (e.g., P.C. § 148(a)(1)) is being violated.

“[T]he ability to briefly stop a suspect, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice.” (Italics added; Hayes v. Florida (1985) 470 U.S. 811, 816 [84 L.Ed.2nd 705.]

“The principles of Terry (v. Ohio (1968) 392 U.S. 1) permit a State to require a suspect to disclose his name in the course of a Terry stop.” (Hiibel v. Sixth Judicial District Court of Nevada, supra, at p. 187.)


But see In re Gregory S. (1980) 112 Cal.App.3rd 764, 776, where the Court “assume(d) for the sake of discussion” that a violation of Penal Code section 148 may not be premised on a refusal to answer questions, including a request for
identification.) (Italics added) The issue, however, despite the Court’s stated opinion that refusing to identify probably is not a P.C. § 148 violation (pg. 779), was neither analyzed nor discussed the issue in that other valid grounds for upholding a P.C. § 148 (delaying the officer in the performance of his duties) was found by the detainee attempting to walk away. Also, Gregory S. was decided some 24 years before Hiibel.

Note: A careful reading of Hiibel, Quiroga, and Gregory S. indicates that whether or not P.C. § 148(a)(1) can be charged in a circumstance where a detainee has refused to identify himself is a question that will depend upon the specific circumstances of the individual case at issue. In those cases where refusing to identify oneself does in fact delay the officer in the performance of his duties (e.g., did it unnecessarily extend the time required to complete the detention or otherwise draw the officer away from completing his other lawful duties), the answer should be “yes.” If not, then the answer will likely be “no.”

See State v. Aloi (2007) 280 Conn. 824, where the Connecticut Supreme Court found that by refusing to identify himself, the lawfully detained defendant was in fact in violation of a state statute that specifically provided: “A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer or firefighter in the performance of such peace officer’s or firefighter’s duties . . . .” (Gen. Statutes (Rev. to 2001) § 53a – 167a; “Because a refusal to provide identification in connection with a Terry stop may hamper or impede a police investigation into apparent criminal activity, we see no reason why such conduct would be categorically excluded under the expansive language of § 53a-167a.” (Id., at p. 833.)

It still follows, however, that a person who is only subject to a “consensual encounter” is not required to identify himself. (See Kolender v. Lawson, supra.)
Detentions of an Employee in the Workplace (or a Student at School):

Problem: When an employee’s supervisors (or a student’s principal, a military supervisor, or a law enforcement supervisor) order the employee (or student, military subordinate, or police officer) to report to the office or remain in the workplace pending an interview, at the request or complicity of law enforcement, is the employee “detained” for purposes of the Fourth Amendment?

Answer: Not necessarily, but it depends upon the circumstances. (See Aguilera v. Baca, infra.)

Sheriff’s deputies who are ordered to remain at the station pending an interview by Internal Affairs investigators about an alleged excessive force citizen’s complaint, where criminal prosecution could result, the deputies were held to be not detained for purposes of the Fourth Amendment after an evaluation of the following factors (Aguilera v. Baca (9th Cir. 2007) 510 F.3rd 1161, 1167-1171, citing Driebel v. City of Milwaukee (7th Cir. 2002) 298 F.3rd 622, 638.):

- The experience level of the subordinate;
- Whether the treatment was consistent with that allowed by department guidelines or general policy;
- The occurrence of physical contact or threats of physical restraint;
- An explicit refusal of permission to depart;
- Isolation of the subordinate officer;
- Permission to use the restroom without accompaniment;
- The subordinate officer’s being informed that he was the subject of a criminal investigation;
- Whether the subordinate officer was spoken to “in a menacing or threatening manner;”
- Whether the subordinate officer was under constant surveillance;
- Whether superior officers denied a request to contact an attorney or union representative;
- The subordinate officer’s ability to retain law enforcement equipment, including weapons and badges;
- The duration of the detention; and
- The subordinate’s receipt of overtime pay.

Similar cases:

No seizure when an on-duty civilian Air Force employee was ordered to report for an interview with an intelligence officer. (United States v. Muegge (11th Cir. 2000) 225 F.3rd 1267, 1270.)
No seizure when an on-duty Coast Guard officer was ordered to report for an interview with an intelligence officer. *(United States v. Baird* (D.C. Cir. 1988) 851 F.2nd 376, 380-382.)*

*Note:* Although there are no cases available describing when a student is ordered to the principal’s office at the request of law enforcement for an interview, a situation that often arises, it is arguable that the same analysis could be made. The officer telling the student, however, that he is free to return to class would probably negate any argument that he or she was detained under the circumstances.

Note that *Greene v. Camreta* (9th Cir. 2009) 588 F.3rd 1011; where the Ninth Circuit Court of Appeal ruled that interviewing a child victim on a school campus without the parents’ consent required a search warrant or other court order, or exigent circumstances, as a Fourth Amendment seizure, was overruled by the United States Supreme Court in *Camreta v. Greene* (2011) __ U.S. __ [131 S.Ct. 2020; 179 L.Ed.2nd 1118]. The Ninth Circuit’s decision, however, was merely vacated, leaving the issue undecided.

See P.C. § 11174.3(a), setting out a statutory procedures police officers are to use in interviewing child victims while at school.

**Seizure of Firearms During a Detention:**

Gov’t. Code § 8571.5 provides that a police officer may not seize or confiscate any firearm or ammunition from an individual who is lawfully carrying or possessing the firearm or ammunition. However, the officer may temporarily disarm an individual if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual. An officer who disarms an individual is to return the firearm before discharging the individual unless the officer arrests the individual or seizes the firearm as evidence of the commission of a crime.

*Note:* This new section is in the part of the Government Code entitled the “California Emergency Services Act.” This new section is intended to prohibit an executive order disarming individuals who are in lawful possession of firearms during a state of emergency or crisis, and will conform California law to a new federal law, Public Law 109-295, which prohibits the confiscation of otherwise legal firearms from law-abiding citizens during a state of emergency by any agent of the Federal Government or by anyone receiving federal funds. However, it appears to be written
broad enough to affect a police officer’s contacts with individuals on the street.

And note P.C. § 833.5, providing a peace officer the authority to detain for investigation anyone who the officer has “reasonable cause” to believe illegally has in his or her possession a firearm or other deadly weapon.

Also, P.C. § 12031(e) gives a peace officer the right to inspect a firearm carried by any person on his person or in a vehicle “on any public street in an incorporated city or prohibited area of an unincorporated territory.” Refusal to allow a peace officer to inspect a firearm is probable cause to arrest the subject for violating P.C. § 12031(a)(1); illegally carrying a loaded firearm in the listed public places.

**Detention Examples, in General:**

After questioning a person at an airport, a detention was held to be lawful where the name given to police was different than that put on checked luggage, with no documentary proof of identity, while traveling to a faraway city known for receiving narcotics, plus other suspicious circumstances. (*People v. Daugherty* (1996) 50 Cal.App.4th 275.)

Carrying an ax on a bicycle at 3:00 a.m. is reasonable suspicion of criminal activity justifying a detention for investigation. (*People v. Foranyic* (1998) 64 Cal.App.4th 186.)

Detaining a person on school grounds for purposes of investigating the lawfulness of his presence there, as an “administrative search,” is lawful. (*In re Joseph F.* (2000) 83 Cal.App.4th 501.)

An Anchorage, Alaska, Municipal Code ordinance forbidding any item affixed to the windshield (similar to California’s V.C. § 26708(a)(1); see *People v. White* (2003) 107 Cal.App.4th 636.) was not violated by an air freshener dangling from the rear view mirror. A traffic stop was found to be illegal. (*United States v. King* (9th Cir. 2001) 244 F.3rd 736, 740.)

A traffic stop for a violation of V.C. § 26708(a) was held to be illegal in *People v. White, supra.*, where insufficient evidence was presented in court of an obstruction of the driver’s view caused by an air freshener dangling from the rearview mirror, but legal in *People v. Colbert* (2007) 157 Cal.App.4th 1068, where the officer was able to testify why he believed the driver’s view was obstructed by the same type of object and the defense failed to present any evidence to the contrary.
Observing defendant break traction for about 20 to 25 feet, lasting about 2 seconds, was sufficient cause to suspect a violation of V.C. § 23109(c), exhibition of speed. (Brierton v. Department of Motor Vehicles (2005) 130 Cal.App.4th 499, 509-510.)

Seeing three vehicles with four Black male occupants each, one of the occupants who is known to be a gang member, driving as if in military formation at 12:30 at night, hours after a prior gang shooting, the vehicles being in one of the warring Black gang’s territory, held to be insufficient to justify a stop and detention. (People v. Hester (2004) 119 Cal.App.4th 376, 385-392.)

Where the defendant was confronted by six officers, all surrounding him, with five of them in uniform with visible firearms, in an area shielded from public view (an apartment hallway), where his request to shut the door to his room was denied, he was patted down for weapons, he was told three times that he was subject to arrest for failing to register (thus implying a need to cooperate should he wish to avoid the specter of arrest), and where he was never told that he was free to leave, a reasonable person in defendant’s position at the time would not have believed that he was free to terminate the contact. (United States v. Washington (9th Cir. 2004) 387 F.3rd 1060, 1068-1069; finding that defendant’s detention was “more intrusive than necessary” and that upon his denial of anything illegal in his room, the detention became illegal.)

A stop and detention based upon stale information concerning a threat, which itself was of questionable veracity, and with little if anything in the way of suspicious circumstances to connect the persons stopped to that threat, is illegal. (People v. Durazo (2004) 124 Cal.App.4th 728: Threat was purportedly from Mexican gang members, and defendant was a Mexican male who (with his passenger) glanced at the victim’s apartment as he drove by four days later, where the officer admitted was acting on his “gut feeling” that defendant was involved.)

Stopping the plaintiff, an African-American male, a half mile away while driving a gray car in the direction of a witness’s house, 30 minutes after the witness called police to report that he had just been warned by a friend that two African-American males were coming to his house to do him harm and that he had just seen two such males driving by in a gray or black car, was held to be a lawful stop based upon a reasonable suspicion that the plaintiff was possibly one of the suspects. (Flowers v. Fiore (1st Cir. 2004) 359 F.3rd 24.)

Despite local statutes to the contrary, an officer need not, under the Fourth Amendment, have personally observed a traffic violation in order to justify making a traffic stop, so long as the necessary “reasonable
suspicion” to believe a violation (such knowledge coming from another officer in this case) did in fact occur. *(United States v. Miranda-Guerena (9th Cir. 2006) 445 F.3rd 1233.)*

Observation of a truck that matched the description of one that had just been stolen in a carjacking, but with a different license plate that appeared to be recently attached, and with two occupants who generally matched the suspects’ description, constituted the necessary reasonable suspicion to justify the defendant’s detention. *(United States v. Hartz (9th Cir. 2006) 458 F.3rd 1011, 1017-1018.)*

A search and seizure condition justifies a detention without a reasonable suspicion of criminal activity. *(People v. Viers (1991) 1 Cal.App.4th 990, 993-994; defendant stopped in his vehicle.)*

A “knock and talk” at the defendant’s motel room justified the eventual detention of defendant when (1) the officers had some limited information from an earlier traffic stop that defendant might be involved in the manufacturing of methamphetamine, including the presence of a pressure cooker which the officer knew could be used in the manufacturing of methamphetamine; (2) a roommate took a full two minutes to open the motel room door while the officers could hear noises like people moving things around inside; (3) when defendant was contacted, he acted extremely nervous, contrary to how he had acted during a previous contact by the same officers; and (4) the roommate admitted to being a methamphetamine user and that other people had visited the room the night before. *(United States v. Crapser (9th Cir. 2007) 472 F.3rd 1141, 1147-1149.)*

Observing defendant sitting in a parked motor vehicle late at night near the exit to a 7-Eleven store parking lot with the engine running, despite prior knowledge of a string of recent robberies at 7-Elevens, held *not* to be sufficient to justify a detention and patdown. *(People v. Perrusquia (2007) 150 Cal.App.4th 228.)*

Spotlighting the defendant in a high narcotics area and then walking up to him “briskly” while asking questions held to be an unlawful detention under the circumstances. *(People v. Garry (2007) 156 Cal.App.4th 1100.)*

Voluntarily going with the police to the police station, where he was interviewed as a possible witness, and not a suspect, where nothing was ever done or said to indicate otherwise at least up until his arrest, was not an unlawful detention. *(People v. Zamudio (2008) 43 Cal.4th 327, 341-346.)*
Observation by an officer trained as a “drug recognition expert” of defendant apparently asleep in his vehicle in a drugstore parking lot, at 8:00 p.m., with the parking lights on, knowing that people who are under the influence of drugs tend to fall “asleep quickly, inappropriately, and sometimes uncontrollably,” and then noticing that he was breathing faster than usual, and, when awakened, finding defendant to be irritable, aggressive, and overly assertive—all indications of someone under the influence of drugs—held to be sufficient cause to detain him.  (Ramirez v. City of Buena Park (9th Cir. 2009) 560 F.3rd 1012, 1016-1018, 1020-1021.)

Observing defendant standing near the open trunk of a car, which he immediately shut upon the approach of the officers and walk away, while appearing nervous, when combined with the officer’s plain sight observations of exposed wires in the vehicle where the door panel and the stereo trim had been removed, with tools such as screwdrivers and pliers lying around, was more than enough reasonable suspicion to justify the defendant’s detention.  (People v. Osborne (2009) 175 Cal.App.4th 1052, 1058.)

With personal knowledge that someone had been illegally shooting a firearm and had an illegal campfire in the area of defendant’s campsite, contacting and detaining defendant at the campsite the following morning was lawful.  (United States v. Basher (9th Cir. 2011) 629 F.3rd 1161, 1165-1166.)

Merchants, Library Employees and Theater Owners:

P.C. § 190.5(f): Detention of a shoplift or theft suspect, or a person illegally recording a movie in a theater, by a merchant, library employee or theater owner, respectively, for the purpose of determining whether the suspect did in fact steal property belonging to the victim, or illegally record a movie, is authorized by statute.

Once the purpose of the detention is accomplished, the suspect must either be turned over to and arrested by police, or released.

Only non-deadly force may be used.  (P.C. § 190.5(f)(2))

Chapter 4

Arrests:

Defined: The “taking a person into custody, in a case and in the manner authorized by law.” (P.C. § 834)

Standard of Proof: Requires “Probable Cause”: “(A) police officer may arrest without (a) warrant (a person) . . . believed by the officer upon reasonable (or “probable”) cause to have been guilty of a felony (or misdemeanor).” (Emphasis added; United States v. Watson (1976) 423 U.S. 411, 417 [46 L.Ed.2nd 598, 605].)

Defined: Probable (or Reasonable) Cause to Arrest: “Reasonable or probable cause is shown if a man of ordinary care (or caution) and prudence (or a reasonable and prudent person) would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty.” (See People v. Lewis (1980) 109 Cal.App.3rd 599 608-609; People v. Campa (1984) 36 Cal.3rd 870, 879; People v. Price (1991) 1 Cal.4th 324, 410.)

Note: The terms “reasonable” and “probable” cause are used interchangeably in both the codes (See P.C. § 995(a)(1)(B)) and case law, but (when properly used) mean the same thing. “Reasonable cause” and “reasonable suspicion” (i.e., the standard of proof for a detention) do not mean the same thing and are not to be confused.

Note: More than a “reasonable suspicion,” but less than “clear and convincing evidence” or “proof beyond a reasonable doubt.”

When Probable Cause Exists: “(P)robable cause” exists if, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that the individual had committed a crime.” (Italics added; United States v. Hernandez (9th Cir. 2002) 314 F.3rd 430, 434; see also Dunaway v. New York (1979) 442 U.S. 200, 208, fn. 9; [60 L.Ed.2nd 824]; People v. Scott (2011) 52 Cal.4th 452, 474.) Various courts have used variations of this same definition to define probable cause:

“Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe an offense has been or is being committed by the person being arrested.” John v. City of El Monte (9th Cir. 2008) 515 F.3rd 936, 940; citing Beck v. Ohio (1964) 379 U.S. 89, 91 [13 L.Ed.2nd 142].)
“Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense. (Citation)” (McSherry v. City of Long Beach (9th Cir. 2009) 584 F.3rd 1129, 1135.)

“In California, ‘an officer has probable cause for a warrantless arrest ‘if the facts known to him would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.’”[Citations.]” (Blakenhorn v. City of Orange (9th Cir. 2007) 485 F.3rd 463, 471; see also People v. Price (1991) 1 Cal.4th 324, 410.)

Except perhaps for a “specific intent” element, “an officer need not have probable cause for every element of the offense.” (Blakenhorn v. City of Orange, supra., at p. 472.)

“(T)his rule (however,) must be applied with an eye to the core probable cause requirement; namely, that ‘under the totality of the circumstances, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.’” (Citation omitted) Rodis v. City and County of San Francisco (9th Cir. 2007) 499 F.3rd 1094, 1099.)

“Probable cause” merely requires that “the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense. . . . Police must only show that, under the totality of the circumstances, . . . a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime.” (Hart v. Parks (9th Cir. 2006) 450 F.3rd 1059, 1065-1066.)

“Probable cause exists when the facts known to the arresting officer would persuade someone of ‘reasonable caution’ that the person to be arrested has committed a crime. [Citation.] ‘[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . .’ [Citation.] It is incapable of precise definition. [Citation.] ‘The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,’ and that belief must be ‘particularized with respect to the
person to be . . . seized.’ [Citations.] ‘[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment’”  (Gillan v. City of Marino (2007) 147 Cal.App.4th 1033, 1044.)

“‘Reasonable and probable cause’ may exist although there may be some room for doubt.”  (Lorenson v. Superior Court (1950) 35 Cal.2d 49, 57.)

“(T)he probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” (Citations and internal quotation marks omitted; Maryland v. Pringle (2003) 540 U.S. 366, 370 [157 L.Ed.2nd 769]; probable cause for arrest of all three occupants of a vehicle found where a controlled substance was found within reach of any of them.)

“The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that belief must be ‘particularized with respect to the person to be . . . seized.’”  (People v. Celis (2004) 33 Cal.4th 667, 673; citing Maryland v. Pringle, supra.)

“Probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . . .”  (Illinois v. Gates (1983) 462 U.S. 213, 231-232 [76 L.Ed.2nd 527, 548]; using the term “fair probability” to describe probable cause.  See also Rodis v. City and County of San Francisco (9th Cir. 2007) 499 F.3rd 1094, 1098.)

Probable cause allows for an officer’s reasonable mistake.  It only means that he or she is “probably” right, or in effect, having more evidence for than against.  (Ex Parte Souza (1923) 65 Cal.App. 9.)

“[P]robable cause means ‘fair probability,’ not certainty or even a preponderance of the evidence.”  (United States v. Gourde (9th Cir. 2006) 440 F.3rd 1065, 1069.)

“Probable cause to arrests exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of caution to believe that an offense has been or is being committed by the person being arrested.”  (Citations omitted; Ewing v. City of Stockton (9th Cir. 2009) 588 F.3rd 1218, 1230.)
Under the totality of the circumstances, a reasonable officer could believe that the arrestee possessed cocaine in violation of Washington law. The arrestee’s husband and 911 callers told the police that the arrestee was high on drugs. She said in her deposition that, given her comments to the police officers, it would have been reasonable for them to believe she was on drugs. The police officers also had reasonable cause to take her to the hospital for mental evaluation under Washington’s mental health evaluation statute.  *(Luchtel v. Hagemann (9th Cir. 2010) 623 F.3rd 975.)*

Detectives had probable cause to stop and arrest defendant and his cohorts the officers saw four males running from one street toward another. The officer observed defendant carrying an object which could be used as a deadly weapon. The officer also observed specific behavior that caused him to entertain an honest and strong suspicion that a crime was being committed. He observed a brick in defendant’s hand, heard a shout of “*he’s over there*” which he believed to have come from one of the four males, and witnessed a gesture from one of the group directing the others where to go. Viewed collectively, there were clearly facts to suggest the group intended to use their rudimentary weapons to harm someone. The officer’s knowledge that defendant was a member of a street gang that “claimed” that particular area reasonably supported this analysis of the facts. At this point, probable cause existed to arrest defendant for possession of a deadly weapon with intent to commit an assault, per *P.C. § 12024.*  *(In re J.G. (2010) 188 Cal.App.4th 1501.)*

“Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested. (Citation) For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence. . . . (Citation) . . . (P)olice are not required ‘to believe to an absolute certainty, or by clear and convincing evidence, or even by a preponderance of the available evidence’ that a suspect has committed a crime. (Citation) All that is required is a ‘fair probability,’ given the totality of the evidence, that such is the case.  *(Garcia v. County of Merced (9th Cir. 2011) 639 F.3rd 1206, 1209.)*

Probable cause was found to exist with the defendant’s statements to his girlfriend about his dream concerning the stabbing of the first victim in a series of crimes, even before the murder was reported in the newspapers. Also, defendant was known to be
involved in the martial arts and liked to dress as a ninja which was consistent with the suspect information. Defendant told co-workers that he possessed a semiautomatic pistol similar to the weapon used in some of the crimes. Defendant also matched the physical description of the suspect in the various crimes, being a unique combination of Black and Japanese, with a dark complexion that tended to be lighter than most Blacks. *(People v. Scott* (2011) 52 Cal.4th 452, 474-476.)

Probable cause existed under Nevada law where the arresting agent knew that defendant (1) admitted to gambling at various casinos under a different name, (2) admitted to using identification not issued by a government entity identifying him by that different name, and (3) possessed and had used a credit card issued in that different name. *(Fayer v. Vaughn* (9th Cir. 649 F.3rd 1061, 1064-1065.)

*The “Collective Knowledge” Doctrine:*

Probable cause can be established by the “collective knowledge” of other officers. The officer making a stop, search or arrest need not personally know all the precise information relied upon by other officers. *(People v. Ramirez* (1997) 59 Cal.App.4th 1548; *United States v. Sandoval-Venegas* (9th Cir. 2002) 292 F.3rd 1101; *United States v. Butler* (9th Cir. 1996) 74 F.3rd 916, 921; *People v. Gomez* (2004) 117 Cal.App.4th 531, 541; *United States v. Mayo* (9th Cir. 2005) 394 F.3rd 1271, 1276, fn. 7.)

“[W]here law enforcement authorities are cooperating in an investigation . . . , the knowledge of one is presumed shared by all.” *(Illinois v. Andreas* (1983) 463 U.S. 765, 722, fn. 5 [77 L.Ed.2nd 1003].)

“[W]hen police officers work together to build ‘collective knowledge’ of probable cause, the important question is not what each officer knew about probable cause, but how valid and reasonable the probable cause was that developed in the officers’ collective knowledge.” *(People v. Gomez, supra, quoting People Ramirez, supra, at p. 1555.)

A law enforcement dispatcher’s knowledge of specific facts not passed onto the officers in the field may also be considered as a part of the “collective knowledge” needed to substantiate a finding of a “reasonable suspicion” justifying a traffic stop. *(United States v. Fernandez-Castillo* (9th Cir. 2003) 324 F.3rd 1114, 1124.)
Information known to three separate officers, involving informant information from three informants of varying degrees of reliability, held to be sufficient to justify defendant’s arrest and the impounding, and searching, of his vehicle even though the arresting officer, himself, did not have enough personal knowledge upon which to justify a finding of probable cause.  (United States v. Jensen (9th Cir. 2005) 425 F.3rd 698.)

The collective knowledge doctrine is of two types:  (1) When a number of law enforcement officers are all working together with bits and pieces of information spread out among the individual officers, but which when all added altogether, amounts to reasonable suspicion or probable cause.  (2) When one or more officers with information amounting to reasonable suspicion or probable cause command a separate officer, who may know nothing about the nature of the investigation, to detain, arrest, and/or search.  There is some difference of opinion as to whether the first category is sufficient unless there is shown to be some communication among the officers involved.  The second category is universally accepted as coming within the rule.  (United States v. Ramirez (9th Cir. 2007) 473 F.3rd 1026; narcotics officers commanding a patrol officer to make a traffic stop:  The stop, detention, arrest and search all upheld.)

The “collective knowledge doctrine” does not apply unless (1) the separate law enforcement agents are working together in an investigation even though they may not have explicitly communicated to the other the facts that each has independently learned, or (2) unless one officer, with direct personal knowledge of all the facts necessary to give rise to a reasonable suspicion or probable cause, directs or requests another officer to conduct a stop, search, or arrest.  Some cases suggest that for the first rule to apply, there must also have been some communication between the two agents.  (United States v. Villasenor (9th Cir. 2010) 608 F.3rd 467, 475-476.)

Miscellaneous Rules:

Information used to establish probable cause need not be admissible in court:  E.g., “hearsay,” or even “double hearsay.”  (People v. Superior Court (Bingham) (1979) 91 Cal.App.3rd 463, 469; see also Hart v. Parks (9th Cir. 2006) 450 F.3rd 1059, 1066-1067.)

The fact that the information available to police officers “gave rise to a variety of inferences,” some of which support (the suspect’s)
innocence,” is also irrelevant. “(O)fficers may ‘draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” (Hart v. Parks, supra, at p. 1067.)

Similarly, the fact that if viewed in isolation, any single fact, independently, might not be enough to establish probable cause is unimportant. Probable cause is a determination made based upon “cumulative information” (often referred to as the “totality of the circumstances”). (Ibid.)

The information used to establish probable cause may be from the defendant’s own admissions which, without independent evidence of the corpus of the crime, will not be admissible in court. However, the likelihood of conviction is not relevant in establishing probable cause to arrest. (People v. Rios (1956) 46 Cal.2nd 297; defendant’s admission that he had injected drugs two weeks earlier sufficient to establish probable cause for the past possession of a controlled substance. Search incident to the arrest was therefore lawful.)

“Police officers ‘must be given some latitude in determining when to credit witnesses’ denials and when to discount them, and we’re not aware of any federal law . . . that indicates precisely where the line must be drawn.’ (Citation)” “Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense. (Citation)” (McSherry v. City of Long Beach (9th Cir. 2009) 584 F.3rd 1129, 1135-1136.)

Examples:

Probable cause to believe defendant had been in possession of narcotics found from the defendant’s own admissions which, without independent evidence of the corpus of the crime, would not be admissible in court. However, the likelihood of conviction is not relevant in establishing probable cause to arrest. (People v. Rios (1956) 46 Cal.2nd 297; defendant’s admission that he had injected drugs two weeks earlier (along with the arresting officer’s prior knowledge that defendant was a narcotics user and visible puncture marks on his arms) held to be sufficient to establish probable cause to arrest him for the past possession of a controlled substance. A subsequent search incident to the arrest was therefore lawful.)
Probable cause was found where the defendant was in the presence of a commercial quantity of drugs while in a vehicle coming over the International Border from Mexico, defendant was the sole passenger (other than the driver), there was a strong odor of gasoline in the vehicle (with the drugs being discovered in the gas tank), hiding drugs in a vehicle’s gas tank was known as a common method used by drug smugglers, and the driver lied about his immigration status. *(United States v. Carranza* *(9th Cir. 2002)* 289 F.3rd 634.)

Probable cause found where defendant was the backseat passenger in a minivan in which a commercial quantity of marijuana was found, and defendant acted nervously and avoided eye contact with a Customs Inspector. *(United States v. Hernandez* *(9th Cir. 2002)* 314 F.3rd 340.)

As the passenger in a vehicle crossing the U.S./Mexican border, ignoring a border inspector until another passenger was asked to move from a spot where contraband was later found to be hidden, at which time defendant attempted to distract the inspector by inviting him to a party, was sufficient to constitute probable cause for arrest as soon as the contraband was found. *(United States v. Juvenile (RRA-A)* *(9th Cir. 2000)* 229 F.3rd 737, 743.)

Where a large amount of money is found rolled up in a vehicle’s glove compartment, and five plastic glassine baggies of cocaine are found behind the center armrest of the backseat, with the armrest pushed up into the closed position to hide the contraband, such contraband being accessible to all the occupants of the vehicle, the arrest of all three subjects in the vehicle (driver, right front and rear seat passengers) was supported by probable cause. *(Maryland v. Pringle* *(2003)* 540 U.S. 366 [157 L.Ed.2nd 769].)

Conceding that most other circuits have ruled that the mere passing of a counterfeit note (a $100 bill in this case), when coupled with an identification of the person who passed the note, furnishes probable cause to arrest the individual identified as passing the note (Citations at pg. 970, infra.), the Ninth Circuit declined to decide the issue, finding that whether or not the arrest was illegal, the arresting officers were entitled to qualified immunity from civil liability. *(Rodis v. City and County of San Francisco* *(9th Cir. 2009)*, 558 F.3rd 964; reversing its prior finding (2007, 499 F.3rd 1094.) that the officers lacked probable cause to make the arrest.)
A minor (14 years old) was seized without sufficient probable cause when a detective interviewed him at school concerning a four-year-old’s allegations of child molest, when the victim’s account of the facts were inconsistent and conflicting. Further investigation should have been conducted given the problems with the minor’s story. (Stoot v. City of Everett (9th Cir. 2009) 582 F.3rd 910, 918-921; but qualified immunity supported summary judgment in the officer’s favor.)

Probable cause found where the six-year-old victim, on two occasions, positively identified defendant as her attacker, and then a third time in court under oath. She also identified the defendant’s father’s car as the vehicle used. A crime lab analysis of semen taken from the victim could not eliminate defendant (pre-DNA). Also, defendant’s modus operandi known to police from prior similar assaults matched. The fact that the victim’s initial description of the assailant varied from how defendant actually appeared did not mean that the officer did not have probable cause to arrest defendant. (McSherry v. City of Long Beach (9th Cir. 2009) 584 F.3rd 1129, 1135.)

“‘Mere propinquity to others independently suspected of criminal activity . . . does not, without more, give rise to probable cause.’” (United States v. Collins (9th Cir. 2005) 427 F.3rd 688, quoting Ybarra v. Illinois (444 U.S. 85, 91 [62 L.Ed.2nd 238].)

Test: Whether or not a person has been “arrested,” (i.e., “seized,”), under the Fourth Amendment, is determined by considering whether, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave and/or was about to go to jail. (See In re James D. (1987) 43 Cal.3rd 903, 913.)

“The standard for determining whether a person is under arrest is not simply whether a person believes that he is free to leave, see United States v. Mendenhall, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980), but rather whether a reasonable person would believe that he or she is being subjected to more than ‘temporary detention occasioned by border-crossing formalities.’ United States v. Butler, 249 F.3d 1094, 1100 (9th Cir. 2001).” (United States v. Hernandez (9th Cir. 2002) 314 F.3rd 430, 436; a border arrest and search case.)

There was no arrest where Federal Bureau of Investigations (FBI) agents did not tell defendant that he had the right to refuse to accompany them to the FBI office, but neither did they tell him that he had to go. The agents used no tools of coercion to force defendant to go with them; i.e., they asked him if he would come in to talk because they were investigating
cases, and he agreed to do so. Defendant was not in custody during the questioning until he confessed to the sexual assault and murder. In the time leading to the confession, a reasonable person in defendant's shoes would have thought that he or she could get up and go if declining to take part in further investigative questioning. (United States v. Redlightning (9th Cir. 2010) 624 F.3rd 1090.)

Unlawful Arrest: An arrest, if done without probable cause, is a violation of the Fourth Amendment as an unlawful seizure, and therefore unconstitutional. Any evidence recovered as a direct product of such an unlawful arrest will be subject to suppression. (See Smith v. Ohio (1990) 494 U.S. 541 [108 L.Ed.2nd 464].)

Confession obtained as the product of an illegal arrest is subject to suppression, absent attenuating circumstances. (Brown v. Illinois (1975) 422 U.S. 590, 603 [45 L.Ed.2nd 416, 427]; Kaupp v. Texas (2003) 538 U.S. 626 [155 L.Ed.2nd 814].)

However, when probable cause exists, but the defendant is later exonerated, there is no basis for the officers’ civil liability for an illegal arrest. “Probable cause arises when an officer has knowledge based on reasonably trustworthy information that the person arrested has committed a criminal offense. . . . ‘Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.’” (McSherry v. City of Long Beach (2009) 584 F.3rd 1129, quoting, at p. 1135, Gausvik v. Perez (9th Cir. 2003) 345 F.3rd 813, 818.)


A violation by a police officer of a state statute, such statute limiting the officer’s right to make a custodial arrest or a search, so long as not also in violation of the Fourth Amendment, does not result in the suppression of the resulting evidence unless mandated by the terms of the statute. While a state is empowered to enact more restrictive search and seizure rules, violation of those rules that are not also a Fourth Amendment violation, does not invoke
Also, prosecution of a defendant is not precluded merely because a defendant is abducted abroad for the purpose of prosecution, even if done in violation of an extradition treaty, such as when U.S. law enforcement agents forcibly abduct a foreign national in Mexico and bring him to the United States for prosecution.  (Alvarez-Machain (1992) 504 U.S. 655 [119 L.Ed.2nd 441]; see also Ker v. Illinois (1886) 119 U.S. 436 [30 L.Ed. 421]; Frisbie v. Collins (1952) 342 U.S. 519, 522 [96 L.Ed.2nd 541]; People v. Salcido (2008) 44 Cal.4th 93, 119-126.)

General Rule: “(T)he manner by which a defendant is brought to trial does not affect the government’s ability to try him.”  (United States v. Matta-Ballesteros (9th Cir. 1995) 71 F.3rd 754, 762.)

Exceptions: Where (1) the transfer of the defendant violated the applicable extradition treaty; or (2) the government engaged in misconduct of the most shocking and outrageous kind to obtain the defendant’s presence.  (United States v. Anderson (9th Cir. 2006) 472 F.3rd 662, 666.)

Because defendant had not been extradited, his argument that his removal from Panama to the United States was not in compliance with the Extradition Treaty, U.S.-Pan., May 25, 1904, 34 Stat. 2851 failed.  Moreover, the treaty did not prohibit the use of means besides extradition to obtain a defendant's presence in the United States.  The Government had not engaged in shocking and outrageous conduct so as to warrant dismissal of the criminal case against him.  The lies that an embassy official told Panamanian officials came after Panama had already decided to cooperate in returning defendant to the United States.  Moreover, defendant was deported after his passport was revoked.  The trial court properly denied dismissal based on its supervisory powers.  There was no evidence that defendant’s right to counsel was violated, and he had not developed his argument that international law was violated.  Finally, even assuming the indictment process was deficient for its reliance on unlawfully obtained evidence, that deficiency was cured when defendant was convicted by a jury after a trial that excluded all of the suppressed evidence.  (United States v. Struckman (9th Cir. 2010) 611 F.3rd 560, 569-575.)

While a state may impose stricter standards on law enforcement in interpreting its own state constitution (i.e., “independent state grounds”), a
Prosecution in federal court is guided by the federal interpretation of the Fourth Amendment and is not required to use the state’s stricter standards. (*United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 989-991, 997.)

An officer is entitled to qualified immunity from a civil allegation of unlawful arrest so long as at the time of the arrest (1) there was probable cause for the arrest, or (2) “it is reasonably arguable that there was probable cause for arrest—that is, whether reasonable officers could disagree as to the legality of the arrest such that the arresting officer is entitled to qualified immunity.” (*Rosenbaum v. Washoe County* (9th Cir. 2011) 663 F.3rd 1071; finding that because no Nevada statute applied to the plaintiff’s “scalping” of tickets to a fair, his arrest was unlawful.)

**Statutory Elements of an Arrest:**

P.C. § 834: The arrested person must be taken into custody in a case and in the manner authorized by law.

P.C. § 835: The arrest may be made by actual restraint of the person or the arrested person’s submission to authority.

P.C. § 835a: Reasonable force may be used to affect an arrest, prevent escape or overcome resistance. (See below)

P.C. §§ 834, 836, 837: An arrest may be made by a peace officer or a private person. (See below)


**Use of Force:**

*Reasonable Force:* Only that amount of *force* that is *reasonably necessary* under the circumstances may be used to affect an arrest, prevent escape, or overcome resistance. (*Headwaters Forest Defense v. County of Humboldt* (9th Cir. 2002) 276 F.3rd 1125.)

“The Fourth Amendment prohibition against *unreasonable seizures* permits law enforcement officers to use only such force to effect an arrest as is ‘objectively reasonable’ under the circumstances.” (Emphasis added; *Id.*, at p. 1130.)
Note: A civil rights action pursuant to 42 U.S.C. § 1983 was held to be proper against non-law enforcement employees of a private corporation that operated a federal prison under contract. (Pollard v. GEO Group, Inc. (9th Cir. 2010) 607 F.3rd 583.)

“A police officer may use force, including blocking a vehicle and displaying his or her weapon, to accomplish an otherwise lawful stop or detention as long as the force used is reasonable under the circumstances to protect the officer or members of the public or to maintain the status quo.” (People v. McHugh (2004) 119 Cal.App.4th 202, 211.)

The use of force to affect an arrest is evaluated in light of the Fourth Amendment’s prohibition on unreasonable seizures. (Graham v. Connor (1989) 490 U.S. 386 [104 L.Ed.2nd 443].)

A seizure is a “governmental termination of freedom of movement through means intentionally applied.” (Jensen v. City of Oxnard (9th Cir. 1998) 145 F.3rd 1078, 1083.)

This includes the accidental use of the wrong weapon; e.g., accidentally using a firearm when the officer intended to use a Taser. (Torres v. City of Madera (9th Cir. 2008) 524 F.3rd 1053.)

“(A)cts by which cruel and sadistic purpose to harm another would be manifest” may also be a violation of the Eighth Amendment’s proscription on “cruel and unusual” punishment. (Watts v. McKinney (9th Cir. 2005) 394 F.3rd 170; kicking a prisoner in the genitals.)

The reasonableness of the force used to affect a particular seizure is determined by a “careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interest at stake.” (Graham v. Connor, supra, at p. 396 [104 L.Ed.2nd at p. 455], quoting Tennessee v. Garner (1985) 471 U.S. 1, 8 [85 L.Ed.2nd 1, 7]; Jackson v. City of Bremerton (9th Cir. 2001) 268 F.3rd 646.)

The use of excessive force on a prison or jail inmate is an Eighth Amendment “cruel and unusual punishment” issue. Also, relevant inquiry is not the extent of the injury that results, but rather the degree of force used. (Wilkins v. Gaddy (Feb. 22, 2010) ___ U.S. ___ [130 S.Ct. 1175; 175 L.Ed.2nd 995].)
Use of a Taser on an irate, but unarmed person stopped for a traffic violation, absent the person posing an immediate threat to safety, resisting arrest, or attempting to escape, is unreasonable and grounds for civil liability. The officers, however, were entitled to qualified immunity the issue being one that is as of yet settle in the law. (Bryan v. McPherson (9th Cir. 2010) 630 F.3rd 805.)

The use of a Taser to subdue non-threatening, although uncooperative, suspects, depending upon the circumstances, absent a threat to the safety of the officers or others, may constitute excessive force and a Fourth Amendment violation. (Mattos v. Agarano (9th Cir. 2011) 661 F.3rd 433: Two cases; one involving a Tasing of the victim in a domestic violence situation where she was the victim, and the other being of an uncooperative driver who refused to sign a traffic citation. Both cases resulted in a finding of a Fourth Amendment excessive force violation, but with qualified immunity for the officers, the incidents happening before there was any relevant case law.

The Court cited three prior cases, being the only federal cases on the issue, where it had been held that the use of a Taser was not a Fourth Amendment violation; i.e., Russo v. City of Cincinnati (6th Cir. 1992) 953 F.2nd 1036; Hinton v. City of Elwood (10th Cir. 1993) 997 F.2nd 774; and Draper v. Reynolds (11th Cir. 2004) 369 F.3rd 1270. These three cases, respectively, involved officers being attacked by a suicidal, homicidal, mental patient who was armed with two knives, a violently resisting suspect who was flailing at, kicking, and biting the arresting officers, and a lone officer being confronted by an angry, confrontational, and agitated truck driver who refused five times to produce certain documents as he paced back and forth, yelling at the officer. (Id., at pp. 446-448.)

The use of pepper spray and a baton on a non-combative, albeit uncooperative, citizen during a traffic stop is excessive force and a Fourth Amendment violation. (Young v. County of Los Angeles (9th Cir. 2011) 655 F.3rd 1156.)

The use of a reasonable amount of force necessary in handcuffing and searching the plaintiff during a lawful arrest is not a battery. (Fayer v. Vaughn (9th Cir. 649 F.3rd 1061,1065.)
Factors to consider in determining the amount of force that may be used include:

- The severity of the crime at issue;
- Whether the suspect posed an immediate threat to the safety of the officers or others;
- Whether the suspect was actively resisting arrest or attempting to evade arrest by flight; and
- Any other exigent circumstances present at the time.

(Bell v. Wolfish (1979) 441 U.S. 520 [60 L.Ed.2nd 447]; Chew v. Gates (9th Cir. 1994) 27 F.3rd 1432, 1440-1441, fn. 5; Bryan v. MacPherson (9th Cir. 2010) 630 F.3rd 805; Espinosa v. City and County of San Francisco (9th Cir. 2010) 598 F.3rd 528, 537; Mattos v. Agarano (9th Cir. 2011) 661 F.3rd 433, 441; Young v. County of Los Angeles (9th Cir. 2011) 655 F.3rd 1156, 1163.)

Examples:

Use of Pepper Spray or Other Chemical Irritants:

The use of pepper spray on non-violent demonstrators was determined to be excessive where there were less intrusive alternatives. (Headwaters Forest Defense v. County of Humboldt (9th Cir. 2002) 276 F.3rd 1125.)

It has been held that squirting pepper spray randomly into a crowd of demonstrators where there was insufficient cause to believe the demonstrators posed an immediate threat to the safety of the officers or others might be excessive and expose the offending police officers to civil liability. (Lamb v. Decatur (C.D.Ill. 1996) 947 F.Supp. 1261.)

However, the use of a “chemical irritant” against party-goers who are impeding a lawful arrest and fighting with law enforcement officers, particularly after a warning, was not improper, or excessive. (Jackson v. City of Bremerton (9th Cir. 2001) 268 F.3rd 646, 651-653.)

The use of pepper spray on fighting prison inmates in a maximum security prison, in an attempt to stop the fight, was held to be reasonable, although the failure to provide
medical attention to other inmates who might also have been affected by the pepper spray vapors, showing a "deliberate indifference" to their health, will subject correctional authorities to potential civil liability. (*Clement v. Gomez* (9th Cir. 2002) 298 F.3rd 898.)

The use of pepper spray and a baton on a non-combative, albeit uncooperative, citizen during a traffic stop is excessive force and a *Fourth Amendment* violation. (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3rd 1156.)

See also *Forrester v. City of San Diego* (9th Cir. 1994) 25 F.3rd 804; where the use of "pain compliance" to arrest passively resistant demonstrators was upheld as reasonable, in that it was used only after a warning, was not applied any more than necessary to gain compliance, and was something that could be ended instantaneously when the protestor submitted.

Use of “less-lethal” cloth-cased beanbag shot against an unarmed, mentally deranged suspect, particularly when not warned first, may be excessive. (*Deorle v. Rutherford* (9th Cir. 2001) 242 F.3rd 1119.)

Pointing a gun at close range at an unarmed, unresisting suspect who is only being detained, is probably excessive, and could result in civil liability. (*Robinson v. Solano County* (9th Cir. 2002) 278 F.3rd 1007.)

“(P)ointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force.” *Espinosa v. City and County of San Francisco* (9th Cir. 2010) 598 F.3rd 528, 538.

Similarly, pointing a firearm at a suspect while he’s being arrested when it is apparent that the arrestee is not a threat to officer safety is excessive force sufficient to create civil liability. (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3rd 752, 776-777.)

A SWAT team holding children at gunpoint after officers gained control of a situation is unreasonable, and could result in civil liability. (*Holland v. Harrington* (10th Cir. 2001) 268 F.3rd 1179.)

The use of reasonable force in extracting blood, when done in a medically approved manner, is lawful. (*Ritschel v. City of
When a court analyzes excessive force claims, the initial inquiry is whether the police officer's actions were objectively reasonable in light of the facts and circumstances confronting him. A police officer had probable cause to arrest a suspect for being under the influence of a controlled substance or for disorderly conduct where the officer observed the suspect kicking the door to a police station for no apparent reason, the suspect disobeyed commands to stop, and when he was verbally unresponsive, perspiring heavily, and had bloodshot eyes. Whether a particular use of force was objectively reasonable depends on several factors including the severity of the crime that prompted the use of force, the threat posed by a suspect to the police or to others, and whether the suspect was resisting arrest. An arresting officer’s use of a control hold on an arrestee in order to place him in handcuffs was objectively reasonable and thus did not support excessive force claim; the officer had probable cause to arrest, the arrestee was behaving erratically, and the arrestee spun away from the officer and continued to struggle after officer told him to calm down. Detention of the arrestee after the arrest did not rise to the level of excessive force even though the officers positioned the arrestee on his stomach for approximately 90 seconds, then positioned him on his side, and failed to perform emergency resuscitation on the arrestee after the arrestee kicked and struggled so that the brief restraint on his stomach was necessary to protect the officers and the arrestee himself, the officers monitored the arrestee, and they called for an ambulance as soon as they noticed that arrestee was breathing heavily. Just as the Fourth Amendment does not require a police officer to use the least intrusive method of arrest, neither does it require an officer to provide what hindsight reveals to be the most effective medical care for an arrested suspect.

Five deputies holding down a resisting criminal defendant for the purpose of obtaining his fingerprints, in a courtroom (but out of the jury’s presence), where there were found to be less violent
alternatives to obtaining the same evidence, is force that “shocks the conscience” and a violation of the defendant’s **Fourteenth Amendment** due process rights. (*People v. Herndon* (2007) 149 Cal.App.4th 274; held to be “harmless error” in light of other evidence and because defendant created the situation causing the force to be used.)

An officer used a Taser to subdue the plaintiff after he was stopped for a seat belt violation. The Taser, model X26, using compressed nitrogen to propel a pair of “probes” (i.e., aluminum darts tipped with stainless steel barbs connected to the X26 by insulated wires) at its target, was held to be a form of “non-lethal force,” constituting an “intermediate or medium, though not insignificant, quantum of force.” (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3rd 805.)

Plaintiff was obviously irate, yelling expletives and other “gibberish,” and hitting his thighs, while dressed only in boxer shorts and tennis shoes. Plaintiff got out of his car after being ordered to stay in it. He also may have taken a step towards the officer although he was still 15 to 25 feet away from him. Use of the Taser on the plaintiff, who never verbally threatened the officer nor made any attempt to flee, was held to be excessive under these circumstances. (*Bryan v. MacPherson, supra.*)

Officers had reasonable cause under the Washington statutes to take plaintiff for a mental evaluation on the basis of her paranoid comments to the officers and the 911 reports that she had been hiding under a car with her son, screaming that someone was trying to kill her and that she would kill herself. The officers’ use of force in arresting and detaining her was reasonable. There was no genuine dispute from the evidence that she posed a threat to herself, her neighbors, and the officers. The evidence was undisputed that she was actively resisting arrest. (*Luchtel v. Hagemann* (9th Cir. 2010) 623 F.3rd 975.)

See “**Deadly Force;**” below.

**Duty to Warn:**

The Ninth Circuit Court of Appeal has held a number of times that where it is possible to do so, the officer must warn a person before applying force, at least when the force is likely to cause injury. (*Deorle v. Rutherford* (9th Cir. 2001) 242 F.3rd 1119, 1284,
beanbag: *Bryan v. MacPherson* (9th Cir. 2010) 630 F.3rd 805; Taser.)

**Applicable Statutes:**

**P.C. § 692:** Lawful resistance to the commission of a public offense may be made:

1. By the party about to be injured;
2. By other parties.

See also **CALCRIM, # 3470,** “Self-Defense and Defense of Another.”

A defendant has a right of self-defense if he “reasonably believed that he was in imminent danger of suffering bodily injury” through the application of unreasonable force applied by a person attempting to make a citizen’s arrest. *(People v. Adams* (2009) 176 Cal.App.4th 946.)*

“Self-defense” does not justify an assault absent an “immediate threat of unlawful force, and the need for the action to be commensurate with the threat, with no more force used than reasonably necessary to meet it.” Harsh, insulting, nor demeaning words alone are insufficient to trigger the right to use self-defense in return. *(United States v. Urena* (9th Cir. 2011) 659 F.3rd 903, 906-907; being called a “bitch” hours earlier did not justify a preemptive strike by defendant.)*

**P.C. § 693:** *Party about to be injured;* circumstances in which force is authorized: By the party, in what cases and to what extent:

1. To prevent an offense against his person, or his family, or some member thereof.
2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

See also **CALCRIM, # 3470,** “Self-Defense and Defense of Another.”

**P.C. § 694:** *Other Parties;* circumstances in which force is authorized: Any other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense.
P.C. § 834a: “If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.”

It is illegal to resist any arrest or detention by a peace officer, even if it is determined to be an illegal arrest or detention. *(Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321.) The person illegally arrested or detained has a civil remedy against the offending officer(s). (See 42 U.S.C. § 1983)

P.C. § 835: “The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.”

P.C. § 835a: “Any peace officer who has reasonable cause to believe a person to be arrested has committed a public offense may use reasonable force to affect the arrest, to prevent escape, or to overcome resistance.”

An officer is not required to desist in his or her efforts merely because the accused offers some resistance. *(People v. Hardwick* (1928) 204 Cal. 582, 587.)

Use of excessive force by an officer gives the arrestee the right to use self-defense, and negates the element of “acting in the performance of his or her duties” for any potential charge where this element must be proved. (E.g.; P.C. §§ 148(a), 243(b) & (c), and 245(c) & (d))

An officer who uses excessive force is subject to prosecution for a felony (P.C. § 149) and/or, if the victim is a prisoner and the officer is guilty of “willful inhumanity or oppression towards (the) prisoner,” a $4,000 fine and removal from office (P.C. § 147), in addition to any other applicable assault or battery violations.

P.C. § 843: “When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either flees or forcibly resists, the officer may use all necessary means to effect the arrest.”
P.C. § 844: “To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.”

Note: This is California’s “knock and notice” statute, for making arrests. (See “Knock and Notice,” below)

P.C. § 845: “Any person who has lawfully entered a house for the purpose of making an arrest, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.”

P.C. § 846: “Any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken.”

P.C. § 490.5(f)(2): A merchant, library employee or theater owner may use a reasonable amount of non-deadly force necessary to protect himself and to prevent escape or prevent loss of tangible or intangible property.

Use of Deadly Force:

Causing Death: When the use of force results in the death of another person, a “homicide,” or a “killing of a human being by another human being,” has occurred. (People v. Antick (1975) 15 Cal.3d 79, 87.)

See CALCRIM, # 500, “Homicide: General Principles.”

“Deadly Force Defined:” “Force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury.” (Emphasis added; See Model Penal Code § 3.11(2) (1962))

The Ninth Circuit Court of Appeal had previously held that “deadly force,” when evaluating the use of force by a law enforcement agency through the use of a police dog, should be defined as: “Force which is reasonably likely to cause
(or which ‘had a reasonable probability of causing’) death.” (Vera Cruz v. City of Escondido (9th Cir. 1997) 139 F.3rd 659, 663; use of a police dog is not deadly force.)

E.g.: Use of a police dog to bite and hold a potentially dangerous fleeing felon for up to a minute, until the arresting officer could insure that the situation was safe, did not constitute the use of “deadly force,” and was therefore not a violation of the Fourth Amendment (seizure), despite the fact that the suspect’s arm was severely injured by the dog. (Miller v. Clark County (9th Cir. 2003) 340 F.3rd 959.)

The above, however, was a minority opinion. As a result, the Ninth Circuit has recently changed its mind, adopting the majority rule, agreeing that even in the use of a police dog, “deadly force” should be defined as “force that creates a substantial risk of death or serious bodily injury.” (Smith v. City of Hemet (9th Cir. 2005) 394 F.3rd 689.)

Note: The Ninth Circuit Court of Appeal further held in Smith that the defendant pleading guilty to resisting arrest, per P.C. § 148(a)(1), does not preclude him from suing the officers for using unreasonable force so long as the officer’s legal actions can be separated from his use of unreasonable force. The California Supreme Court later ruled in Yount v. City of Sacramento (2008) 43 Cal.4th 885, that it is not necessary to find the officers’ lawful actions divisible from their use of unreasonable use of force in order for the criminal defendant to be guilty of resisting arrest and still sue. Based upon this theory, the Ninth Circuit found that a criminal defendant, even after pleading guilty to resisting arrest per P.C. § 148(a)(1), may sue the officer for using unreasonable force in a continuous course of action so long as at least part of the officer’s actions were lawful. (Hooper v. County of San Diego (9th Cir. 2011) 629 F.3rd 1127.) Both Smith and Hooper are dog bite cases.

However, the use of a police dog does not necessarily constitute the use of deadly force. It depends upon the circumstances of the case in question. In such a case, the issue for a civil jury is to merely determine whether the
force used was reasonable under the circumstances. 


**Non-Criminal Homicides:** Not all homicides, however, are criminal. The non-criminal homicides are commonly grouped into two general categories; “excusable” (P.C. § 195; when committed by “accident or misfortune”) and “justifiable” (P.C. §§ 196 et seq.), when authorized by law.


The use of *deadly force*, and the resulting killing of a human being, may be “justifiable” (i.e., not illegal) when committed as authorized by statute, and as limited by case law.

**Applicable Statutes:**

**P.C. § 196:** Homicide is *justifiable* when committed by *public officers* and those acting by their command in their aid and assistance, when:

1. In obedience to any judgment of a competent court; or
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or
3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with a felony, and who are fleeing from justice or resisting such arrest.


**P.C. § 197:** Homicide is also *justifiable* when committed by *any person* in any of the following situations:
1. When resisting any attempt to murder, commit a felony, or to do great bodily injury upon any person; or
2. When committed in defense of habitation, property or person, at least in cases of violent felonies; or
3. When committed in defense of person, or of a wife or husband, parent, child, master, mistress, or servant of such person, at least in cases of violent felonies; or
4. When necessarily committed in attempting to apprehend any person for any felony, or in suppressing any riot, or in keeping and preserving the peace.

See also CALCRIM # 508: “Justifiable Homicide: Citizen Arrest (Non-Peace Officer),” and # 509: “Justifiable Homicide: Non-Peace Officer Preserving the Peace.”

Limitations: In reading these statutes (P.C. §§ 196 & 197), a literal interpretation would seem to indicate the conclusion that killing a suspect in any felony situation, even if only a property offense, to prevent the commission of a felony against a person, or to arrest or stop any fleeing felony suspect, nonviolent as well as violent, is lawful.

Forcible and Atrocious Crime: Although maybe true at one time, modern case law no longer allows such a liberal application of the justifiable homicide defense. Today, the use of deadly force is specifically limited to defending against, or in the attempt to arrest someone, for “forcible and atrocious” crimes only. (People v. Ceballos (1974) 12 Cal.3d 470, 478; Tennessee v. Garner (1985) 471 U.S. 1, 12-15 [85 L.Ed.2nd 1, 10-12]; People v. Martin (1985) 168 Cal.App.3rd 1111, 1124; and CALCRIM # 509: “Justifiable Homicide: Non-Peace Officer Preserving the Peace.”

History: The wording in the statutes, referring to felonies seemingly without limitation, comes from the “Common Law” which, in its early history, made all felonies, of which there were only a few, capital offenses.

The Common Law justification for this rule has been quoted, for historical value only, by more
recent cases: “Ordinarily, an officer or private person, in making an arrest for a felony, may use whatever force is reasonably necessary to overcome a resisting felon or to stop a fleeing felon, even to the extent of taking his life; and, if deadly force is used, the homicide is justifiable. The supportive theory is that “felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death.”” (See People v. Martin (1985) 168 Cal.App.3rd 1111, 1115.)

Today, with the law vastly expanded, there are many non-violent, non-capital felonies for which deadly force is not an appropriate response. (People v. Ceballos, supra; Tennessee v. Garner, supra.)

The Fourth Amendment: The restrictions on the use of deadly force have their genesis in the United States Constitution. A Fourth Amendment “seizure” occurs whenever “there is a governmental termination of freedom of movement through means intentionally applied.” (Brower v. Inyo (1989) 489 U.S. 593, 597 [103 L.Ed.2nd 628, 635].)

“The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable.” (Emphasis added; Tennessee v. Garner, supra, at p. 11 [85 L.Ed.2nd at p. 9].)

Similarly, the indiscriminate use of a “booby trap” (a felony, per P.C. § 12355) (or a “trap gun,” a misdemeanor per Fish & Game Code, § 2007), set up in the house or elsewhere to ward off expected intruders, has been held to constitute an illegal use of force which, by its very nature, cannot be limited to those trespassers who constitute a threat of death or great bodily injury. (People v. Ceballos, supra.)

See CALCRIM # 500 et seq.

“Forcible and Atrocious Crime,” Defined: A “forcible and atrocious crime,” warranting the use of deadly force; “is any felony that by its nature and the manner of its
commission threatens, or is reasonably believed by the “defendant” (i.e., the victim of an assault who uses deadly force in response, and who is now being charged with a homicide) to threaten life or great bodily injury so as to instill in him or her a reasonable fear of death or great bodily injury.” (Tennessee v. Garner, supra.)

Forcible and atrocious crimes have been held to include murder, rape, robbery (at least, when the suspect is armed) and mayhem. (People v. Ceballos (1974) 12 Cal.3rd 470.)

Depending upon the circumstances, they might also include the so-called “inherently dangerous felonies” (with the exception of burglary; discussed below) listed in the “felony murder” statute; i.e., arson, carjacking, kidnapping, train wrecking, torture, felony child molest and other forcible sex offenses, and murder perpetrated by means of discharging a firearm from a motor vehicle with the intent to inflict death. (See P.C. § 189)

Viable arguments might be made to include other felonies as well, depending upon the circumstances of an individual case.

Similarly, contrary to a literal reading of the justifiable homicide statutes (e.g., P.C. § 197.2), killing someone in defense of property, even one’s own home (but see P.C. § 198.5, below), when not provoked by a threat of death or serious bodily harm to any person, is probably not justifiable. (People v. Ceballos, supra.) (But, see P.C. § 198.5, below.)

Although a trespasser may be physically ejected, using whatever non-deadly force is reasonably necessary under the circumstances should he or she refuse to leave when requested, killing the nonviolent trespasser is only likely to leave the landowner, who thought he had a right to defend his property interests at all costs, facing possible civil and criminal penalties. (People v. Corlett (1944) 67 Cal.App. 27, 35-36; CALCRIM # 506: “Justifiable Homicide: Defending Against Harm to Person with Home or on Property.”
Burglary of a Residence was considered at Common Law to be a dangerous felony. Modernly, however, burglary is not normally considered a forcible and atrocious crime, at least where the character and manner of the burglary does not reasonably create a fear of death or great bodily harm to any person within the home. (People v. Ceballos (1974) 12 Cal.3rd 470, 479.)

P.C. § 198.5: However, California has enacted a statutory presumption that a resident of a home is in fact in reasonable fear of death or great bodily injury to himself, his family, or any member of the household, when someone, not a member of the family or household, has forcibly and unlawfully entered the residence, thus legalizing the resident’s use of deadly force within the residence, absent evidence tending to rebut the presumption. (People v. Owen (1991) 266 Cal.App.3rd 996, 1003-1004.)

This presumption, however, is rebuttable. Should the homeowner have known under the circumstances that the burglar was not a threat, he might very well be criminally and civilly liable for using deadly force against the intruder. (See People v. Owen, supra, at pp. 1003-1007; and CALCRIM # 506 (‘Justifiable Homicide: Defending Against Harm to Person Within Home or on Property.’))

Federally, it is not necessary for a trial court to instruct the jury that: “In the home, the need for self-defense and property defense is most acute.” The standard federal self-defense jury instructions (9th Cir. Model Crim. Jury Instr. 6.7) are sufficient. (United States v. Morsette (9th Cir. 2010) 622 F.3rd 1200.)

Self-Defense: A personal assault which itself is not sufficient to cause a reasonable apprehension of death or great bodily injury, even if the assault constitutes a felony, is insufficient to justify the use of deadly force against the assailant. “(T)he felony contemplated by the (justifiable homicide) statute is one that is more dangerous than a personal assault.” (People v. Jones (1961) 191 Cal.App.2nd 478, 481-482; and see P.C. §§ 197.1, 197.3, above.)
See CALCRIM # 500 et seq.

Any person, including a peace officer, may use deadly force against another when the circumstances reasonably create a fear of imminent death or serious bodily harm to the person, and the use of deadly force reasonably appears necessary to resist the threat. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Hardin* (2000) 85 Cal.App.4th 625, 629-630; *People v. Harris* (1971) 20 Cal.App.3rd 534, 537.)

In defending oneself or another, deadly force may only be used in response to the illegal application of deadly force from the aggressor. Thus, “a misdemeanor assault must be suffered without the privilege of retaliating with deadly force.” (*People v. Jones*, *supra*, at p. 482; *People v. Clark* (1982) 130 Cal.App.3rd 371, 380.)

In order for the defense of self-defense to apply, it must be shown that there existed:

- A reasonable belief that the use of force was necessary to defend oneself against the immediate use of unlawful force; and

- The use of no more force than was reasonably necessary in the circumstances. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065; and see *United States v. Biggs* (9th Cir. 2006) 441 F.3rd 1069; rejecting the argument that the defendant must also show that there were no reasonable alternatives to the use of force.)

*E.g.:* An assault by fists does not justify the person being assaulted in using a deadly weapon in response unless that person reasonably believes that the assault is likely to result in the infliction of death or great bodily injury.

Deadly force is justified only when the apparent peril is *imminent*; meaning at the very time of the deadly response. A threat of future harm does not
legally justify the application of deadly force in self-defense. (But see “Fleeing Felon,” below.)

“Imminent peril” refers to the situation which, from all reasonable appearances, must be instantly dealt with. (People v. Aris (1989) 215 Cal.App.3rd 1178, 1187-1188; In re Christian S. (1994) 7 Cal.4th 768-783.)

The homicide of the defendant’s grandfather was not mitigated (which would have reduced the offense to a voluntary manslaughter under a “heat of passion” theory) by the fact that the grandfather had been overly critical and “mean” to the defendant in the past. (People v. Kanawyer (2003) 113 Cal.App.4th 1233.)

A person using a firearm to scare off attacking dogs may have a viable self-defense argument. (People v. Lee (2005) 131 Cal.App.4th 1413; conviction for discharging a firearm with gross negligence reversed for failure of the court to allow a self-defense argument.)

A convicted felon, charged with being a felon in possession of a firearm (P.C. §§ 29800 et. seq.; formerly § 12021), may use the defense of self-defense where he grabbed a firearm when confronted with an imminent danger in those instances where “the firearm only became available during an emergency and was possessed temporarily in response to the emergency and there was no other means of avoiding the danger,” and the firearm was then immediately thereafter transported or given to law enforcement. (People v. King (1978) 22 Cal.3rd 12, 24; see also P.C. § 29850, formerly P.C. § 12021(h).)

Similarly, an inmate of a penal institution has a potential defense to a P.C. § 4502 (Inmate in Possession of a Weapon) charge when the possession was in response to an imminent danger, where there is no opportunity to seek the help of authorities, and the weapon is given to authorities as
soon as the danger has passed. (People v. Saavedra (2007) 156 Cal.App.4th 561, 568-570.)

But note that the danger has to be imminent. A threat of some future harm is not justification for possessing a prohibited weapon in violation of P.C. § 4502. (People v. Velasquez (1984) 158 Cal.App.3rd 418, 420.)

“Bare fear,” or the killer’s subjective fear, by itself, is not sufficient to justify self-defense or the defense of others.

Not only must the person attempting to exercise the right to self-defense or defense of others honestly feel the need to use force, but the circumstances must be sufficient to excite the fears of a reasonable person as well. (People v. Sonier (1952) 113 Cal.App.2nd 277, 278; People v. Lopez (1948) 32 Cal.2nd 673, 675; People v. Williams (1977) 75 Cal.App.3rd 731, 739; P.C. § 198; CALJIC # 5.14; “Homicide in Defense of Member of Family.”)

“Apparent necessity” is all that is required. As long as the person is acting reasonably, he may act on appearances even though it is later discovered that there in fact was no real need for self-defense. (People v. Dawson (1948) 88 Cal.App.2nd 85, 96; People v. Pena (1984) 151 Cal.App.3rd 462, 475-478.)

For example, in using deadly force to prevent a residential burglary, whether or not the deceased actually had the intent to commit a burglary is irrelevant to the issue of whether the person who killed him could legally use deadly force. (People v. Walker (1973) 32 Cal.App.3rd 897.) The issue will be what the person who applied the force reasonably believed the circumstances to be.

However, an honest but unreasonable belief, while insufficient to establish a claim of
self-defense in a murder case, might be enough to negate malice aforethought and thus reduce murder to a non-statutory voluntary manslaughter, sometimes referred to as “imperfect self-defense.” (People v. Flannel (1979) 25 Cal.3d 688, 674; People v. Uriarte (1990) 223 Cal.App.3d 192; see also People v. Saille (1991) 54 Cal.3d 1103, 1107, fn. 1; McNeil v. Middleton (9th Cir. 2005) 402 F.3d 920.)

The California Supreme Court has held that such an “honest, but unreasonable belief” theory applies to the commission of a homicide in the defense of a third person as well. (See People v. Randle (2005) 35 Cal.4th 987.)

However, the theory of an “imperfect self-defense” is not available where the defendant’s acts are based only upon his own delusions. (People v. Mejia-Lenares (2006) 135 Cal.App.4th 1437.)

The “imperfect self-defense” theory did not apply where the victim had the right to use force to try to escape an unlawful, hour’s long imprisonment and to protect himself and the other victim when defendant’s accomplice attacked the other victim in another room. Thus, when the victim charged defendant upon the sound of the accomplice snapping the other victim’s neck, defendant had the option of fleeing, stepping out of the way, or taking what he had coming to him. He did not have the right to defend himself from the victim’s lawful resort to self-defense and the defense of the other victim. (People v. Frandsen (2011) 196 Cal.App.4th 266.)

Original Aggressor, or One Engaged in Mutual Combat, Claiming Self-Defense: Goading another into a deadly quarrel also imposes some restrictions on the use of self-defense.
The one who initiates a quarrel with the intention of forcing a deadly response in an attempt to justify the use of deadly force in return cannot claim self-defense when he kills his victim. *(People v. Garnier* (1950) 95 Cal.App.2nd 489, 496.)*


Similarly, a person who starts the confrontation with an unjustifiable attack or who voluntarily engages in a fight or mutual combat, and suddenly finds himself losing, cannot claim self-defense unless he first attempts to withdraw from the affray and communicates that withdrawal to his adversary. *(People v. Bolton* (1979) 23 Cal.3rd 51, 68; P.C. § 197.3.)*

A jury instruction based upon this theory is erroneous when it infers that one engaged in mutual combat must be successful in communicating his intent to withdraw. It need only be shown that the defendant “*really and in good faith have endeavored to decline any further struggle . . . .”* *(People v. Quach* (2004) 116 Cal.App.4th 294, 300-303; see also P.C. § 197.3)*

“*Mutual Combat*” has a legal definition. It consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied agreement to fight. There must be evidence from which the jury could reasonably find that both combatants actually consented or intended to fight before the claimed occasion for self-defense arose.

Note, however, that a “public officer” does not lose his or her right of self-defense due to initiating a confrontation through the use of reasonable force to affect an arrest, prevent escape, or overcome resistance. (P.C. § 836.5(b))

Once the aggressor makes a good faith attempt at withdrawal, and attempts to inform his opponent of this fact, he regains his right to claim self-defense should the original victim continue the attack. (People v. Button (1895) 106 Cal. 628, 632-635; People v. Hecker (1895) 109 Cal. 451, 463-465.)

See CALCRIM # 3474: “Danger No Longer Exists or Attacker Disabled.”

An “original aggressor,” or a person engaged in “mutual combat,” may claim the right to self-defense if he first effectively communicates (or attempts to communicate) by words or conduct that he wants to both (1) stop the fighting and (2) is in fact stopping the fighting. (People v. Hernandez (2003) 111 Cal.App.4th 582.)

See People v. Nem (2003) 114 Cal.App.4th 160, at pp. 166-167, disagreeing with Hernandez’s conclusion that the word “inform,” in former CALJIC 5.54, was misleading because it necessarily caused a jury to believe that the original aggressor’s words were the only way to communicate an intent to withdraw.

If the one who originally had a right to self-defense continues the altercation after the
aggressor has broken off his assault and there is no longer imminent peril to the original victim, that victim cannot claim the defense when he catches and assaults the former aggressor. *(People v. Smith* (1981) 122 Cal.App.3rd 581, 590; *People v. Perez* (1970) 12 Cal.App.3rd 232, 236.)

See also **CALCRIM # 3474:**

"Danger No Longer Exists or Attacker Disabled."

However, if the original victim reasonably and in good faith feels that he must pursue his attacker in order to effectively secure himself from further danger, then self-defense is still applicable. *(People v. Hatchett* (1942) 56 Cal.App.2nd 20, 22.)

The pursuit, however, must not be motivated by revenge nor after the necessity for self-defense has ceased. *(People v. Finali* (1916) 31 Cal.App. 479; *People v. Conkling* (1896) 11 Cal. 616, 626.)

Also, if the original aggressor used less than deadly force, his intended victim may not respond with deadly force, and if he does, then the original aggressor has the right to use deadly force in self-defense. *(People v. Hecker, supra* at p. 464.)

On the other hand, the one originally attacked has no duty to attempt to withdraw. He may stand his ground and need not take advantage of an opportunity to escape from, or avoid another’s attack or any attempt to use deadly force against him. *(People v. Dawson* (1948) 88 Cal.App.2nd 85, 95; *People v. Gonzales* (1887) 71 Cal. 569, 578.)

Self-Defense is not available to a person charged with murder under the felony murder statute; i.e., one who kills another during the commission of one of the
dangerous felonies listed in the murder statute; P.C. § 189. The purpose of the “felony murder rule” is to deter even accidental killings by imposing strict liability on anyone who causes another’s death while committing any one or more of the specified felonies. (People v. Loustaunau (1986) 181 Cal.App.3d 163, 170.)

Neither self-defense nor defense of property is available to one who uses force to resist a lawful arrest or to deter a lawful entry upon one’s land. (See P.C. § 693)

**Burden of Proof**: Under federal law, it has been held that justification for possessing a firearm (otherwise illegal under 18 U.S.C. § 922(g)(1)) in self-defense is an affirmative defense for which the defendant must prove by a “preponderance of the evidence” the necessity for doing so. (United States v. Beasley (9th Cir. 2003) 346 F.3d 930.)

See also CALCRIM # 3471; “Right to Self-Defense: Mutual Combat or Initial Aggressor.”

**Fleeing Felon**: The use of “deadly force” to stop a “dangerous person” fleeing from the scene of a “forcible and atrocious crime,” or suspected of having committed such a crime, is legally justifiable. (See Tennessee v. Garner, (1985) 471 U.S. 1 [85 L.Ed.2d 1]; P.C. §§ 196.3, 197.4, above.)

See CALCRIM # 507: “Justifiable Homicide: By Public Officer.”

An officer may not use deadly force to apprehend a suspect in those circumstances where the suspect poses no immediate threat to the officer or others. But on the other hand, it is constitutionally reasonable to use deadly force to prevent an escape whenever an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. In making this decision, a court must consider:
(1) The severity of the crime at issue;
(2) Whether the suspect poses an immediate threat of serious physical harm to the officers or others; and
(3) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight. 

(\textit{Wilkinson v. Torres} (9th Cir. 2010) 610 F.3rd 546, 550-554.)

A “\textit{dangerous person}” is one who “poses a significant threat of death or serious bodily injury to the person attempting the apprehension or to others, or has committed a forcible and atrocious felony.” 

(\textit{People v. Martin} (1985) 168 Cal.App.3rd 1111, 1124.)

Police may use deadly force to stop an escaping violent felony suspect who would pose a substantial risk to others if apprehension is delayed. (\textit{Forrett v. Richardson} (9th Cir. 1997) 112 F.3rd 416; deadly force used to stop a “\textit{home invasion}” suspect who had previously shot and wounded a victim.)

While the commission of a violent crime in the immediate past is an important factor, it is \textit{not} justification for using deadly force “on sight.” (\textit{Harris v. Roderick} (9th Cir. 1997) 126 F.3rd 1189, 1203.)

See also \textit{Hopkins v. Andaya} (9th Cir. 1992) 958 F.2nd 881, 887; holding that an officer’s second use of deadly force was unreasonable even though the suspect had violently assaulted the officer a few minutes before, but by the time of the second use of deadly force, although he was advancing towards the officer, he was wounded and unarmed.

The force used must still be no greater than necessary under the circumstances. The use of so-called “\textit{less lethal}” (e.g., bean bag ammunition) force may still be deadly, and not necessarily appropriate despite the fact that the suspect upon which it is used is threatening violence. (\textit{Deorle v. Rutherford} (9th Cir. 2001) 242 F.3rd 1119; imposing
a duty to warn, where appropriate, before using potentially deadly force.)

Absent circumstances that elevate an incident into a dangerous felony assault, deadly force is not lawful in attempting to arrest a misdemeanor suspect. (People v. Wild (1976) 60 Cal.App.3rd 829, 832-833.)

_A high-speed pursuit_ may or may not allow for the use of deadly force, each case depending upon its individual circumstances. (Brosseau v. Haugen (2004) 543 U.S. 194 [160 L.Ed.2nd 583]; finding that an officer who shot a suspect who was attempting to flee in his vehicle did not have “fair notice” based upon the conflicting case law as to whether the force she used was excessive. She was therefore entitled to “qualified immunity” from civil suit.)

Ending a dangerous high speed vehicle chase with speeds in excess of 85 miles per hour, where the suspect was driving recklessly and forcing other motorists off the road, by bumping the suspect’s car and pushing him off the road severely injuring him, is reasonable force. Also, there is no duty to break off the chase. (Scott v. Harris (2007) 550 U.S. 372 [167 L.Ed.2nd 686].)

The Court held in _Scott_ that there was no special _Fourth Amendment_ standard for unconstitutional deadly force, but all that matters is whether the police officer’s actions were reasonable. (Id., at pp. 381-383; see also _Acosta v. Hill_ (9th Cir. 2007) 504 F.3rd 1323.)

Other federal circuits have approved the use of deadly force to halt a dangerous high-speed vehicular police pursuit, although under circumstances which, arguably, were more aggravated than in _Haugen_. See:
Scott v. Clay County (6th Cir. 2000) 205 F.3rd 867, 877: Shooting a fleeing felon whose reckless driving posed an immediate threat to the safety of officers and innocent civilians.

Smith v. Freeland (6th Cir. 1992) 954 F.2nd 343, 347-348: Shooting a fleeing misdemeanor who posed a danger to officers at a police roadblock when it appeared likely he would “do almost anything to avoid capture.”

Cole v. Bone (8th Cir. 1993) 993 F.2nd 1328, 1330-1333: Shooting a defendant fleeing in a truck when he posed a threat to travelers on a crowded highway.

Pace v. Capobriacco (11th Cir. 2002) 283 F.3rd 1275, 1281: Shooting a fleeing felon in a vehicle when it appeared likely he would continue to use his car aggressively during a police pursuit.

Deadly force may not be justified, however, in a “nonchalant,” or “rapid Sunday drive” speed pursuit where the driver was rammed twice (under circumstances that were contrary to CHP policy) and then shot six times without a prior warning and without a showing that the officer, or any other officer, was in immediate danger. (Adams v. Speers (9th Cir. 2007) 473 F.3rd 989.)

“(T)he harm resulting from failing to apprehend him does not (by itself) justify the use of deadly force to do so.” (Espinosa v. City and County of San Francisco (9th Cir. 2010) 598 F.3rd 528, 537; quoting Tennessee v. Garner (1985) 471 U.S. 1, 11-12 [85 L.Ed.2nd 1].)
The question is not whether an objectively reasonable officer would have believed it was constitutional to harm without a legitimate law enforcement objective, but whether such an officer would have believed, in the circumstances with which the officer was confronted, a legitimate law enforcement objective existed. In this case, where an officer shot a woman following a high-speed chase, the officer might have had a mistaken understanding as to whether a particular amount of force was legal in those circumstances. Nothing in the universe of cases prior to the officer’s conduct would have alerted him that his split-second decision in dealing with someone who had just led police on a dangerous high-speed chase and who was using her car as a weapon shocked the conscience. (A.D. v. Markgraf (9th Cir. 2011) 636 F.3rd 555; finding that the officer was entitle to qualified immunity from civil liability.)

A police officer’s use of deadly force is constitutional where an escaping suspect constitutes a threat of serious physical harm to officers or others. (Wilkinson v. Torres (9th Cir. 2010) 610 F.3rd 546, 550-554; attempts to flee in a stolen vehicle endangered two officers lying on the ground and/or standing nearby.)

Transferred Intent: In attempting to determine the legality of a claim of self-defense, and presumably the other legal justifications for committing a homicide, it is important to note that the doctrine of transferred intent applies.

E.g.: Accidentally shooting an innocent person while lawfully attempting to defend oneself from someone else’s use of deadly force is a “justifiable homicide,” there being no criminal intent. (People v. Mathews (1979) 91 Cal.App.3rd 1018, 1024; People v. Levitt (1984) 156 Cal.App.3rd 500, 507-508.)
Use of Deadly Force by Police Officers:

Attacking a police officer with a deadly weapon justifies the officer’s use of deadly force in response:

Where the suspect violently resisted arrest, physically attacked the officer, and grabbed the officer’s gun. (*Billington v. Smith* (9th Cir. 2002) 292 F.3rd 1177, 1185.)

Where a suspect, who had been behaving erratically, swung a knife at an officer. (*Reynolds v. County of San Diego* (9th Cir. 1996) 84 F.3rd 1162, 1168.)

Pointing a gun at a police officer. (See *Scott v. Henrick* (9th Cir. 1994) 39 F.3rd 912, 914.)

When the suspect attacked an officer with a rock and a stick. (*Garcia v. United States* (9th Cir. 1987) 826 F.2nd 806, 812.)

Defendant, acting in a bizarre manner, reported to have already assaulted someone, and apparently under the influence of drugs, holding a pen with its point facing toward the officers which “may inflict lethal force,” justified three officers holding him down while he was handcuffed. (*Gregory v. County of Maui* (9th Cir. 2008) 523 F.3rd 1103; suspect died of a heart attack while being held down.)

A police officer’s use of deadly force is constitutional where an escaping suspect constitutes a threat of serious physical harm to officers or others. (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3rd 546, 550-554; attempts to flee in a stolen vehicle endangered two officers lying on the ground and/or standing nearby.)

It was further held that the officer’s used of deadly force under these circumstances, where the officer did not act with an “intent to harm,” but rather with a “legitimate law enforcement objective,” did not deprive plaintiffs of their *Fourteenth Amendment*.  

138
due process right to “familial association” with the deceased.  *(Id., at pp. 554-555.)*

*However*, the mere fact alone that a person possesses deadly weapons does not justify the use of deadly force. *(Harris v. Roderick* *(9th Cir. 1997)* 126 F.3rd 1189, 1202.)*

See also *Curnow v. Ridgecrest Police* *(9th Cir. 1991)* 952 F.2nd 321, 324-325; holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot.

And *Ting v. United States* *(9th Cir. 1991)* 927 F.2nd 1504, 1508-1511; Use of deadly force held to be unreasonable when the suspect had already dropped his gun.

Possession of a pocket knife, which the deceased was threatening to cut his own throat but not brandishing it towards officers, resulting in the officers shooting and killing him after beanbag rounds failed to subdue him, may not have warranted the use of firearms (nor even the beanbag shotgun) and thus subjecting the officers to civil liability. *(Glenn v. Washington County* *(9th Cir. Dec. 27, 2011)* __ F.3rd __ [2011 U.S.App. LEXIS 25932; 2011 DJDAR 18401].)*

The reasonableness of the force used by a police officer must be judged from the perspective of a reasonable officer on the scene. Also, the court must allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. The ultimate question is whether an officer’s actions are objectively reasonable in light of the facts and circumstances confronting him, the force allowed under the circumstances encompassing a range of conduct. The availability of a less intrusive alternative will not, by itself, render an officer’s conduct as unreasonable. *(Wilkinson v. Torres* *(9th Cir. 2010)* 610 F.3rd 546, 550-554.)*

“(P)ointing a loaded gun at a suspect, employing the threat of deadly force, is use of a high level of force.” *Espinosa*
The use of a police dog may be “deadly force.” (Smith v. City of Hemet (2005) 394 F.3rd 689; overruling prior authority to the contrary and defining deadly force as “force that creates a substantial risk of death or serious bodily injury.”) But it depends upon the circumstances. (Thompson v. County of Los Angeles (2006) 142 Cal.App.4th 154.)

See “Deadly Force, Defined,” above.

When the fleeing felon was known to have shot a victim in the course of a burglary from which he was escaping, the use of deadly force to stop him is justified. (Forrett v. Richardson (9th Cir. 1997) 112 F.3rd 416, 420.)

A high-speed pursuit may or may not allow for the use of deadly force, each case depending upon its individual circumstances. (Brosseau v. Haugen (2004) 543 U.S. 194 [160 L.Ed.2nd 583]; finding that an officer who shot a suspect who was attempting to flee in his vehicle did not have “fair notice” based upon the conflicting case law as to whether the force she used was excessive. She was therefore entitled to “qualified immunity” from civil liability.)

Police officers involved in high speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless a person who is injured (i.e., the plaintiff in the resulting civil suit) can prove that the officer acted with a deliberate intent to harm. (Bingue v. Prunchak (9th Cir. 2008) 512 F.3rd 1169; see also V.C. § 17004.7.)

Pointing and “training” a firearm at a five-week-old infant while conducting a Fourth Waiver search is excessive, and a Fourth Amendment violation. (Motley v. Parks (9th Cir. 2005) 432 F.3rd 1072, 1088-1089.)

Ending a dangerous high speed vehicle chase with speeds in excess of 85 miles per hour, where the suspect was driving recklessly and forcing other motorists off the road, by bumping the suspect’s car and pushing him off the road severely injuring him, is reasonable force. Also, there is no
duty to break off the chase. (Scott v. Harris (2007) 550 U.S. 372 [167 L.Ed.2nd 686].)

The use of deadly force is lawful whenever an officer has a “reasonable belief” that defendant poses a threat of death or serious harm. However, this language does not negate the need for “probable cause” in that the later refers to the quantity of evidence required for such a reasonable belief. (Price v. Sery (9th Cir. 2008) 513 F.3rd 962.)

Shooting a person who had not yet been accused of any crime, did not appear to be a threat to the public, and could not escape, even though he had been uncooperative and refused to show his hands, held to raise questions of fact for a civil jury to decide whether the officers had used excessive force by shooting and killing him. (Espinosa v. City and County of San Francisco (9th Cir. 2010) 598 F.3rd 528. 537-538.)

The potential civil liability of an officer who shot a handcuffed prisoner, seated in the backseat of a patrol car, with a semiautomatic pistol, killing him, under the mistaken belief that she was using her stun gun, is an issue for a civil jury to decide. The question was whether her conduct in mistakenly applying deadly force was objectively unreasonable under the totality of the circumstances. Instead of finding that the circumstances forced her to make a split-second judgment about firing a weapon, a reasonable jury could conclude that her own poor judgment and lack of preparedness caused her to act with undue haste. (Torres v. City of Madera (9th Cir. 2011) 648 F.3rd 1119.)

See CALCRIM # 500 et seq.

**Legal Authority for Arrests:**

**Arrests by a Peace Officer:**

**P.C. §§ 834, 836:** A peace officer “may” make an arrest under the following circumstances:

- Pursuant to an arrest warrant; or
- Whenever the officer has reasonable (or probable) cause to believe the suspect has committed a crime; and
Whenever the officer has *reasonable* (or *probable*) cause to believe a crime has in fact been committed.

*Note* that only “*reasonable*” or “*probable*” cause is needed: The fact that the officer may be mistaken as to defendant’s guilt, of that a crime even occurred, is irrelevant so long as the arrest is made with probable cause to believe he is guilty and that a crime occurred. The arrest would still be lawful.

The use of the word “*may*” in the statute indicates that the officer is under no obligation to make an arrest. It is a matter of discretion whether or not, despite the existence of “probable cause,” an arrest will be made. An officer is not generally (absent a command to do so in a particular, applicable statute) required to arrest an individual despite the officer’s determination that an arrest could legally be made. *(Michenfelder v. City of Torrance* (1972) 28 Cal.App.3rd 202, 206-207; *Tomlinson v. Pierce* (1960) 178 Cal.app.2nd 112, 116.)

**P.C. § 150; “Posse Comitatus:”** A uniformed peace officer, or any peace officer described in P.C. §§ 830.1, 830.2(a), (b), (c), (d), (e), or (f), or 830.33(a), has statutory authority to command any “able-bodied” individual over the age of 18 to assist in an arrest. Refusing such a command is punishable by a fine of from $50 to $1,000.

In a domestic violence situation (see P.C. §§ 13700 et seq.), a peace officer:

* Must make a good faith effort to explain to the victim/witness of his or her right to make a private person’s arrest (P.C. § 836(b)), or

* When responding to a situation involving the violation of a domestic violence restraining or protective order (per Fam. Code, §§ 2040 et seq., 6200 et seq., or 7700 et seq.), or of a protective order issued pursuant to P.C. § 136.2 (Victim or Witness Intimidation), the peace officer him or herself must, absent exigent circumstances, make the arrest if, under the circumstances, if it is lawful to do so. *(P.C. §§ 836(c)(1), 13701(b)) (See “Misdemeanor ‘In The Presence’ Requirement,” below.)*
**Arrests by a Private Person:**

**P.C. §§ 834, 837:** A private person may make an arrest under the following circumstances:

- Whenever the person has *reasonable* (or *probable*) *cause* to believe the suspect has committed a crime, and
- Whenever a criminal offense *has in fact* been committed.

Per the above, while a private person may be mistaken as to who committed a particular crime, there is no room for error as to whether a crime actually occurred.

*Exception: P.C. § 490(f)(1):* A merchant, library employee, or theater owner may act upon *probable cause* that an offense is occurring in detaining a *shoplifter, book thief*, or someone who is attempting to *operate a video recording device* in a theater.

*Note:* the section refers to such a contact as a “detention,” as opposed to an arrest.

Private persons, like police officers, may summon others to assist in an arrest. (P.C. § 839) However, there is no penalty for a person refusing to help.

The private person may delegate to a peace officer his or her authority to actually perform the arrest for the person. (*People v. Sjosten* (1968) 262 Cal.App.2nd 539.)

A police dispatcher, being subjected to defendant’s numerous harassing telephone calls, may delegate to a police officer the responsibility to arrest the defendant for her. The offense, over the phone, was held to be in her presence. The arrest was timely in that officers responded immediately to where defendant was calling from and took him into custody. The arrest was held to be a lawful citizen’s arrest. (*People v. Bloom* (2010) 185 Cal.App.4th 1496.)

A private person making an arrest must, without unnecessary delay, take the person arrested before a magistrate or deliver him or her to a peace officer. (P.C. § 847)

In a *domestic violence* situation (see P.C. §§ 13700 et seq.), a peace officer *must* make a good faith effort to explain to the
victim/witness of his or her right to make a private person’s arrest (P.C. § 836(b))

The provision that a peace officer commits a felony should he or she refuse to take a subject who was arrested by a private citizen, even when the officer determines that the arrest was made without probable cause (P.C. § 142), was amended with the addition of subd. (c) which states that: “This section shall not apply to arrests made pursuant to Section 837,” i.e., a private person’s arrest.

Although taking a citizen’s arrestee when not supported by probable cause, as it was widely believed P.C. § 142 as previously written required, will not subject the officer to any civil liability in state court (Kinney v. County of Contra Costa (1970) 8 Cal.App.3rd 761, 767-769; Hamburg v. Wal-Mart Stores (2004) 116 Cal.App.4th 497, 503-504.), the Ninth Circuit Court of Appeal is of the opinion that the officer in such a situation is subject to federal civil liability. (Arpin v. Santa Clara Valley Transportation Agency (9th Cir. 2001) 261 F.3rd 912, 924-925.) The addition of subdivision (c), eliminating the requirement that an officer accept a prisoner arrested by a private citizen, avoids the dilemma of incurring federal civil liability while attempting to follow the dictates of a state statute.

But the rule remains that for an officer to allow a citizen to make a citizen’s arrest and then to take the suspect into custody when there is insufficient probable cause to justify the arrest, will subject the officer to potential federal civil liability. (Hopkins v. Bonvicino (9th Cir. 2009) 573 F.3rd 752, 774-776.)

The federal civil liability exists despite the fact that the officers are exempt from state civil liability in a citizen’s arrest situation. (Ibid.; and see P.C. § 847.)

The Stale Misdemeanor Rule applies to private person’s arrests as well. (See Green v. Department of Motor Vehicles (1977) 68 Cal.App.3rd 536; arrest made some 35 to 40 minutes after the observation held to be lawful; see also Ogulin v. Jeffries (1953) 121 Cal.App.2nd 211; 20 minute delay; arrest lawful.) (See below)

“In the Presence” requirement: Misdemeanors (and infractions) must have occurred in the private person’s (in the case of a private person’s arrest) presence. (P.C. §§ 836(a)(1), 837.1; Jackson v.
Superior Court (1950) 98 Cal.App.2nd 183; see also V.C. § 40300.)

A police dispatcher, being subjected to defendant’s numerous harassing telephone calls, may delegate to a police officer the responsibility to arrest the defendant for her. The offense, over the phone, was held to be in her presence. The arrest was timely in that officers responded immediately to where defendant was calling from and took him into custody. The arrest was held to be a lawful citizen’s arrest. (People v. Bloom (2010) 185 Cal.App.4th 1496.)

Note: P.C. § 836 is not restricted by its terms to adults. There is no authority for the argument that minors cannot also make citizen’s arrests, or that the phrase “private persons” is restricted to adults.

Out-of-State Officers in “Fresh Pursuit:”

P.C. § 852.2: “Any peace officer of another State, who enters this State in fresh pursuit, and continues within this State in fresh pursuit, of a person in order to arrest him on the ground that he has committed a felony in the other State, has the same authority to arrest and hold the person in custody, as peace officers of this State have to arrest and hold a person in custody on the ground that he has committed a felony in this State.”

P.C. § 852.3: The arresting officer is then to take the arrestee “immediately before a magistrate” of the county in which the arrest is made. The magistrate is to determine whether the person had been lawfully arrested. If so, the arrestee is to be held for extradition. If not, he is to be “discharge(d).”

Federal Officers:

P.C. 830.8(a): Federal criminal investigators and federal law enforcement officers are not California peace officers. However, after having been certified by their agency heads as having satisfied the training requirements of P.C. § 832, or the equivalent thereof, they may exercise the powers of arrest of a California peace officer under the following circumstances:
• Any circumstance specified in *P.C. § 836* (see above) or *W&I § 5150* (Mental patients who are a danger to themselves, others, or who are gravely disabled).
• When incidental to the performance of their federal law enforcement duties.
• When requested by a California law enforcement agency to be involved in a joint task force or criminal investigation.
• When probable cause exists to believe that a public offense that involves immediate danger to persons or property has just occurred or is being committed.

See also **subd. (b)**: “Duly authorized federal employees who comply with the training requirements set forth in **Section 832** are peace officers when they are engaged in enforcing applicable state or local laws on property owned or possessed by the United States government, or on any street, sidewalk, or property adjacent thereto, with the written consent of the sheriff or the chief of police, respectively, in whose jurisdiction the property is situated.” (see *People v. Redd* (2010) 48 Cal.4th 691, 703-704, 711-722.)

When arresting pursuant to *P.C. § 830.8*, an arrestee must be taken immediately before a magistrate or delivered to a peace officer, as specified in *P.C. § 847*.

Federal officers of the Bureau of Land Management and the Forest Service of the Department of Agriculture have no authority to enforce California statutes without the written consent of the sheriff or the chief of police in whose jurisdiction they are assigned.

See also **subd. (d)** providing these officers with similar powers during a “state of war emergency or a state of emergency,” as defined in *Gov’t. Code § 8558*.

**P.C. § 830.8(b)**: Federal employees who have met the training requirements of *P.C. § 832* are peace officers when they are engaged in enforcing applicable state or local laws on property owned or possessed by the United States government, or on any street, sidewalk, or property adjacent thereto, so long as they have the written consent of the sheriff or the chief of police respectfully, in whose jurisdiction the property is situated.
P.C. § 830.8(c): National Park Rangers are not California peace officers. However, after having been certified by their agency heads as having satisfied the training requirements of P.C. § 832.3, or the equivalent thereof, they may exercise the powers of a California peace officer under any circumstance specified in P.C. § 836 (see above) or W&I § 5150 (Mental patients who are a danger to themselves, others, or who are gravely disabled), for violations of state or local laws, but only:

- When incidental to the performance of their federal duties;  
  or
- When requested by a California State Park Ranger to assist in preserving the peace and protecting state parks and other property for which California State Park Rangers are responsible.  

*(People v. Redd* (2010) 48 Cal.4th 691, 703-704, 711-722.)

P.C. § 830.8(e) further provides for limited law enforcement powers for a qualified person who is appointed as a Washoe tribal law enforcement officer.

*The San Ysidro Port of Entry*, in San Diego, is state land and not federal, although the attached facilities belong to the federal government. A federal Immigration and Naturalization Agent at that location may therefore lawfully make a citizen’s arrest for a state criminal violation (e.g., driving while under the influence) and turn him over to state and local law enforcement officers. *(People v. Crusilla* (1999) 77 Cal.App.4th 141.)

*Bounty Hunters*, or “Bail Enforcement Agents,” have long exercised a Common Law power to locate, arrest, and return to custody persons released from custody on bail provided by a bail-bondsman, when the person fails to make a necessary court appearance. *(Taylor v. Taintor* (1872) 83 U.S. 366 [21 L.Ed. 287].)

Because state courts have found that a bounty hunter’s broad authority comes from the implied terms of a private agreement between the bondsman (i.e., a private citizen) and the defendant, bounty hunters are unburdened by many of the constitutional and statutory restrictions which control the conduct of state law enforcement officers. *(Reese v. United States* (1969) 76 U.S. 13, 22 [19 L.Ed. 541, 544].)
Generally, “the common-law right of recapture is (only) limited by the reasonable means necessary to affect the arrest.” (Lopez v. Cotter (10th Cir. 1989) 875 F.2nd 273, 277.)

Bounty hunters “enjoy extraordinary powers to capture and use force” in tracking down and arresting fugitives. (Kear v. Hilton (4th Cir. 1983) 699 F.2nd 181, 182.)

Not being agents of the state, bounty hunters are not restricted by the usual constitutional constraints that apply to law enforcement. (See People v. Johnson (1947) 153 Cal.App.2nd 870, 873; Landry v. A-Able Bonding, Inc. (5th Cir. 1996) 75 F.3rd 200, 203-205; United States v. Rhodes (9th Cir. 1983) 731 F.2nd 463, 467.)

E.g.: The “Exclusionary Rule” does not apply to the actions of a bounty hunter. (People v. Houle (1970) 13 Cal.App.3rd 892, 895.)

California has only recently sought to regulate the licensing and training requirements for bounty hunters. (See P.C. §§ 1299 et seq., and Ins. Code § 1810.7.)

Other provisions provide for the arrest of a bail jumper by the bounty hunter when the bounty hunter’s authority is in writing upon a certified copy of either the undertaking of bail or the certificate of a bail deposited with the court. (P.C. §§ 1300, 1301)

P.C. § 1301 also requires the bondsman or bounty hunter to bring the bail jumper before a magistrate, or deliver him to the custody of a sheriff or police department, within 48 hours after arrest or after being brought into this state, excluding weekends and holidays. It is a misdemeanor to violate this section.

P.C. § 847.5 provides that an out-of-state bounty hunter must first seek an arrest warrant from a local magistrate, filing with the court an affidavit listing the name and whereabouts of the fugitive, certain particulars of the fugitive’s offense, and the circumstances of the fugitive’s violation of the terms of his bail. The bounty hunter is also required to bring the fugitive before the magistrate after which a hearing is held. The magistrate may then authorize the bounty hunter to remove the fugitive from the state.

However, a bounty hunter who ignores the requirements of section 847.5, because he acts outside California’s statutory regulations, is not acting “under color of state law,” and, therefore, is not civilly liable, at least in a Title

P.C. §§ 1299 et seq., and Ins. Code § 1810.7, provide, by statute, an extensive list of educational, training and procedural requirements necessary before exercising the powers of a bounty hunter.

P.C. § 1299.06: It is a legal prerequisite to apprehending a bail fugitive that the bounty hunter have in his or her possession the “proper documentation of authority to apprehend issued by the bail or depositor of bail,” as provided for under sections 1300 and 1301, and as briefly referenced above.

P.C. § 1299.07 prohibit any attempts to make a bounty hunter look like, or be identified as, a government employee of and federal, state or local agency.

P.C. § 1299.08 requires that local law enforcement be notified by the bounty hunter when an apprehension of a bail jumper is to be made.

Also, bounty hunters are to comply with all other arrest statutes, including the statutory “knock and notice” requirements (P.C. § 1299.09), and not be in violation of any firearms or other weapons laws. (P.C. § 1299.10)

A bail agent may, upon request of the surety liable for the undertaking, arrest a defendant and transport him to a court, magistrate, sheriff, or police, as directed; although a bail agent has no explicit statutory authority to carry a loaded firearm when performing his duties, like any person who does not have a permit to carry a firearm, he may carry a loaded firearm while engaged in the act of making or attempting to make a lawful arrest of the defendant. (81 Op.Cal. Atty.Gen. 257, 7-29-98.)

A bail recovery agent was not “attempting to make a lawful arrest” when stopped by police officers, and thus the California statute providing that person attempting to make lawful arrest may carry loaded handgun (i.e., P.C. § 12031(k)) was inapplicable. The officers had probable cause to arrest agent for carrying loaded firearm when the agent was arrested because he was in his car half block

Violation of any of the **section 1299** requirements is a misdemeanor.  (**P.C. § 1299.11**)

**Arrest Options:** A peace officer has **five options** when he or she makes an arrest pursuant to **P.C. § 836** or takes custody of a prisoner from a private person, arrested pursuant to **P.C. § 837**:

- **Release Without Charges:** If, after a subject has been arrested, the officer feels that based upon additional information collected, the arrest is not justified (i.e., there is insufficient probable cause), he or she may unconditionally release the prisoner pursuant to authority described in **P.C. § 849(b)(1)**.

  If, when arrested by a private person, the person changes his or her mind about wanting to arrest the subject, the prisoner may simply be released without any further action.

  Otherwise, any such arrest and release must be documented pursuant to **P.C. § 851.6**, with a certificate issued to the arrested person by the arresting agency describing such action as a detention only.

  The legal status of anyone so released shall be deemed a detention only; not an arrest. (**P.C. § 849(c)**)

  **Note:** It is also arguable that a law enforcement officer may choose to release a subject for whom probable cause **does** exist. There is nothing in the case or statutory law that says that **P.C. § 849(b)** is the exclusive authority for releasing an arrested prisoner.

  **Note,** however, **P.C. § 4011.10** prohibiting law enforcement from releasing a jail inmate for the purpose of allowing the inmate to seek medical care at a hospital, and then immediately re-arresting the same individual upon discharge from the hospital, unless the hospital determines this action would enable it to bill and collect from a third-party payment source.

- **Seek an Arrest Warrant:** (I.e., a “Notify Warrant.”) Should the peace officer determine that, although probable cause for an arrest exists, the person may not be lawfully arrested (e.g., a
misdemeanor not in the officer’s presence or the private person’s presence, or a “stale misdemeanor,” (see below; “Legal Requirements of an Arrest”), or as a discretionary option to taking the subject into custody or writing a misdemeanor citation, an arrest report may be filled out with the appropriate notation made (or box, e.g., □ notify warrant,” checked).

This is not an arrest and requires (after a “detention for investigation” during which identification information is collected and a brief investigation is conducted) the immediate release of the subject. The local prosecuting agency to which the reports are forwarded will then notify the subject of when and where to appear in court to answer to any charges filed in court. Should the person fail to respond to this notification, an arrest warrant will be sought.

Stopping a suspect in a misdemeanor offense, a noise violation, not occurring in the officer’s presence, at least where there are possible alternative, less intrusive methods, of identifying the suspect, is probably unlawful. The Court is to balance law enforcement’s interest in crime prevention with the detainee’s interest in personal security from government intrusion. (See United States v. Hensley (1985) 469 U.S. 221 [83 L.E.2nd 604].) In a misdemeanor situation, law enforcement’s interest may not outweigh the suspect’s. (United States v. Grigg (9th Cir. 2007) 498 F.3rd 1070.)

- Issuance of a Misdemeanor Citation: A misdemeanor arrest for an offense which is not “stale” and which did occur in the officer’s (or a private citizen’s) presence, but when booking is either not legal or not appropriate under the circumstances, may result in the subject being cited and released at the scene.

Misdemeanor citations are in fact an arrest, although the subject is released without booking, and must therefore be conducted according to the rules on misdemeanor crimes occurring in the officer’s presence, etc. (See below; “Legal Requirements of an Arrest”)

Misdemeanor arrestees are, as a general rule, to be cited and released unless one of the exceptions listed in P.C. § 853.6(i) applies. (P.C. § 853.6(a))

© 2012 Robert C. Phillips. All rights reserved
Note also that all persons released on a misdemeanor citation must be booked and fingerprinted either at the scene or at the arresting agency at some point prior to appearing in court, and, if released prior to doing so, should be so notified of their responsibility to comply. (P.C. § 853.6(g))

Booking at the scene requires the officer to use a mobile fingerprint device to take all fingerprints instead of merely a thumbprint.

- **Booking into Jail**: When one or more of the circumstances listed in P.C. § 853.6(i) does exist, and the subject may otherwise lawfully be arrested (e.g., a felony arrest, or a misdemeanor in the officer’s or private person’s presence which is not “stale.”), the arrested person may be arrested and transported to county jail for booking.

- **Take the Subject Directly Before a Magistrate**: When court is in session, and a judge is available, a subject may be transported directly to the judge.

  The offense must be a felony, or the conditions for a lawful misdemeanor arrest must be present (i.e., in the presence of the officer or private person making the arrest and not stale).

See also P.C. § 853.5 and V.C. §§ 40300.5, 40302, 40303, 40304, and 40305 (below), for conditions under which persons arrested for certain infractions or misdemeanors may be taken immediately before a magistrate.

**Legal Requirements of an Arrest**:

**Felonies**: A peace officer may make an arrest for a felony, with or without a warrant, at any time, day or night, at any location, whether or not the felony has occurred in the officer’s presence, so long as such arrest is supported by “probable cause.” (P.C. § 836(a)(2), (3))

  **Exception**: Warrantless arrests in a person’s home. (See below)

See also V.C. § 40301: When probable cause exists to believe that a particular person has violated a Vehicle Code felony, the subject “shall be dealt with in like manner as upon arrest for the commission of any other felony,” according to the general
provisions of the Penal Code on felony arrests. (See People v. Superior Court (Simon) (1972) 7 Cal.3rd 186, 199.)

Misdemeanors and Infractions:

“In the Presence” requirement: Misdemeanors (and infractions) must have occurred in the officer’s (or private person’s, in the case of a private person’s arrest) presence. (P.C. §§ 836(a)(1), 837.1; Jackson v. Superior Court (1950) 98 Cal.App.2nd 183; see also V.C. § 40300.)

“In the Presence,” Defined: “In the presence” is commonly interpreted to refer to having personal knowledge that the offense in question has been committed, made known to the officer through any of the officer’s five senses. (See People v. Burgess (1959) 170 Cal.App.2nd 36, 41.)

The crime of making annoying or harassing telephone calls, per P.C. § 653x, is done in the listener’s presence. (People v. Bloom (2010) 185 Cal.App.4th 1496; harassing phone calls to a police dispatcher.)

Exceptions: A peace officer has statutory authorization to arrest for misdemeanors which did not occur in the officer’s presence under limited circumstances:

1. Juvenile Arrests: (W&I Code § 625(a); In re Samuel V. (1990) 225 Cal.App.3rd 511.)

2. Driving While Under the Influence of Alcohol and/or Drugs, when any of the following circumstances exist (V.C. § 40300.5):

   • (a) The person was involved in a traffic accident.
   • (b) The person is observed in or about a vehicle that is obstructing a roadway.
   • (c) The person will not be apprehended unless immediately arrested.
   • (d) The person may cause injury to himself or herself or damage property unless immediately arrested.
• (e) The person may destroy or conceal evidence of the crime unless immediately arrested.

(People v. Schofield (2001) 90 Cal.App.4th 968; the metabolic destruction of alcohol in a DUI suspect’s body (i.e., the “burn off” rate) qualifies as the “destruction of evidence” for purposes of this exception.)

See also Troppman v. Gourley (2005) 126 Cal.App.4th 755, at pp. 760-761, where it was noted that the prior Supreme Court case of Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 768-769, requiring some observation of the vehicle’s movement by the arresting officer, was no longer valid case law in light of the amendment to this statute.

Even though the officer did not observe defendant’s vehicle moving, where the police officer discovered defendant asleep behind wheel with his foot on the brake, the engine running, and the gear in drive, in the middle of interstate highway, defendant’s arrest for driving while under the influence was lawful based upon the circumstantial evidence that defendant had driven there while under the influence. (Villalobos v. Zolin (1995) 35 Cal.App.4th 556.)

The old California rule of requiring a valid arrest, even of an unconscious suspect, prior to the extraction of a blood sample (See People v. Superior Court [Hawkins] (1972) 6 Cal.3d 757, 762.), was abrogated by passage of Proposition 8, in 1982. Now, so long as probable cause exists to believe that the defendant was driving while intoxicated, a formal arrest is not a prerequisite to a warrantless seizure of a blood sample. (People v. Trotman (1989) 214 Cal.App.3d 430, 435; People v. Deltoro (1989) 214 Cal.App.3d 1417, 1422, 1425.)
3. Battery on School Grounds during school hours. (P.C. § 243.5)


5. Assault or Battery Against the Person of a Firefighter, Emergency Medical Technician, or Paramedic, per P.C. §§ 241(b) or 243(b). (P.C. § 836.1)

6. Persons Violating a Domestic Violence Protective or Restraining Order issued under authority of:

- CCP § 527.6 (Harassment Orders);
- Fam. Code, §§ 6200 et seq. (Domestic Violence);
- P.C. § 136.2 (Victim or Witness Intimidation);
- P.C. § 646.91 (Stalking);
- P.C. § 1203.097(a)(2) (Acts of violence, threats, stalking, sexual abuse, and harassment, in Domestic Violence);
- W&I § 213.5 (During Child Dependency Proceedings);
- W&I § 15657.03, (Elder or Dependent Adult Abuse) or
- Similar orders from another state, tribe, or territory;

... where the officer has probable cause to believe the suspect has knowledge of the order and has committed an act in violation of the order. (P.C. § 836(c)(1))

Note: This section, and P.C. § 13701(b), at least when “domestic violence” (per Fam. Code §§ 2040 et seq., 6200 et seq., or 7700 et seq.) is involved, or when victim or witness intimidation (per P.C. § 136.2) is involved, make this arrest mandatory upon the officer, absent “exigent circumstances”excusing the lack of an arrest.
7. **Assaults or Batteries** upon the suspect’s current or former spouse, fiancé, fiancée, a current or former cohabitant (per **Fam. Code, § 6209**), a person with whom the suspect currently is having or has previously had an engagement or dating relationship (per **P.C. § 243(f)(10)**), a person with whom the suspect has parented a child, or is presumed to have parented a child (per the **Uniform Parentage Act; Fam. Code, §§ 7600 et seq.**), a child of the suspect, a child whose parentage by the suspect is the subject of an action under the **Uniform Parentage Act**, a child of a person in one of the above categories, or any other person related to the suspect by consanguinity or affinity within the second degree, when the officer has probable cause and the arrest is made as soon as probable cause arises. (**P.C. § 836(d)**)

**P.C. § 13700(b):** “**Cohabitant**” is defined in the **Penal Code** as “two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to,

(1) sexual relations between the parties while sharing the same living quarters,
(2) sharing of income or expenses,
(3) joint use or ownership of property,
(4) whether the parties hold themselves out as husband and wife,
(5) the continuity of the relationship, and
(6) the length of the relationship.”

**Fam. Code, § 6209:** “**Cohabitant**” is defined in the **Family Code** as a person who regularly resides in the household. “**Former Cohabitant**” is defined as a person who formerly regularly resided in the household.
P.C. § 243(f)(10): “Dating Relationship” is defined as frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations.

8. **Elder Abuse**: Assaults or batteries upon any person who is 65 years of age or older and who is related to the suspect by blood or legal guardianship, when the officer has probable cause and the arrest is made as soon as probable cause arises. (P.C. § 836(d))

9. **Carrying a Concealed Firearm**, per P.C. § 12025, when a peace officer has reasonable (or probable) cause to believe a violation has occurred within the area of an airport (as “airport” is defined by the Pub. Utilities Code, § 21013) to which access is controlled by the inspection of persons and property, and when the arrest is made as soon as reasonable (or probable) cause arises. (P.C. § 836(e))

10. **Operating a Vessel or Recreational Vessel, or Manipulation of Water Skis, Aquaplane or Similar Device**, while under the influence of drugs and/or alcohol, or addicted to the use of drugs. (Har. & Nav. Code, § 655(b), (c), (d) or (e)) Upon information from a commissioned, warrant or petty officer of the United States Coast Guard establishing “reasonable cause,” a peace officer may arrest for a violation of any of the above offenses. (Subd. (g))

11. **Operating a Vessel While Under the Influence of Alcohol and/or Drugs**, when the person is involved in an accident on the waters of this state, with “reasonable cause,” any peace officer may arrest. (Har. & Nav. Code, § 663.1)

**Vehicle Code Violations**: The Vehicle Code contains limited exceptions for citing a person for a misdemeanor or infraction even though the offense cited for did not occur in the peace officer’s presence:
**V.C. § 16028(c):** A peace officer, or a regularly employed and salaried employee of a city or county who has been trained as a traffic collision investigator upon review by a peace officer, at the scene of an accident, may cite any driver involved in the traffic collision who is unable to provide evidence of financial responsibility.

**V.C. § 40600(a):** A peace officer who has successfully completed a course or courses of instruction, approved by the Commission on Peace Officer Standards and Training (i.e., P.O.S.T.) in the investigation of traffic accidents may cite any person involved in a traffic accident when the officer has probable cause to believe the person violated a provision of the Vehicle Code not declared to be a felony or a local ordinance and when the offense cited for was a factor in the occurrence of the traffic accident. **Subd. (d)** provides that the offense need not occur in the officer’s presence. However, **subd. (c)** provides that such a citation is not considered as an “arrest.”


California peace officers are specifically authorized under the Vehicle Code to enforce parking citations. (V.C. §40202(a); **People v. Hart** (1999) 74 Cal.App.4th 479; **United States v. Choudhry**, supra.)

A parking violation, even though civil, is cause for a police officer to stop and detain a vehicle’s driver despite the fact that such a violation is but a “pretext” for detaining the driver to investigate some other offense for which the officer does not have a reasonable suspicion, per the rule of **When v. United States** (1996) 517 U.S. 806 [135 L.Ed.2nd 89]. (**United States v. Choudhry**, supra.)

“Stale Misdemeanor Rule:” The arrest for a misdemeanor must occur at the time, or shortly after, the commission of the offense. (**People v. Hampton** (1985) 164 Cal.App.3rd 27.) If not, it is a “stale misdemeanor” for which the defendant may not be arrested even if it had occurred in the officer’s presence. (**People v. Craig**
What is and what is not stale depends upon the circumstances:

“No hard and fast rule can, however, be laid down which will fit every case respecting what constitutes a reasonable time. What may be so in one case under particular circumstances may not be so in another case under different circumstances. All that can be affirmed with safety is that the officer must act promptly in making the arrest, and as soon as possible under the circumstances, and before he transacts other business.’ . . . ‘(W)e hold that in order to justify an arrest without warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest he must then obtain a warrant therefor (sic).’” (Oleson v. Pincock (1926) 68 Utah 507, 515-516 [251 P.23, 26].)

“In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest.” (Jackson v. Superior Court (1950) 98 Cal.App.2nd 183, 187; next day, arrest illegal.)

The stale misdemeanor rule applies to arrests by private citizens, under authority of P.C. § 837, as well. (Green v. Department of Motor Vehicles (1977) 68 Cal.App.3rd 536; arrest made some 35 to 40 minutes after the observation held to be lawful; see also Ogulin v. Jeffries (1953) 121 Cal.App.2nd 211; 20 minute delay, arrest lawful.)

A police dispatcher, being subjected to defendant’s numerous harassing telephone calls, may delegate to a police officer the responsibility to arrest the defendant for her. The offense, over the phone, was held to be in her presence. Also, the arrest was timely in that officers responded immediately to where defendant was calling from and took him into custody. The arrest was held to be a lawful citizen’s arrest. (People v. Bloom (2010) 185 Cal.App.4th 1496.)

Sanctions for Violations: A violation by a peace officer of either the “in the presence,” or, arguably, the “stale misdemeanor” rules, or any other statutory (as opposed to constitutional) limitation on

© 2012 Robert C. Phillips. All rights reserved

A violation by a police officer of a state statute, such statute limiting the officer’s right to make a custodial arrest or a search, so long as not also in violation of the Fourth Amendment, does not result in the suppression of the resulting evidence unless mandated by the terms of the statute. While a state is empowered to enact more restrictive search and seizure rules, violation of those rules that are not also a Fourth Amendment violation, does not invoke the Fourth Amendment’s exclusionary rule. (Virginia v. Moore (2008) 553 U.S. 164 [170 L.Ed.2nd 559]; People v. Xinos (2011) 192 Cal.App.4th 637, 653.)


“It is elemental that the illegality tainting evidence and rendering it inadmissible is illegality flowing from the violation of a defendant’s constitutional rights—primarily those involving unlawful searches and seizures in violation of the Fourth Amendment to the United States Constitution and the essentially identical guarantee of personal privacy set forth in article I, section 19, of the California Constitution. [Citations.] Evidence obtained in violation of a statute is not inadmissible per se unless the statutory violation also has a constitutional dimension.” (People v. Brannon (1973) 32 Cal.App.3d 971, 975; People v. Pifer (1989) 216 Cal.App.3rd 956, 962-963.)
See also the same reasoning being used in *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1470; suggesting that because a “nighttime” search does not violate any constitutional principles, evidence discovered during a nighttime search without judicial authorization, in violation of the requirements of P.C. § 1533, should not result in suppression of any evidence.

And see *People v. Collins* (2004) 115 Cal.App.4th 137: Violation of the administrative provisions for the searching of prisoners in a prison, absent a constitutional violation, does not require the suppression of any resulting evidence.


A violation of “implied consent law,” forcing a “DUI” (Driving While Under the Influence”) suspect to submit to a blood test instead of a breath test, being a violation of state law only, does not expose the officer to any civil liability. (*Ritschel v. City of Fountain Valley* (2005) 137 Cal.App.4th 107.)

While a state may impose stricter standards on law enforcement in interpreting its own state constitution (i.e., “independent state grounds”), a prosecution in federal court is guided by the federal interpretation of the Fourth Amendment and is not required to use the state’s stricter standards. (*United States v. Brobst* (9th Cir. 2009) 558 F.3d 982, 989-991, 997.)

Mistakenly collecting blood samples for inclusion into California’s DNA data base (See P.C. § 296), when the defendant did not actually have a qualifying prior conviction, does not require the suppression of the mistakenly collected blood samples, nor is it grounds to suppress the resulting match of the defendant’s DNA with that left at a crime scene. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1116-1129.)
The Ninth Circuit Court of Appeal is now in accord with the rule of *Virginia v. Moore.* *(Edgerly v. City and County of San Francisco* *(9th Cir. 2010) 599 F.3rd 946, 955-956.)*

*Arrest for an Infraction or Misdemeanor:*

**Release Requirement:** Persons subject to citation for the violation of a crime deemed to be an “infraction” *must* be released on a citation, except in limited circumstances. If the person to be cited does not have a driver’s license or other satisfactory evidence of identification, the officer *may* (in lieu of a custodial arrest, at the officer’s discretion) require the arrestee to place a right thumbprint, or left thumbprint or fingerprint if the person has a missing or disfigured right thumb, on the promise to appear. *(P.C. § 853.5)*

See also *Public Resources Code § 5786.17,* for the authority for uniformed employees of a Parks and Recreation District to issue misdemeanor and infraction citations for violations of state law, city or county ordinances, or district rules, regulations, or ordinances when the violation is committed within a recreation facility and in the presence of the employee issuing the citation.

**Exceptions:** The exceptions to the requirement that the subject be released on his written promise to appear when arrested for an infraction, as listed in *P.C. § 853.5,* are:

- As specified in *V.C. §§ 40302, 40303, 40305* and *40305.5* (see below); *or*
- The arrestee refuses to sign a written promise to appear; *or*
- The arrestee has no satisfactory identification; *or*
- The arrestee, without satisfactory identification, refuses to provide a thumbprint or fingerprint.

Because the section is written in the disjunctive, it is the opinion of the State Attorney General that if the person does not have satisfactory evidence of identification, the officer has the discretion to take the person into physical custody despite the fact that the person is willing to sign a written promise to appear and to provide a thumbprint. *(2005, *Opn.Cal.Atty.Gen.*, #05-206)*

See *United States v. Mota* *(9th Cir. 1993) 982 F.2nd 1384,* where it was held that a physical arrest of a person
committing a business license infraction was a constitutional violation requiring the suppression of evidence: Questionable authority after *Virginia v. Moore* (2008) 553 U.S. 164 [170 L.Ed.2nd 559], holding that booking a suspect for a non-bookable criminal violation is not a Fourth Amendment violation. (See “Sanctions for Violations,” above.)

V.C. § 40302: Persons who would otherwise be cited and released for a Vehicle Code infraction or misdemeanor shall be arrested and taken immediately before a magistrate when the person:

- Fails to present his driver’s license or other satisfactory evidence of his identity for examination; or
- Refuses to give his written promise to appear; or
- Demands an immediate appearance before a magistrate; or
- Is charged with violating V.C. § 23152 (i.e., “driving while under the influence.”).

“Other Satisfactory Evidence of His Identity:” The arresting officer has the discretion to determine what constitutes “other satisfactory evidence of his identity,” when the subject fails to provide a driver’s license as required by the section. (*People v. Monroe* (1993) 12 Cal.App.4th 1174, 1182; *People v. McKay* (2002) 27 Cal.4th 601, 619-625.)

However, that discretion is not unlimited. Identification documents which are an “effective equivalent” are presumptively (i.e., in the absence of contrary evidence) sufficient. This would include a California identity card (issued per V.C. § 13000) or any current written identification which contains at a minimum a photograph and description of the person named on it, a current mailing address, a signature of the person, and a serial or other identifying number. (*People v. Monroe*, supra, at p. 1186.)

The officer is not legally obligated to make radio or other inquiries in an attempt to verify the person’s oral assertions of identity. (*Id.*, at p. 1189; *People v. McKay*, supra.)

An officer’s refusal to accept oral statements as sufficient evidence of identity will be upheld on appeal. (*People v. McKay*, supra; *People v. Grant* (1990) 217 Cal.App.3rd 1451, 1455; see also *People v. Anderson* (1968) 266 Cal.App.2nd 125, 128.)
An officer’s refusal to accept a Social Security card upheld on appeal. (*People v. Farley* (1971) 20 Cal.App.3rd 1032, 1036, fn. 2.)

See B&P Code § 25660, describing what is considered to be “*bona fide evidence of age*” for purposes of purchasing alcoholic beverages:

(1) A valid vehicle operator’s license containing the person’s name, date of birth, physical description and picture.
(2) A valid passport issued by the United States or a foreign government.
(3) A valid military identification card that includes a date of birth and picture of the person.

**V.C. § 40303; Arrestable Offenses:** This section lists 17 different circumstances in which an arresting officer has the option of either taking a person “*without unnecessary delay*” before a magistrate, or releasing the person with a 10-days’ written notice to appear:

- Violation of V.C. §§ 10852 or 10853, relating to injuring or tampering with a vehicle.
- Violation of V.C. §§ 23103 or 23104, relating to reckless driving.
- Violation of V.C. § 2800(a), relating to failure to stop and submit to an inspection or test of a vehicle’s lights per V.C. § 2804.
- Violation of V.C. § 2800(a), relating to failure to stop and submit to a brake test.
- Violation of V.C. § 2800(a), relating to failure to stop and submit to a vehicle inspection, measurement, or weighing, per V.C. § 2802, or a refusal to adjust the load or obtain a permit, per V.C. § 2803.
- Violation of V.C. § 2800(a), relating to continuing to drive after being lawfully ordered not to drive by a member of the California Highway Patrol for violating the driver’s hours of service or driver’s log regulations, per V.C. § 34501(a).
- Violation of V.C. § 2800(b), (c) or (d), relating to failure or refusal to comply with any lawful out-of-service order.
- Violation of V.C. §§ 20002 or 20003, relating to duties in the event of an accident.
• Violation of V.C. § 23109, relating to participating in a speed contest or exhibition of speed.
• Violation of V.C. §§ 14601, 14601.1, 14601.2, or 14601.5, relating to driving on a suspended or revoked license.
• When the person arrested has attempted to evade arrest.
• Violation of V.C. § 23332, relating to persons upon vehicular crossings.
• Violation of V.C. § 2813, relating to the refusal to stop and submit a vehicle to an inspection of its size, weight, and equipment.
• Violation of V.C. § 21461.5, relating to being found on a freeway within 24 hours of being cited for same, and refusing to leave when lawfully ordered to do so by a peace officer after having been informed that he is subject to arrest.
• Violation of V.C. § 2800(a) relating to being found on a bridge or overpass within 24 hours of being cited for same, and refusing to leave when lawfully ordered to do so by a peace officer pursuant to V.C. § 21962, after having been informed that he is subject to arrest.
• Violation of V.C. § 21200.5, relating to riding a bicycle while under the influence of alcohol and/or drugs.
• Violation of V.C. § 21221.5, relating to operating a motorized scooter while under the influence of alcohol and/or drugs.

V.C. § 12801.5(e): The Unlicensed Driver: “Notwithstanding (V.C.) Section 40300 or any other provision of law, a peace officer may not detain or arrest a person solely on the belief that the person is an unlicensed driver, unless the officer has reasonable cause to believe the person is under the age of 16 years.”

See Bingham v. City of Manhattan Beach (9th Cir. 2003) 329 F.3d 723, amended and superseded on denial of rehearing at 341 F.3d 939; arrest for driving with an expired driver’s license, in contravention of this statute, subjects the offending officer to federal civil liability: Questionable authority after Virginia v. Moore (2008) 553 U.S. 164 [170 L.Ed.2nd 559], holding that booking a suspect for a non-bookable criminal violation is not a Fourth Amendment violation. (See “Sanctions for Violations,” above.)

V.C. § 40305: Non-Residents: A nonresident who is arrested for any violation of the Vehicle Code and who fails to provide
satisfactory evidence of identity and an address within this State at which he can be located may be taken immediately before a magistrate.

V.C. § 40305.5: Traffic Arrest Bail Bond Certificate: Provisions for the arresting officer to receive a guaranteed traffic arrest bail bond certificate (with the requirements for such a certificate listed) when a nonresident driver of a commercial vehicle of 7,000 pounds or more (excluding house cars) is arrested for violating any provision of the Vehicle Code and fails to provide satisfactory evidence of identification and an address within the State at which he can be located.

P.C. § 853.6(i): Misdemeanor Citations: A person arrested for a misdemeanor must also be cited (on a “misdemeanor citation form”) and released unless one of the following statutory exceptions applies:

- The person is intoxicated.
- The person requires medical treatment.
- The person was arrested for one or more of the offenses listed in V.C. §§ 40302 or 40303 (see above).
- The person has outstanding warrants.
- The person is unable to provide “satisfactory evidence of identification” (see above).
- Prosecution would be jeopardized by immediate release.
- Reasonable likelihood that the offense would continue or that persons or property would be imminently endangered by the release of the person.
- The person demands to be taken before a magistrate or refuses to sign the notice to appear.
- There is reason to believe that the person would not appear on the citation.
- The person was subject to P.C. § 1270.1.

P.C. § 1270.1 prohibits the release of a person for a specified crime on his or her own recognizance, or on bail in an amount that is either more or less than the amount that is contained in the bail schedule for that offense. This includes the following offenses:

- Serious felonies, per P.C. § 1192.7(c).
- Violent felonies, per P.C. § 667.5(c).
- Domestic violence with corporal injury, per P.C. § 273.5.
- Witness intimidation, per P.C. § 136.1(c).
- Spousal rape, per P.C. § 262.
- Stalking, per P.C. § 646.9.
- Felony criminal threats, per P.C. § 422.
- Misdemeanor domestic violence, per P.C. § 243(e)(1).
- Restraining order violations, per P.C. § 273.6; if the detained person made threats to kill or harm, engaged in violence against, or went to the residence or workplace of, the protected party.

It is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (Atwater v. City of Lago Vista (2001) 532 U.S. 318 [149 L.Ed.2nd 549].), or even for a fine-only, infraction. (People v. McKay (2002) 27 Cal.4th 601, 607; see also United States v. McFadden (2nd Cir. 2001) 238 F.3rd 198, 204.)

California’s statutory provisions require the release of misdemeanor arrestees in most circumstances. (e.g., see P.C. §§ 853.5, 853.6, V.C. §§ 40303, 40500) However, violation of these statutory requirements is not a constitutional violation and, therefore, should not result in suppression of any evidence recovered as a result of such an arrest. (People v. McKay, supra, at pp. 607-619, a violation of V.C. § 21650.1 (riding a bicycle in the wrong direction); People v. Gomez (2004) 117 Cal.App.4th 531, 539, seat belt violation (V.C. § 27315(d)(1)), citing Atwater v. City of Lago Vista (2001) 532 U.S. 318 [149 L.Ed.2nd 549]; People v. Bennett (July 21, 2011) 197 Cal.App.4th 907, 918.)

The United States Supreme Court has recently affirmed this principle:

A violation by a police officer of a state statute, such statute limiting the officer’s right to make a custodial arrest or a search, so long as not also in violation of the Fourth Amendment, does not result in the suppression of the resulting evidence unless mandated by the terms of the statute. While a state is empowered to enact more restrictive search and seizure rules, violation of those rules that

*With an Existing Warrant of Arrest:*

**P.C. § 818:** A peace officer serving upon a person a warrant of arrest for a misdemeanor offense under the Vehicle Code or under any local ordinance relating to stopping, standing, parking, or operation of a motor vehicle and where no written promise to appear has been filed and the warrant states on its face that a citation may be used in lieu of physical arrest, may, instead of taking the person before a magistrate, prepare a notice to appear and release the person on his or her promise to appear. In such a case, issuing a citation is deemed to be compliance with directions of the warrant. The officer shall endorse on the warrant; “Section 818, Penal Code, complied with,” and return the warrant to the magistrate who issued it.

**P.C. § 827.1:** A person for whom an arrest warrant has been issued for a misdemeanor offense *may* be released upon the issuance of a citation, issued per **P.C. §§ 853.6 to 853.8**, in lieu of physical arrest, *unless* one of the following conditions exists:

- The misdemeanor cited in the warrant involves violence.
- The misdemeanor cited in the warrant involves a firearm.
- The misdemeanor cited in the warrant involves resisting arrest.
- The misdemeanor cited in the warrant involves giving false information to a peace officer.
- The person arrested is a danger to himself or herself or others due to intoxication or being under the influence of drugs or narcotics.
- The person requires medical examination or medical care or was otherwise unable to care for his or her own safety.
- The person has other ineligible charged pending against him or her.
• There is reasonable likelihood that the offense or offenses would continue to resume, or that the safety of persons or property would be immediately endangered by the release of the person.
• The person refuses to sign the notice to appear.
• The person cannot provide satisfactory evidence of personal identification.
• The warrant of arrest indicates that the person is not eligible to be released on a citation.

**Arrest Warrants:**

*Defined:* A warrant of arrest is a written order, signed by a magistrate, and generally directed to a peace officer, commanding the arrest of the defendant. (P.C. §§ 813, 814, & 815)

A warrant will issue “if, and only if, the magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, . . . .” (Emphasis added; P.C. § 813(a))

The warrant must be supported by a sworn statement made in writing, reflecting the probable cause for the arrest. (P.C. § 817(b))

However, an “administrative warrant,” issued pursuant to 18 U.S.C. § 4213(a) for the retaking of an alleged parole violator, is not subject to the oath or affirmation requirement of the Fourth Amendment. (United States v. Sherman (9th Cir. 2007) 502 F.3rd 869; noting that the rule is to the contrary when the warrant is for a supervised release violation, per 18 U.S.C. § 3583(i), as held by United States v. Vargas-Amaya (9th Cir. 2004) 389 F.3rd 901.)

The “complaint” must be backed by a factual showing (i.e., a declaration or affidavit) reflecting probable cause. (See People v. Sesslin (1968) 68 Cal.2nd 418.)

*Content:* An arrest warrant is directed to “any peace officer, or any public officer or employee authorized to serve process where the warrant is for a violation of a statute or ordinance which such person has the duty to enforce” (Emphasis added), and states the following (P.C. § 816):

• The crime, designated in general terms.
The defendant’s name, or, if this is unknown, any name. (E.g., “John Doe.”)

- The date and time of issuance.
- Bail.
- The city or county where it is issued.
- The duty of the arresting officer to bring the defendant before the magistrate.
- The judge’s signature.
- The court.

Other Types of Arrest Warrants:

Bench Warrant: An arrest warrant for a defendant who has been discharged on bail and subsequently fails to appear in court. (P.C. §§ 979 et seq.)

A bench warrant, issued by a neutral and detached magistrate upon a defendant’s failure to appear, is legal justification for making entry into a residence in which there is probable cause to believe the subject of the warrant is hiding, despite the fact that such a warrant is issued without a finding of probable cause. (United States v. Gooch (9th Cir. 2007) 506 F.3rd 1156.)

Telephonic Arrest Warrant: An arrest warrant utilizing telephonic communication between the magistrate and the affiant, and facsimile (i.e., “fax”) transmission equipment or computer e-mail, to send the necessary documents to the magistrate for signature and return of the warrant to the affiant. (P.C. § 817(c), (d), (e) & (f))

See P.C. § 817(f) for the suggested warrant format.

“Ramey Warrant”: A term of art used to describe an arrest warrant issued prior to the court filing of a criminal case against a specific defendant. (Millender v County of Los Angeles (9th Cir. 2010) 620 F.3d 1016, 1021, fn. 1; and see People v. Ramey (1976) 16 Cal.3rd 263.)

Note: A writ of certiorari was granted by the United States Supreme Court in Millender, making it no longer available for citation until decided by that court. (Messerschmidt v. Millender (June 27, 2011) __ U.S. __ [131 S.Ct. 3057; 180 L.Ed.2nd 884].)

Note: Ordinarily, a prerequisite to the issuance of an arrest
warrant is the filing of a complaint with the magistrate, charging a felony originally triable in the superior court of the county, or where the complaint is presented to a judge in a misdemeanor or infraction case, charging an offense triable in that judge’s court.

However, the formal filing of a written complaint is not a condition precedent to issuance of an arrest warrant. *(People v. Case* (1980) 105 Cal.App.3rd 826, 832.)*

Long approved by case law *(People v. Case, supra; and People v. Bittaker* (1989) 48 Cal.3rd 1046, 1070-1072.), pre-filing arrest warrants are now authorized by statute. *(P.C. § 817(a))*

**A “DNA, John Doe” Warrant:**

An arrest warrant must identify the subject of the subject of the warrant with reasonable certainty. Describing the subject of an arrest warrant as merely “John Doe” with a description of a particular DNA profile is sufficient to meet this constitutional requirement. *(State of Wisconsin v. Dabney* (2003) 254 Wis.2nd 43 [663 N.W.1nd 366].)*

The California Supreme Court is in agreement, holding that a DNA profile is an accurate, reliable, and valid method of identifying a defendant in an arrest warrant because it is particular in its description. It neither violates the Fourth Amendment, California’s statutes authorizing arrest warrants (see P.C. §§ 813, 815, 859, 860), nor a defendant’s due process rights. *(People v. Robinson* (2010) 47 Cal.4th 1104, 1129-1143.)*

**Necessity of an Arrest Warrant:**

Warrantless arrests, at least at any location other than within one’s private home or other area to which the public does not have ready access (see below), have been held by the United States Supreme Court to be lawful, at least when the offense is a felony (whether or not it occurred in the officer’s presence), or for any offense (felony or misdemeanor) which occurs in the officer’s presence (see below). *(United States v. Watson* (1976) 423 U.S. 411 [46 L.Ed.2nd 598].)*

Surrounding a barricaded suspect in his home is in effect a warrantless arrest, justified by the exigent circumstances. The
passage of time during the ensuing standoff does *not* dissipate that exigency to where officers are expected to seek the authorization of a judge to take the suspect into physical custody. (*Fisher v. City of San Jose* (9th Cir. 2009) 558 F.3rd 1069; overruling its own prior holding (at 509 F.3rd 952) where it was held that failure to obtain an arrest warrant during a 12 hour standoff resulted in an illegal arrest of the barricaded suspect.)

*Service and Return:*

*Felony arrest warrants* may be executed anytime, anywhere, day or night. (*P.C. §§ 836(a), 840*)

*But* see *Steagald v. United States* (1981) 451 U.S. 204 [68 L.Ed.2nd 38], below, mandating a search warrant to execute an arrest warrant in a *third party’s* home.

*Misdemeanor arrest warrants* may be served anytime, anywhere, day or night, *except* that when the suspect *is not* in public but *not* already in custody (e.g., in his residence), the warrant may not be served between 10:00 p.m. and 6:00 a.m. unless the warrant is “endorsed” for “night service” in which case it may be served at any time. (*P.C. § 840(4)*)

“Night Service” must be justified in the warrant affidavit, describing the need to make the arrest in other than the daytime. (See *People v. Kimble* (1988) 44 Cal.3rd 480, 494; discussing the need for justifying nighttime service for a search warrant.)

*Query:* If an officer is already lawfully in the house, may a misdemeanor arrest warrant be executed despite the lack of a nighttime endorsement? *Unknown.* *P.C. § 840* itself does not provide for any such exception. But since this limitation on arrests has been held to be statutory only, and not of constitutional origins (*People v. Whitted* (1976) 60 Cal.App.3rd 569.), no evidence would be suppressed anyway, making this question moot.

*Necessity of Having a Copy of The Arrest Warrant:* The law contemplates that when an arrest is made, the officer *should* have a copy of the warrant in his possession. (*People v. Thomas* (1957) 156 Cal.App.2nd 117, 120.) However, it has been held that there is
no violation even though he does not. (P.C. § 842; People v. Miller (1961) 193 Cal.App.2nd 838, 839.)

However, if requested, the arrestee shall be shown a copy of the warrant as soon as it is practicable to do so. (P.C. § 842)

Knock and Notice: The “knock and notice” rules (see Search Warrants, below) apply as well to the execution of an arrest warrant, and for warrantless arrests within a residence. (P.C. § 844.)

The rule that evidence will not be suppressed as a result of a knock and notice violation, as dictated by Hudson v. Michigan (2006) 547 U.S. 586 [165 L.Ed.2nd 56] (a search warrant case.), is applicable as well as in a warrantless, yet lawful, arrest case, pursuant to P.C. § 844. (In re Frank S. (2006) 142 Cal.App.4th 145.)

Procedure After Arrest:

Disposition of Prisoner: An officer making an arrest in obedience to a warrant must proceed with the arrestee as commanded by the warrant, or as provided by law. (P.C. § 848)

In-County Arrest Warrants: If the offense is for a felony, and the arrest occurs in the county in which the warrant was issued, the officer making the arrest must take the defendant before the magistrate who issued the warrant or some other magistrate of the same county. (P.C. § 821)

Note: In reality, an arrestee is typically taken to jail where he or she will await the availability of a magistrate.

Out-of-County Arrest Warrants: If the defendant is arrested in another county on either a felony (P.C. § 821) or a misdemeanor (P.C. § 822) warrant, the officer must, without unnecessary delay:

- Inform the defendant in writing of his right to be taken before a magistrate in that county; and
Note on the warrant that he has so informed defendant; and

Upon being requested by the defendant, take him before a magistrate in that county.

That magistrate is to admit the defendant to the bail specified on the warrant, if any. (P.C. §§ 821, 822) If the offense is a misdemeanor, and no bail is specified on the warrant, the magistrate may set the bail. (P.C. § 822)

If the defendant does not bail out for any reason, law enforcement officers from the county where the warrant was issued have five (5) days (or five (5) court days if the offense is a felony and the law enforcement agency is more than 400 miles from the county where the defendant is being held) to take custody of the defendant. (P.C. §§ 821, 822) (See 62 Op.Cal.Attty.Gen. 78, 2-16-79)

Note: There are no similar statutory requirements for an out-of-county arrest made without an arrest warrant (i.e., a “probable cause” arrest).

Note: Arrests without a Warrant; P.C. § 849(a): An officer (or private person) making an arrest without a warrant shall, without unnecessary delay, take the prisoner not otherwise released before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

Necessity of Having Probable Cause: Until recently, it has been held that before a police officer may enter a home, absent consent to enter, the officer must have “probable cause” to believe the person who is the subject of the arrest warrant is actually inside at the time. (See People v. Jacobs (1987) 43 Cal.3d 472; United States v. Gorman (9th Cir. 2002) 314 F.3rd 1105; United States v. Diaz (9th Cir. 2007) 491 F.3rd 1074; United States v. Phillips (9th Cir. 1974) 497 F.2nd 1131; (United States v. Gooch (9th Cir. 2007) 506 F.3rd 1156, 1159, fn. 2; Cuevas v. De Roco (9th Cir. 2008) 531
An arrest warrant constitutes legal authority to enter the suspect’s residence and search for him. (People v. LeBlanc (1997) 60 Cal.App.4th 157, 164.)

“Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home.” (Steagald v. United States (1981) 451 U.S. 204, 214-215, fn. 7 [68 L.Ed.2nd 38, 46].)

“Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” (Italics added; Payton v. New York (1980) 445 U.S. 573, 603 [63 L.Ed.2nd 639, 661].)

This “reason to believe” language, in making reference to the likelihood that the subject is home at the time the arrest warrant is served, has until recently been interpreted by both state and federal authority to require full-blown “probable cause” to believe the suspect is there at that time. (See People v. Jacobs, supra; United States v. Gorman, supra; and United States v. Phillips, supra; see “Sufficiency of Evidence to Believe the Suspect is Inside,” below.)

Noting that five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a minority opinion (see United States v. Gorman, supra.), the Fourth District Court of Appeal (Div. 2) found instead that an 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. Employing that standard, the entry into defendant’s apartment to conduct a probation search was lawful based on all of the information known to the officers. Accordingly, the court upheld the trial court’s conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment and was present at the time, and therefore
the officers had the right to enter the apartment to conduct a warrantless probation search. *(People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.)

Also arguing that the California Supreme Court, in *People v. Jacobs*, *supra*, did not find that probable cause was required, contrary to popular belief. *(Id., at p. 662.)*

“It is not disputed that until 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, . . .” *(Maryland v. Buie* (1990) 494 U.S. 325, 330 [108 L.Ed.2nd 276, 283].)

See “*Sufficiency of Evidence that the Suspect is Inside,*” below.

*The “Steagald Warrant:** If the person is in a *third party’s home,* absent consent to enter, a *search warrant* for the residence must be obtained in addition to the arrest warrant. *(Steagald v. United States, *supra*, at pp. 211-222 [68 L.Ed.2nd at pp. 45-52]; *People v. Codinha* (1982) 138 Cal.App.3rd 167; see *P.C. § 1524(a)(6).*)

*Statute of Limitations:* Obtaining an arrest warrant will “*toll*” (i.e., “*stop*”) the running of the statute of limitations for the charged offense(s). *(P.C. §§ 803, 804; People v. Lee* (2000) 82 Cal.App.4th 1352.)

*Expiration:* There is no statutory requirement that an arrest warrant be executed within any particular time limits. Therefore, arrest warrants do not expire, and do not need to be renewed or extended. They will remain in the system until purged, served, or recalled by the court.

*Effect of an Arrest Warrant on the Exclusion of Evidence after an Illegal Detention:* The fact that the defendant had an outstanding arrest warrant may, depending upon the circumstances, be sufficient of an intervening circumstance to allow for the admissibility of the evidence seized incident to arrest despite the fact that the original detention was illegal. *(People v. Brendlin* (2008) 45 Cal.4th 262; an illegal traffic stop.)

The circumstances to be considered are:
• The temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence;
• The presence of intervening circumstances (e.g., an arrest warrant);
• The flagrancy of the official misconduct.

(Id., at pp. 269-272; citing Brown v. Illinois (1975) 422 U.S. 590 [45 L.Ed.2nd 416].)

A Defective Arrest Warrant:

Arresting a subject with the good faith belief that there was an outstanding arrest warrant, only to discover after the fact that the arrest warrant had been recalled, does not require the suppression of any resulting evidence where the mistake is the result of negligence only, and was not reckless or deliberate. (Herring v. United States (2009) 555 U.S. 135 [172 L.Ed.2nd 496].)

If officers making an arrest have probable cause to arrest him and the arrest is otherwise lawful (e.g., in public), then it is irrelevant whether the arrest warrant is invalid. (United States v. Jennings (9th Cir. 2008) 515 F.3rd 980, 985.)

Statutory Limitations:

Daytime and Nighttime Arrests (P.C. § 840):

Felony Arrests: An arrest for the commission of a felony may be made:

Without an Arrest Warrant: Any time of the day or night, in any public place or while already in custody on another charge, whether or not the offense occurred in the officer’s presence. (P.C. § 836(a)(2))

Exception: A police officer cannot make a warrantless arrest within the subject’s own home (People v. Ramey (1976) 16 Cal.3rd 263, 276; Payton v. New York (1980) 445 U.S 573 [63 L.Ed.2nd 639].), or the home of another person (Steagald v. United States (1981) 451 U.S. 204 [68 L.Ed.2nd 38.]; see below.), absent an exception.
Exception to Exception: When the officer is already and/or otherwise lawfully in the home, exigent circumstances exist, or defendant is standing in the threshold. (See examples, below.)

With an Arrest Warrant: Any time of the day or night, in any place, including the subject’s own home. (P.C. § 836(a)):

Exception #1: Cannot make a felony warrant arrest within a third person’s home, unless the officer also first obtains a search warrant for the third person’s home (See Steagald v. United States, supra, and below.) or is already and otherwise lawfully in the third person’s home.

Exception #2: Private persons may not serve arrest warrants. (P.C. §§ 813, 816)

Misdemeanor (and Infraction) Arrests:

Without an Arrest Warrant: Any time of the day or night, in any public place or while already in custody. (P.C. § 836(a)(1))

Exception #1: Cannot make a warrantless arrest within the subject’s own home (People v. Ramey. Supra: Payton v. New York, supra.), or the home of another person (Steagald v. New York, supra, and below.), absent an exception.

Exception to Exception: Misdemeanor or infraction committed in the officer’s presence or the presence of a private citizen (in the case of a private person’s arrest), while already and/or otherwise lawfully in the home. (People v. Graves (1968) 263 Cal.App.2nd 719; see also examples, below, under “Case Law Limitations,” “Ramey.”)

Query: If an officer is already lawfully in the house, may a misdemeanor arrest warrant be executed despite the lack of a nighttime endorsement? Unknown. P.C. § 840 itself does not provide for any such exception. But since this limitation on
arrests has been held to be statutory only, and not of constitutional origins (People v. Whitted (1976) 60 Cal.App.3rd 569.), no evidence will be suppressed anyway, making this question moot.

Exception #2: Cannot make a warrantless arrest for a misdemeanor or infraction not committed in the officer’s presence, or the presence of the private person (in the case of a private person’s arrest).

But see exceptions, above.

Exception #3: Cannot make a warrantless arrest for a “stale misdemeanor (or infraction).” (Jackson v. Superior Court (1950) 98 Cal.App.2nd 183, 187; see above.)

With an Arrest Warrant: Any time of the day or night, in any place, including the subject’s own home. (P.C. § 836(a))

Exception #1: Cannot make a misdemeanor warrant arrest at night within the subject’s home unless the warrant is “endorsed for night service” by a judge. (P.C. § 840(4)) (See above)

“Nighttime” for purposes of an arrest warrant is 10:00 p.m. to 6:00 a.m.

The need for a nighttime endorsement must be justified before a judge will approve it; i.e., why does this defendant need to be arrested at night? (See People v. Kimble (1988) 44 Cal.3rd 480, 494; discussing the need for justifying nighttime service for a search warrant.)

Exception #2: Cannot make a misdemeanor warrant arrest within a third person’s home, unless the officer also first obtains a search warrant for the third person’s home (See Steagald v. United States, supra.) or is already and otherwise lawfully in the third person’s home.
Exception #3: Private citizens may not serve arrest warrants. (P.C. §§ 813, 816)

Penal Code § 964: Victim and Witness Confidential Information:
Requires the establishment of procedures to protect the confidentiality of “confidential personal information” of victims and witnesses. The section is directed primarily at prosecutors and the courts, but also contains a provision for documents filed by law enforcement with a court in support of search and arrest warrants; i.e., an affidavit.

Subd. (b): “Confidential personal information” includes, but is not limited to, addresses, telephone numbers, driver’s license and California identification card numbers, social security numbers, date of birth, place of employment, employee identification numbers, mother’s maiden name, demand deposit account numbers, savings or checking account numbers, and credit card numbers.

Live Lineups: An ex parte court order requiring an un-charged criminal suspect to submit to a live lineup, even though there is probable cause to arrest the subject, is unenforceable. There is no statutory procedure for accomplishing such a procedure. (Goodwin v. Superior Court (2001) 90 Cal.App.4th 215.)

Case Law Limitations:

Ramey: Within One’s Own Residence: Warrantless arrests within a private residence are restricted because of the constitutional right to privacy interests a person, even criminal suspects, have within their own home. (See below)

General Rule: Arrests in one’s home for a felony or misdemeanor may only be made with prior judicial authorization in the form of an arrest warrant. (People v. Ramey (1976) 16 Cal.3rd 263, 276; Payton v. New York (1980) 445 U.S. 573 [63 L.Ed.2nd 639].)

Police officers need either (1) an arrest warrant or (2) probable and exigent circumstances to lawfully enter a person’s home to arrest its occupant. (Kirk v. Louisiana (2002) 536 U.S. 635 [153 L.Ed.2nd 599].)

However, surrounding a barricaded suspect in his home is in effect a warrantless arrest, justified by the exigent circumstances. The passage of time during the ensuing standoff does not dissipate that exigency to where officers are expected to seek the authorization of a judge to take the
suspect into physical custody. (Fisher v. City of San Jose (9th Cir. 2009) 558 F.3rd 1069; overruling its prior holding (at 509 F.3rd 952) where it was ruled that failure to obtain an arrest warrant during a 12 hour standoff resulted in an illegal arrest of the barricaded suspect.)

Exceptions: There are numerous exceptions to this rule:


But, “an alleged consenter must be aware of the purpose of the requested entry and a consent obtained trickery or subterfuge renders a subsequent search and seizure invalid.” (People v. Superior Court [Kenner], supra., at p. 69; merely asking for permission to enter “to talk to” the suspect does not justify the warrantless entry and arrest; see also In re Johnny V. (1978) 85 Cal.App.3rd 120, 132.)

Permission to enter need not be an express consent. Asking the homeowner for defendant and for permission to “come in and look around” when it was denied that he was present was reasonably interpreted by the police as consent to enter to find defendant for any purpose that they desired, including arrest. (People v. Newton, supra.)

For the officers to validly rely upon consent, they must reasonably and in good faith believe that the person giving consent had the authority to consent to their entry into the residence. (People v. Escudero (1979) 23 Cal.3rd 800, 806.)

Undercover Entries: Consent obtained by officers working undercover, for the purpose of continuing an investigation, is valid. It is the “intrusion into,” not the arrest while inside, which offends the constitutional standards under Ramey. Arresting the defendant after having gained lawful entry is not

“The Fourth Amendment does not protect ‘a wrongdoer’s misplaced belief that a person whom he voluntarily confides his wrongdoing will not reveal it.’” (*Toubus v. Superior Court* (1981) 114 Cal.App.3rd 378, 383.)

And just because the undercover officer has momentarily left the residence, such action followed immediately by the reentry of the arresting officers, does not violate *Ramey* or *Payton*. (*People v. Cespedes* (1987) 191 Cal.App.3rd 768.)

But the reentry must be simultaneous with, or immediately after, the undercover officer’s exit. (*People v. Ellers* (1980) 108 Cal.App.3rd 943; arrest unlawful when after the “buy,” during an undercover narcotics investigation, the police drove to a parking lot one mile away, spent ten to twenty minutes formulating a plan to arrest the defendant, and then returned and reentered the house to make the arrest.)

- **Exigent circumstances**: “‘(A) warrantless intrusion may be justified by *hot pursuit* of a fleeing felon, or *imminent destruction* of evidence [citation], or the need to prevent a suspect’s *escape*, or the *risk of danger* to the police or to other persons inside or outside the dwelling.’ [citations]” (Italics added; *Minnesota v. Olson* (1990) 495 U.S. 91, 100 [109 L.Ed.2nd 85, 95].) Examples:

  “*Fresh or Hot Pursuit,*” or at the end of a “*substantially continuous investigation*”: A continuous investigation from crime to arrest of the subject in his home, within a limited time period (e.g., within hours), and without an opportunity to stop and obtain an arrest warrant, is “*fresh pursuit.*” It is *not* necessary that the suspect be physically in view during the “pursuit.” (*People v. Escudero* (1979) 23 Cal.3rd 800, 809-810; *In re Lavoyne M.* (1990) 221 Cal.App.3rd 154; *People v. Gilbert* 182...
Where there was a two and a half hour investigation between a robbery-murder and the location of the defendant’s home, the officers were found to be in “fresh pursuit,” justifying a warrantless entry to look for the suspect. *(People v. Gilbert* (1965) 63 Cal.2nd 690, 706.)

When officers contact a rape victim half a block from the crime scene, less than an hour after the rape *(People v. White* (1986) 183 Cal.App.3r 1199, 1203-1204.), or immediately across the street minutes after she escaped from the sleeping suspect *(People v. Kilpatrick* (1980) 105 Cal.App.3rd 401, 409-411.), it is “fresh pursuit” when the officers go to the respective suspects’ homes, make a warrantless entry, and arrest the suspects. This was found to be necessary to prevent the escape of the suspect and the destruction of evidence.

Tracing an armed robbery suspect by the vehicle description and license number to a particular residence, justifies a warrantless entry. *(People v. Daughhetee* (1985) 165 Cal.App.3rd 574.)

The entry and securing of a home pending the obtaining of a search warrant, immediately following a gang shooting, was justified when it was believed that a second shooter and the firearms used were likely in the house. *(In re Elizabeth G.* (2001) 88 Cal.App.4th 496.)

Presence of an armed suspect, who had committed a vicious murder who was likely to flee, with the possibility that defendant would dispose of evidence; warrantless entry and arrest was lawful. *(People v. Williams* (1989) 48 Cal.3rd 1112, 1138-1139.)

A strong reason to believe that defendant was the killer in the murder of two men, that he was probably armed and at a particular apartment, and that he was likely to flee if not immediately
arrested, justified the warrantless entry. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 122-123.)

Officers may even pursue a person into his home upon attempting to cite him for an infraction where the suspect flees into his home. The defendant’s resistance converts the offense into a misdemeanor “resisting arrest” (i.e., P.C. § 148(a)), and allows for a “hot pursuit” into the suspect’s house to arrest him on that charge. (*People v. Lloyd* (1989) 216 Cal.App.3rd 1425.)

Having used a tracking device to follow defendants with stolen stereo speakers to a particular house, the immediate warrantless entry and search was justified by the reasonable fear that defendants would disassemble, destroy or hide the speakers, and wash off identifying fluorescent powder if they waited for a warrant. (*People v. Hull* (1995) 34 Cal.App.4th 1448, 1455.)

Warrantless entry to arrest a DUI (i.e., “Driving while Under the Influence”) suspect:

*Illegal:* *Welsh v. Wisconsin* (1984) 466 U.S. 740 [80 L.Ed.2nd 732], where the state treated a person’s first DUI offense as a non-criminal offense, subjecting the suspect to civil forfeiture only.

*Legal:* *People v. Hampton* (1985) 164 Cal.App.3rd 27, 34, where a warrantless entry was upheld to prevent the destruction of evidence (the blood/alcohol level) and there was reason to believe defendant intended to resume driving. *Welsh* can be distinguished by the simple fact that California treats DUI cases as serious misdemeanors.

*Legal:* Entering a house without consent or a warrant to take a suspected DUI driver into custody and to remove him from the house for identification and arrest by a private citizen who saw defendant’s driving, held to be legal. The fact that the defendant’s
blood/alcohol level might dissipate to some degree pending the obtaining of a telephonic arrest warrant, plus the fact that the suspect might leave and drive again, was sufficient cause to establish an exigent circumstance. *(People v. Thompson (2006) 38 Cal.4th 811.)*

*Note:* The Court differentiated on its facts *Welsh v Wisconsin* (1984) 466 U.S. 740 [80 L.Ed.2nd 732], where it was held that a first time DUI, being no more than a civil offense with a $200 fine under Wisconsin law, was not aggravated enough to allow for a warrantless entry into a residence to arrest the perpetrator. The cut off between a minor and a serious offense seems to be whether or not the offense is one for which incarceration is a potential punishment. *(People v. Thompson, supra, at pp. 821-824, citing Illinois v. McArthur (2001) 531 U.S. 326, 336, 337 [148 L.Ed.2nd 838].)*

*Illegal:* The Ninth Circuit Court of Appeal, arguing the continuing validity of, *Welsh,* held that California’s interpretation under *Thompson* is wrong, and that a warrantless entry into a home to arrest a misdemeanor driving–while-under-the-influence suspect is a *Fourth Amendment* violation. *(Hopkins v. Bonvicino (9th Cir. 573 F.3rd 752, 768-769; finding that warrantless entries into residences in misdemeanor cases “will seldom, if ever, justify a warrantless entry into the home.”)*

Entering a residence with probable cause to believe only that the non-bookable offense of possession of less than an ounce of marijuana is occurring *(H&S § 11357(b)),* is closer to the *Welsh* situation, and a violation of the *Fourth Amendment* when entry is made without consent. *(People v. Hua (2008) 158 Cal.App.4th 1027.)*
A reasonable belief in the imminent threat to life or the welfare of a person within the home, with probable cause to believe a missing person was inside, and a reasonable belief that the person inside needed aid, justified a warrantless entry. (*People v. Coddington* (2000) 23 Cal.4th 529, 580.)

**Exigent Circumstances**, justifying a warrantless residential arrest, include an evaluation of the following circumstances:

- The gravity of the offense;
- Whether the suspect is reasonably believed to be armed;
- Whether probable cause is clear;
- Whether the suspect is likely to be found on the premises; and
- The likelihood that the suspect will escape if not promptly arrested.


- Officers are *already lawfully inside* when probable cause develops. (*People v. Ramey*, *supra*; *People v. Dyke* (1990) 224 Cal.App.3rd 648, 657-659, 661.)

*See United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 997; while executing a search warrant.

- Defendant is *standing in the threshold*: Case law has consistently held that an arrest without a warrant, either outside or *even with the suspect standing in the threshold* of his own home, is lawful. For example:

A warrantless arrest at the threshold of defendant’s motel room, where defendant opened the door in response to the officers’ knock and after having looked outside and seeing the officers standing at the door, is lawful. *Payton* draws a “*bright line*” at the threshold. So long as the officers did not misidentify themselves or use coercion to get defendant to open the door, and defendant acquiesced in the procedure, he is subject to a warrantless arrest. The fact that defendant was
physically inside the door is also irrelevant so long as the officers are outside at the time the arrest is made. ([United States v. Vaneaton (9th Cir. 1995) 49 F.3rd 1423, 1426-1427:] Where officers use no force, threats, or subterfuge, a suspect’s decision to open the door exposes him to a public place, and the privacy interests protected by Payton are not violated.)

Defendant, standing in her doorway as officers approached, is in public. Further, she may not defeat an arrest which has been set in motion by attempting to escape into a private place. ([United States v. Santana (1976) 427 U.S. 38 [49 L.Ed.2nd 300]:])

When the officer attempted to arrest defendant in the threshold of her apartment door, only to have her pull away and into the apartment, the officer may follow her in to complete the arrest he had set in motion on her doorstep. ([People v. Hampton (1985) 164 Cal.App.3rd 27, 35-36]:)

However, arresting defendant who was still in bed, even though he could (and did) reach the door and open it from his bed, was a violation of Payton. It is irrelevant that the officer was still outside the residence when he pronounced defendant under arrest in that it is the defendant’s location, and not the officer’s, that is important. ([United States v. Quaempts (9th Cir. 2005) 411 F.3rd 1046]:)

- While already inside lawfully serving a search warrant. ([People v. McCarter (1981) 117 Cal.App.3rd 894, 908]:)

- A parolee (and, therefore, presumably, a probationer who is on search and seizure Fourth Amendment waiver conditions) may be arrested in his home without the necessity of a warrant. Police are authorized to enter a house without a warrant where the suspect is a parolee who had no legitimate expectation of privacy against warrantless arrests. ([People v. Lewis (1999) 74 Cal.App.4th 662, 665-673; In re Frank S. (2006) 142 Cal.App.4th 145, 151]:)
• **Inviting Defendant Outside:** The defendant may even be “invited” outside, even though the officer’s intent to arrest is not disclosed. When the defendant leaves the protection of his home, *Ramey* does not apply and the arrest outside is lawful. (*People v. Tillery* (1979) 99 Cal.App.3d 975, 979-980; *People v. Green* (1983) 146 Cal.App.3d 369, 377; *People v. Jackson* (1986) 187 Cal.App.3d 499, 505; *Hart v. Parks* (9th Cir. 2006) 450 F.3d 1059, 1065.)

A suspect may be arrested without a warrant when he is in public. Case law tells us that anywhere, “whether it be the driveway, lawn, or front porch,” which are “open to ‘common’ or ‘general use’” by those wishing to contact the resident of a house, are “public places.” (*People v. Olson* (1971) 18 Cal.App.3rd 592, 598.)

See *In re Danny H.* (2002) 104 Cal.App.4th 92, for a thorough discussion of the law on “public places” as it relates to the 24 separate statutes where such is an element.

And while it is illegal for a police officer to use a ruse to make a warrantless entry into a suspect’s home, it has been held that it is *not* illegal to trick the suspect out. (*People v. Rand* (1972) 23 Cal.App.3d 579, 583.) For example:

Calling the suspect’s house and falsely telling him the police are coming with a warrant, causing defendant, by his own choice, to attempt to flee his residence with the contraband, is lawful. There is no constitutional violation in arresting him when he comes outside. (*Ibid.; People Porras* (1979) 99 Cal.App.3d 874; but note this Court’s invitation to the California Supreme Court to review the lawfulness of purposely evading *Ramey* in this manner (pp. 879-880) and the Supreme Court’s refusal to do so by denying appellant’s petition for a hearing.)

These cases, however, are when an officer has probable cause to arrest the suspect. Where there is no pre-existing probable cause.
cause, using a ruse to trick people outside during a narcotics investigation at an apartment complex, for the purpose of confronting as many people as they could lure outside (resulting in the defendant’s illegal detention when he was surrounded by a team of officers all dressed in raid gear) is illegal. “A deception used to gain entry into a home and a ruse that lures a suspect out of a residence is a distinction without much difference. . . .”  (People v. Reyes (2000) 83 Cal.App.4th 7, 12-13.)

But see In re R.K. (2008) 160 Cal.App.4th 1615, where the Court criticized the police tactic of inviting a drunk suspect out from a non-public location onto the public street and then arresting him for being “drunk in public,” ruling that such was illegal arrest even though he “voluntarily acquiesced” to go to a public place. It is unknown if this ruling can be applied to a Ramey situation as well.

There is even some authority allowing a police officer to order the defendant out of his house, after which he is arrested. Ramey forbids warrantless entries only, and is not a relevant issue when the defendant is arrested in public, no matter how he came to be in public.  (People v. Trudell (1985) 173 Cal.App.3rd 1221, 1228-1230.)

However, it has been held that when officers are outside with guns drawn, ordering defendant to come out, he has in effect been seized (i.e., arrested) while in his house. Leaving the house under such coercive circumstances is not an exception to Ramey/Payton.  (United States v. Al-Azzaway (9th Cir. 1985) 784 F.2nd 890, 893-895; Fisher v. City of San Jose (9th Cir. 2009) 558 F.3rd 1069, 1074-1075.)

Sufficiency of Evidence to Believe the Suspect is Inside: The amount of evidence a law enforcement officer must have indicating that a criminal suspect is in fact presently inside his own
residence in order to justify a non-consensual entry, with or without an arrest warrant, has been debated over the years:

The United States Supreme Court, in *Peyton v. New York* (1980) 445 U.S. 573 [63 L.Ed.2nd 639], merely states that a police officer must have a “reason to believe” the suspect is inside his residence, without defining the phrase.

A California lower appellate court found that the officers needed a “reasonable belief,” or “strong reason to believe,” the suspect was home. (*People v. White* (1986) 183 Cal.App.3rd 1199, 1204-1209; rejecting the defense argument that full “probable cause” to believe the subject was inside is required; see also *United States v. Magluta* (11th Cir. 1995) 44 F.3rd 1530, 1535, using a “reasonable belief” standard.)

Other authority indicates that a full measure of “probable cause” is required. (See *Dorman v. United States* (D.C. Cir. 1970) 435 F.2nd 385, 393; see also *United States v. Phillips* (9th Cir. 1974) 497 F.2nd 1131; a locked commercial establishment, at night; *United States v. Gorman* (9th Cir. 2002) 314 F.3rd 1105; defendant in his girlfriend’s house with whom he was living; and *United States v. Diaz* (9th Cir. 2007) 491 F.3rd 1074; and *United States v. Gooch* (9th Cir. 2007) 506 F.3rd 1156, 1159, fn. 2.)

It has been argued that the California Supreme Court, interpreting the language of P.C. § 844 (i.e., “reasonable grounds for believing him to be (inside")”), has found that any arrest, with or without an arrest warrant, requires probable cause to believe the subject is inside in order to justify a non-consensual entry into a residence. (*People v. Jacobs* (1987) 43 Cal.3rd 472, 478-479.)

Noting that five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a minority opinion (see *United States v. Gorman*, supra.), the Fourth District Court of Appeal (Div. 2) found instead that an 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. Employing that standard, the entry into defendant’s apartment to conduct a probation search was lawful based on all of the information known to
the officers. Accordingly, the court upheld the trial court’s conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment and was present at the time, and therefore the officers had the right to enter the apartment to conduct a warrantless probation search. (*People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.)

Also arguing that the California Supreme Court, in *People v. Jacobs*, *supra*, did not find that probable cause was required, contrary to popular belief. (*Id.*, at p. 662.)

**Within a Third Person’s Home:** Probable cause justifying an arrest warrant for one person does not authorize entry into a third person’s home to look for the subject of the arrest warrant. To do so violates the privacy interests of the third party. Therefore, a search warrant, based upon probable cause to believe the wanted subject is in fact in the home of the third party (absent exigent circumstances), is necessary. (*Steagald v. United States* (1981) 451 U.S. 204 [68 L.Ed.2nd 38]; *People v. Codinha* (1982) 138 Cal.App.3rd 167; sometimes referred to as a “Steagald Warrant.” See also P.C. 1524(a)(6); legal authorization for obtaining such a search warrant.)

The arrestee, if doing no more than merely visiting the lawful resident, probably has no standing to contest the unlawful entry of another’s house. (*United States v. Underwood* (9th Cir. 1983) 717 F.2nd 482.) It is when a police officer obtains evidence against the third party homeowner, while looking for the subject of the arrest, that *Steagald* becomes an issue. The homeowner, in such a case, has standing to contest the warrantless entry of his house in defense at his own prosecution. (*Steagald v. United States, supra*, at pp. 212, 216 [68 L.Ed.2nd at pp. 45, 48].)

But, there is some authority that, as an overnight guest in another’s apartment, defendant with an outstanding arrest warrant does have standing to contest the entry of the bedroom in which he is staying when done without a search warrant. (*People v. Hamilton* (1985) 168 Cal.App.3rd 1058.)

A frequent visitor, with free reign of the house despite the fact that he did not stay overnight, might also have standing


The Ninth Circuit Court of Appeal has interpreted Peyton’s “reason to believe” requirement (See also *United States v. Underwood* (9th Cir. 1983) 717 F.2nd 482.) as necessitating “probable cause” to believe a suspect is inside a third person’s home before a non-consensual entry may be made. (*United States v. Gorman* (9th Cir. 2002) 314 F.3rd 1105; attempt to serve an arrest warrant requires “probable cause” to believe the subject of the warrant is inside.)

California’s Fourth District Court of Appeal has held otherwise, finding that only a reasonable belief, falling short of probable cause to believe, that the suspect lives there and is present at the time, is necessary to justify a non-consensual entry. (*People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.)

Also arguing that the California Supreme Court, in *People v. Jacobs*, supra, did not find that probable cause was required, contrary to popular belief. (*Id.*, at p. 662.)

**Consequences of a Ramey/Payton Violation:**


See also *People v. Marquez* (1992) 1 Cal.4th 553, 569; *Harris* rule applies to an arrest made with probable cause but in violation of the California Constitution and *People v. Ramey*, supra.

Even where *Ramey* and *Payton* are violated, so long as the police have probable cause to make the arrest, only evidence secured in the home is subject
to suppression. Defendant’s arrest is not suppressed, nor are his statements later (after leaving the house) made to police as a product of that arrest. (*People v. Watkins, supra.*)

Conducting an illegal parole search within a home where there exists probable cause to arrest the subject (even though he was only detained) will not cause the suppression of a confession obtained after the subject comes to the law enforcement officer’s office where he is interrogated. (*United States v. Crawford* (9th Cir. 2004) 372 F.3rd 1048, 1054-1059.)

Similarly, physical evidence recovered from the defendant’s person upon searching him at the police station, should also be admissible. (*People v. Watkins, supra,* at p. 31, fn. 8; citing out-of-state authority.)

This is supported by dicta in *People v. Marquez, supra,* at p. 569, where the Court noted that a *Ramey* violation, “would require suppression solely of evidence obtained from searching the home at the time of the arrest.”

**Note:** What this means is that should a court rule that *Ramey/Payton* has been violated, any oral or physical evidence seized from the defendant after removing him from the home will not be suppressed, being the product of a lawful arrest and not the product of the illegal entry into the residence. In other words, don’t question or search the individual until he has been removed from the home in any case where the entry is questionable.

**But Note:** Earlier case authority has indicated that a *Ramey* violation is but one factor for the court to consider in determining whether the defendant’s subsequent confession is a product of his free will. (*People v. Trudell* (1985) 173 Cal.App.3rd 1221, 1231-1232.)

“**Knock and Notice:**” “To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the home in which the person to be arrested is, or in which they have reasonable
grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.” (P.C. § 844)

See “Knock and Notice;” under “Search Warrants,” below.

Problems:

Arresting for the Wrong Offense:

As long as, when arrested, probable cause to arrest for some offense was present, it is irrelevant that defendant was arrested for the wrong offense. (People v. Lewis (1980) 109 Cal.App.3rd 599, 608-609; In re Donald L. (1978) 81 Cal.App.3rd 770, 775; see also People v. Richardson (2008) 43 Cal.4th 959, 988-990; and People v. Carmona (2011) 195 Cal.App.4th 1385, 1391.) No sanctions will be imposed for having selected the wrong charge.

“Subjective intentions (of the arresting officer) play no role in ordinary, probable-cause Fourth Amendment analysis.” (Whren v. United States (1996) 517 U.S. 806, 814 [135 L.Ed.2nd 89, 98].)

“(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; Stopping defendant for his third (rear window) brake light out despite not knowing the correct legal justification for finding that the inoperable light was in violation of the Vehicle Code.)

See also People v. Rodriguez (1997) 53 Cal.App.4th 1250; defendant arrested for homicide for which there was no probable cause, while the officer did have probable cause to believe defendant had in fact committed another homicide; arrest lawful.

Arresting defendant for “littering” (per P.C. § 374.4) for urinating in public was a lawful arrest even though the officer used the wrong offense. Defendant’s actions were in fact a violation of P.C. §§ 370, 372, for having created a public nuisance. (People v. McDonald (2006) 137 Cal.App.4th 521, 530.)

The United States Supreme Court has ruled that so long as a police officer has probable cause to arrest for some offense, it matters not that, subjectively, the officer erroneously believed that he only had
probable cause for another offense. (*Devenpeck v. Alford* (2004) 543 U.S. 146 [160 L.Ed.2nd 537]; rejecting the Ninth Circuit Court of Appeals’ opinion that arresting for the wrong offense was only lawful if the two offenses were “closely (or ‘factually’) related,” as described in *Gascho v. United States* (9th Cir. 1994) 39 F.3rd 1420, 1428; and *Alford v. Haner* (9th Cir. 2003) 333 F.3rd 972; petition granted.)

The Ninth Circuit was virtually alone on this issue, with other federal circuits following the same rule as California. (See *United States v. Pulvano* (5th Cir. 1980) 629 F.2nd 1151; *United States v. Saunders* (5th Cir. 1973) 476 F.2nd 5; *Klingler v. United States* (8th Cir. 1969) 409 F.2nd 299; *United States ex rel LaBelle v. LaVallee* (2nd Cir. 1975) 517 F.2nd 750; *Richardson v. Bonds* (7th Cir. 1988) 860 F.2nd 1427; *Knight v. Jacobson* (11th Cir. 2002) 300 F.3rd 1272.)

And while the Ninth Circuit has accepted the rule of *Devenpeck*, it has not done so completely. In *Rosenbaum v. Washoe County* (9th Cir. 2011) 663 F.3rd 1071, the Court refused to extend *Devenpeck* to a statute that the arresting officers were unaware of at the time of the arrest and of which “no reasonable officer, no matter how experienced, would have known . . . .” Noting that the crime in issue here had never been used before, the Court ruled that for *Devenpeck* to apply; “the crime must be reasonably within the arsenal of crimes that officers enforce in the state. (fn. omitted).”

*However,* an arrest for what the officer believes to be a felony, and which did not occur in the office’s presence, but which is in fact only a misdemeanor, may be an illegal arrest, per *P.C. § 836(a)(1)* (i.e., misdemeanor not in the officer’s presence.), and/or the “staleness” rule (see above).

*Mistaken Belief in Existence of Probable Cause to Arrest or Search, an Arrest Warrant, or that a Fourth Waiver Exists, Based upon Erroneous Information received from Various Sources:*

*Problem:* An officer arrests and/or searches a person under the mistaken belief that there is an arrest warrant outstanding for the person, the person is subject to a “Fourth Waiver” (i.e., he has previously waived his Fourth Amendment search and seizure rights), or the officer is given other erroneous information through either court, law enforcement, or other official channels.
Rule: The United States Supreme Court initially held that an officer’s “good faith” will validate the resulting arrest and/or search, at least in those cases where the erroneous information came from a “court source.” (Arizona v. Evans (1995) 514 U.S. 1 [131 L.Ed.2nd 34]; see also People v. Downing (1995) 33 Cal.App.4th 1641.)

Extension of Rule: The United States Supreme Court subsequently ruled (in a 5-to-4 decision) that an officer’s good faith reliance on erroneous information will not invalidate an arrest even when that information comes from a law enforcement source, so long as the error was based upon non-reoccurring negligence only. Deliberate illegal acts, or a reckless disregard for constitutional requirements, or reoccurring or systematic negligence, will not excuse the resulting unlawful arrest. (Herring v. United States (2009) 555 U.S. 135 [172 L.Ed.2nd 496].)

Reasoning: This is because the “Exclusionary Rule” was implemented primarily to deter intentional or reckless police misconduct; not misconduct by the courts or other non-law enforcement sources, or even law enforcement when their error was simply non-reoccurring negligence. It is not necessary to suppress the resulting evidence when to do so does not further the purposes of the Exclusionary Rule. (Arizona v. Evans, supra. At pp. 15-16 [131 L.Ed.2nd at pp. 47-48]; United States v. Leon (1984) 468 U.S. 897, 920-921 [82 L.Ed.2nd 677, 697]; People v. Willis (2002) 28 Cal.4th 22; People v. Tellez (1982) 128 Cal.App.3rd 876, 880; Illinois v. Krull (1987) 480 U.S. 340 [94 L.Ed.2nd 364].)

“(E)vidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’” (Illinois v. Krull, supra., at pp. 348-349.)

“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” (Herring v. United States, supra., at p. 144.)

Law Enforcement vs. Non-Law Enforcement Source: After the decision in Arizona v. Evans (1995), and before Herring v. United States, supra, California courts debated what was a law
enforcement source, and what was not, interpreting *Evans* as establishing a bright line test for the issue. These cases will likely still be relevant in those cases where it is determined to be a law enforcement source and involves deliberate illegal acts, reckless disregard for constitutional requirements, or reoccurring or systematic negligence.

*Law enforcement source cases* where the resulting evidence was suppressed:

**Police Computer Records:** Arrest based upon an arrest warrant which was supposed to have been recalled six months earlier, but which was still reflected as outstanding in the police department’s computer system. (*People v. Ramirez* (1983) 34 Cal.3rd 541, 543-544; *People v. Armstrong* (1991) 232 Cal.App.3rd 228, 241; *Miranda v. Superior Court* (1993) 13 Cal.App.4th 1628.)

**Parole** is a law enforcement source. Erroneous information from a state Department of Corrections parole officer resulted in a belief that the defendant was subject to a Fourth Waiver. The resulting warrantless search was held to be illegal. (*People v. Willis* (2002) 28 Cal.4th 22.)

But see *People v. Tellez* (1982) 128 Cal.App.3rd 876, where erroneous information from Parole did *not* preclude the use of the “Good Faith” exception to the exclusionary rule. This case is of questionable validity given the rule in *Willis*.

**Exception:** Where an officer is erroneously told that the defendant is on parole, only to find out later that he was subject to a probationary Fourth waiver instead, the search will be upheld. It is not relevant what type of Fourth waiver applies to the defendant, the officer acting in “good faith.” (*People v. Hill* (2004) 118 Cal.App.4th 1344.)

**Probation:** Based upon the reasoning of *People v. Willis* (2002) 28 Cal.4th 22, it was held that an adult
Probation Department, even when the error was made by a clerk, is a law enforcement source. This Court questioned the continuing validity of *In re Arron C.* (1997) 59 Cal.App.4th 1365 (finding Juvenile Probation to be a court source), but noted that *Arron C.* dealt with “Juvenile Probation,” which works closer with the courts than does adult probation departments. (*People v. Ferguson* (2003) 109 Cal.App.4th 367.)


**Exception:** Although evidence of a driving under the influence violation is subject to suppression in a criminal prosecution when it is discovered as a product of a traffic stop based upon outdated police records that the vehicle defendant was driving was stolen, that same evidence will not be suppressed in Department of Motor Vehicles administrative proceedings involving the suspension of defendant’s driver’s license. (*Park v. Valverde* (2007) 152 Cal.App.4th 877.)

Non-law enforcement source cases where the resulting evidence was not suppressed:

*Fourth Wavier Information from the Courts:* Erroneous information concerning whether defendant was still on probation and subject to a Fourth Waiver, the error created by a court clerk, is a “court source.” (*People v. Downing* (1995) 33 Cal.App.4th 1641.)

However, the Court in *Downing* noted that once law enforcement is on notice of the defects in the court system, “good faith” may not apply the next time. (*People v. Downing, supra,* at p. 1657, fn. 26; “We caution, however, that where the police department has knowledge of flaws in a record or data base system, it would not seem ‘objectively reasonable’ to rely solely on it without taking additional steps to ensure its accuracy.”)
Reversed Prior Conviction: A probationary Fourth Waiver condition from a prior case that was legally in effect at the time of the search in issue justifies the search. The fact that the prior conviction is subsequently vacated, thus nullifying the search condition, does not retroactively make the search in issue illegal. (People v. Miller (2004) 124 Cal.App.4th 216.)

Where defendant’s prior conviction was overturned on appeal, but only after officers conducted a probationary search based upon that conviction. Same result as in Miller. “(T)he integrity of the process is best served . . . by a rule which determines the validity of the search on the basis of the legal situation which exits at the time the search is made.” (People v. Fields (1981) 119 Cal.App.3rd 386, 390.)

Legislative Source: Relying upon a statute authorizing a warrantless administrative search, after which that statute is later declared to be unconstitutional, is lawful as having come from a “legislative source” (Illinois v. Krull (1987) 480 U.S. 340 [94 L.Ed.2nd 364].), in that the exclusionary rule was not created to punish the Legislature any more than it was created to punish the courts.

See also; Michigan v. DeFillippo (1979) 443 U.S. 31, 37-38 [61 L.Ed.2nd 343, 439-350]; good faith reliance on an ordinance that was later declared to be unconstitutional.

The alleged unconstitutionality of a statute, the violation for which serves as the basis for a search warrant, is irrelevant so long as officers reasonably relied upon the statute’s validity at the time of the obtaining of the search warrant. (United States v. Meek (9th Cir. 2004) 366 F.3rd 705, 714.)

Department of Motor Vehicles Source: Invalid information concerning the status of a vehicle’s
registration, entered into the system by a non-law enforcement “data entry clerk,” is a non-law enforcement source. The officer’s arrest and search in reasonable reliance upon records showing that the defendant’s vehicle’s registration was expired and that a fraudulent tab had been placed on the license plate (displaying false registration tabs, per V.C. §§ 20, 31, 4601 and 40000.1), was upheld under the “good faith” exception. (People v. Hamilton (2002) 102 Cal.App.4th 1311.)

Juvenile Probation: At least within the Juvenile Court, Probation is more aligned with the courts than law enforcement, and is therefore a “court source.” Erroneous information from Juvenile Probation does not preclude application of good faith to save the resulting search. (In re Arron C. (1997) 59 Cal.App.4th 1365.)

Reliance upon a juvenile’s Fourth Waiver, valid at the time, justifies a search irrespective of whether the wavier was lawfully imposed. (People v. Rios (2011) 193 Cal.App.4th 584, 597-598.)

But see People v. Howard (1984) 162 Cal.App.3rd 8, at pp. 19-21, where Probation merely failed to inform a police officer of the correct limits of a particular probation search condition. The Court held the resulting search to be illegal. Howard, however, is criticized by both Downing, supra, at p. 1652, fn. 17, and Arron C., supra, at p. 1372.

Arresting and Searching in Ignorance of an Existing Warrant of Arrest: An arrest and search of a person without probable cause cannot be validated after the fact when it is belatedly discovered that an arrest warrant exists for that person. (Moreno v. Baca (9th Cir. 2005) 431 F.3rd 633, 638-641.)

See “Searching While In Ignorance of a Search Condition,” under “Fourth Waiver Searches,” below.

Minors and Curfew: There is a split of authority on the legality of “arresting” a minor for a curfew violation:
Minors violating curfew may be stopped, detained, and transported to a curfew center, the police station, or other facility where the minor can await the arrival of a parent or other responsible adult. A search of the minor prior to placing him in a curfew center with other children is also reasonable. (In re Ian C. (2001) 87 Cal.App.4th 856.)

Before Ian C., it was held that a curfew violation did not justify the transportation of a minor to a police station for interrogation, such a custodial arrest not being one of the alternatives allowed under the Welfare and Institutions Code, referring to W&I §§ 601, 626, 626 and 626.5. The Court further held that such a transportation, as an illegal arrest, was also a violation of the Fourth Amendment. (In re Justin B. (1999) 69 Cal.App.4th 879.)

In re Justin B. was criticized in the later decision of In re Charles C. (1999) 76 Cal.App.4th 420. The Court in Charles C. held that the arrest and transportation of a minor to a police station for a violation of curfew, at least where the minor’s parents could not be located while still in the field, was not improper. Under such circumstances, taking the minor to a police station is the least intrusive alternative left to the officer. (W&I § 626) Further W&I § 207(b)(2) provides that a minor as described by W&I § 601 (which includes curfew violators) may be taken into custody and held in a “secure facility,” which includes a police station, so long as not confined with adults, for up to 24 hours while the minor’s parents are located. Lastly, the Court held that even if in violation of the Welfare and Institutions Code, the Fourth Amendment is not violated by transporting a curfew violator to a police station, so suppression of any resulting evidence is not required.

The Court further noted that taking a minor “into temporary custody,” as authorized by W&I § 625, is the functional equivalent of an arrest. (In re Charles C., supra, at p. 425, fn. 3; see also In re Thierry S. (1977) 19 Cal.3d 727, 734, fn. 6; and In re Justin B., supra, at p. 889.)

Note: In re Charles C., supra, is the better rule. In re Justin B., supra, criticized both Charles C. (at pp. 426-427.) and In re Ian C., supra, at p. 860, is a strained decision at best, and of questionable validity.
Minors and Truancy:

Observation of a minor carrying a backpack on the street during school hours within several miles of a high school was sufficient cause to stop and detain the minor and inquiry as to his status as a student. When defendant was unable to provide a satisfactory reason for why he was out of school, and had identification in someone else’s name, he was properly arrested for being truant (Ed. Code, § 48264) and searched incident to arrest. (In re Humberto O. (2000) 80 Cal.App.4th 237; recovery of a dagger from his backpack was lawful.)

Information Provided to an Arrested Person:

P.C. § 841: Information to be Provided: The person making the arrest must inform the person being arrested of the following:

- The intention to arrest him;
- The cause of the arrest (i.e., the charges); and
- The authority to make it.

(People v. Superior Court (Logue) (1973) 35 Cal.App.3rd 1, 5.)

Exceptions: There is no need to comply with the above when:

- The person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of, or an attempt to commit, an offense (See People v. Darnell (1951) 107 Cal.App.2nd 541 545; People v. Thomas (1957) 156 Cal.App.2nd 117, 130; People v. Valenzuela (1959) 171 Cal.App.2nd 331, 333.); or
- The person to be arrested is pursued immediately after commission of the offense, or after an escape. (See People v. Pool (1865) 27 Cal. 572, 576; Allen v. McCoy (1933) 135 Cal.App. 500, 508; People v. Campbell (1972) 27 Cal.App.3rd 849, 854; and Johanson v. Department of Motor Vehicles (1995) 36 Cal.App.4th 1209, 1218.)

Even where an exception applies, if the arrestee asks what he or she is being arrested for, he or she must be told. (P.C. § 841)
Foreign Nationals; P.C. § 834c(a)(1):

Advisal to Arrestee/Detainee: Upon the arrest and booking or detention for more than two (2) hours of a known or suspected foreign national, the arrestee/detainee shall be advised “without delay” that he or she has a right to communicate with an official from the consulate of his or her native country. If the arrestee/detainee chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified.

This is a statutory enactment of the 1963 Vienna Convention on Consular Relations, Article 36; a Treaty signed by the United States and 169 other countries.

Although there is some disagreement, it is generally accepted that a foreign national has the “standing” necessary to invoke the provisions of the Vienna Convention in so far as they require notice to an arrestee/detainee of his right to contact his consulate. (See United States v. Superville (Vir. Islands, 1999) 40 F.Supp.2nd 672, 676-678.)

The United States Supreme Court, until recently (see below), declined to decide whether a foreign national who had not been advised of his rights under the Vienna Convention had an enforceable right in U.S. courts. (Sanchez-Llamas v. Oregon (2006) 548 U.S. 331, 343 [165 L.Ed.2nd 557]; assuming for the sake of argument that they did, while specifically declining to decide the issue. Four dissenting opinions would have held that the defendants had a right to raise these issues. (Id., at pp. 369-378.)

The officer’s department is then responsible for making the requested notification. (subd. (a)(2))

The Vienna Convention also provides that any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the authorities “without delay.” (Art. 36(1)(b))

The law enforcement official in charge of a custodial facility where a foreign national is housed shall ensure that
the arrestee is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country. (subd. (a)(3))

Local law enforcement agencies are to incorporate these requirements into their respective policies and procedures. (subd. (c))

**Automatic Notice to Foreign Country:** Fifty-six (56) countries are listed in subdivision (d) which must be notified of the arrest or detention (pursuant to subd. (a)(1); i.e., more than 2 hours) of one of their foreign nationals “without regard to an arrested or detained foreign national’s request to the contrary.”

*Note:* Although Mexico is one of the 170 (which includes the United States) countries that signed the Convention, it is not one of the countries listed that must be automatically notified of the arrest, booking or detention of a foreign national.

**Sanctions for Violations:** It has been generally accepted that a violation of the provisions of the Vienna Convention and, presumably, this statute, will not result in the suppression of any evidence. (*United States v. Lombera-Camorlinga* (9th Cir. 2000) 206 F.3rd 882; *People v. Corona* (2001) 89 Cal.App.4th 1426; *United States v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3rd 1118, 1130.)

Not informing a Japanese national of his right to contact the Japanese consulate upon his arrest is not a violation of the Japan Convention, Article 16(1). Even if Article 16(1) could be interpreted as requiring such notification, a violation would not result in the suppression of the defendant’s later statements nor any physical evidence recovered as the result of a consensual search. (*United States v. Amano* (9th Cir. 2000) 229 F.3rd 801, 804.)

Japan, although a signatory to the Vienna Convention, is not one of the 56 countries listed in P.C. 834c that must be notified upon the arrest or detention of one of their citizens.

The United States Supreme Court, until recently, has rejected appeals on this issue on procedural grounds, declining to decide this issue on its merits. (See *Breard v. Greene* (1998) 523 U.S. 371 [140 L.Ed.2nd 529].)
However, a number of justices have expressed dissatisfaction with avoiding the issue, in general, and not sanctioning states for violating the Convention, in particular. (See also Torres v. Mullin (2003) 540 U.S. 1035 [157 L.Ed.2nd 454].)

The “International Court of Justice” (ICJ), in a lawsuit brought against the United States by Mexico and decided on March 31, 2004, found that there are 54 death row inmates (27 of which are in California) who were not provided with a notification of their consular rights, in violation of the Vienna Convention. The Court concluded that the offending state and local jurisdictions violating these requirements were “obligated” to review and reconsider these cases. (See Mexico v. United States of America [Avena] (2004) 2004 I.C.J. No. 128.)

The United States Supreme Court, in Sanchez-Llamas v. Oregon (2006) 548 U.S. 331, 351-356 [165 L.Ed.2nd 557], while finding that the rulings of the ICJ deserved “respectful consideration,” held that they were not binding upon U.S. courts and declined to follow their guidance on this issue.

In May, 2005, the United States Supreme Court dismissed as improvidently granted a writ of certiorari in a Texas case challenging state law enforcement officers’ failure to provide a capital defendant, and Mexican national, with a Vienna Convention notification. (Medellin v. Dretke (2005) 544 U.S. 660 [161 L.Ed.2nd 982].)

The Court in Medellin v. Dretke did not dismiss the writ out of a lack of interest, however, but rather because the defendant initiated new proceedings in the Texas’ courts, based upon the ICJ’s latest pronouncement (Mexico v. United States of America [Avena], supra.) and an executive order issued by President Bush for American courts to review violations of the Vienna Convention (see International Herald Tribune (3/4/05), that might well resolve the issues.

Even so, four U.S. Supreme Court justices dissented, noting that “(n)oncompliance with our treaty obligations is especially worrisome in capital cases,” and that the defendant in this case had raised
some “debatable” issues that “suggest the very real possibility of his victory in state court.” *(Medellin v. Dretke, supra.)*

The United States Supreme Court finally ruled on the issues of (1) the proper remedy for an Article 36 violation and (2) whether failing to raise the issue at the trial court level precluded the raising of the issue post-conviction. *(Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331 [165 L.Ed.2nd 557] (joined with *Bustillo v. Johnson* (#05-51), a case from the Virginia Supreme Court). In these two cases, the Court held that a violation of the Vienna Convention does not warrant the suppression of evidence, including a defendant’s statements. The Court also held (in the *Bustillo v. Johnson* portion of the decision) that failing to raise the issue in the state courts will preclude, procedurally, the defendant from litigating the issue by way of a federal writ of habeas corpus.

*Not decided* was whether the Vienna Convention grants individuals enforceable rights in a state court, or whether the provisions of the Convention are something to be enforced via political channels between countries, the Court assuming, for the sake of argument, that such rights were enforceable without deciding the issue. *(Sanchez-Llamas v. Oregon, supra., a p. 343.)* Four dissenting opinions would have specifically held that the defendants had a right to raise these issues. *(Id., at pp. 369-378.)*

*But note:* An extradited defendant has standing to seek enforcement of an extradition treaty’s restrictions on the potential punishment to which he may be subjected. *(Benitez v. Garcia* (9th Cir. 2007) 476 F.3rd 676; extradited from Venezuela under the understanding that he would not be subjected to the death penalty or a life sentence.)*

The Vienna Convention does not provide a foreign national any rights that are enforceable in a 42 U.S.C. § 1983 civil rights suit against law enforcement for violating the person’s rights provided for under the Convention. *(Cornejo v. County of San Diego* (9th Cir. 2007) 504 F.3rd 853.)*

Then, in November, 2006, the Texas appellate court refused to comply with the president’s command to provide
defendants whose Vienna Convention rights were violated with a hearing on the issue, deciding that it would not allow Jose Ernesto Medellin to file a second habeas petition seeking relief. *(Medellin v. Texas, 06-984.)*

The United States Supreme Court upheld Texas on this issue, finding that the terms of the Vienna Convention are not “self-executing,” did not have the force of domestic law, and were not binding on U.S. Courts. The Court also held that the President had no authority to dictate the procedures to be used in state court and therefore could not legally order state courts to give prisoners hearings on this issue. *(Medellin v. Texas (2008) 552 U.S. 491 [170 L.Ed.2nd 190].)*

See also *In re Martinez* (2009) 46 Cal.4th 945, where the California Supreme Court concluded that petitioner was precluded from renewing his Vienna Convention claim because he had previously raised the issue and the court had denied relief on its merits. Therefore, his petition was successive, and he failed to demonstrate any change of circumstance or the applicability of any exception to the procedural bar of successiveness to warrant reconsideration of his claim.

The California Supreme Court has held that even assuming a defendant is not advised of his consular rights in violation of the Vienna Convention, relief will not be granted absent a showing of prejudice. *(People v. Mendoza (2007) 42 Cal.4th 686, 709-711.)*

*Note also P.C. § 834b(a):* Law enforcement agencies are required to “fully cooperate” with the United States Immigration and Naturalization Service when it is suspected that an arrested person is in the United States in violation of federal immigration laws.

**Subd. (b):** Such cooperation is to include the following:

1. Attempt to verify the legal immigration status of such person through questioning that person and demanding documentation.

2. Notify the person of his or her apparent status as an alien who is present in the United States illegally and inform him or her that, apart from any
criminal justice proceedings, he or she must either obtain legal status or leave the United States.

(3): Notify the California Attorney General and the United States Immigration and Naturalization Service of the apparent illegal status of the person and provide any additional information that may be requested by any other public entity.

**Subd (c):** “Any legislative, administrative, or other action by a city, county, or other legally authorized local governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.”


**Miranda:** Any person who is arrested, or who is subjected to a contact with law enforcement which has the formal attributes of an arrest, and is questioned, must first be advised of, acknowledge his understanding of, and freely and voluntarily waive, his Fifth Amendment right against self-incrimination, pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2nd 694].)


**Minors & W&I § 625(c):** In any case where a minor (person under the age of 18) is taken “into temporary custody” with probable cause to believe he or she is in violation of W&I §§ 601 or 602 (i.e., delinquent or status offender), or that he or she has violated an order of the juvenile court or escaped from any commitment ordered by the juvenile court, the officer shall advise such minor that anything he says can be used against him or her, and shall advise the minor of his or her constitutional rights including the right to remain silent, the right to have counsel present during any interrogation, and the right to have appointed counsel if he or she is unable to afford counsel.

A *Miranda*-style admonishment obviously covers these requirements. (See *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2nd 694].)
This admonishment, under the terms of the statute (W&I 625(c)), is to be made whether or not the minor is to be subjected to a custodial interrogation. However, there is no sanction for a failure to comply with the requirements of this statute, unless, of course, the minor is in fact interrogated in which case the standard 
*Miranda* rules apply.

*Note:* The statute does *not* require that this admonishment be made “immediately” upon arrest.

A minor who is taken “into temporary custody,” as authorized by W&I § 625, has been *arrested.* *(In re Charles C.* (1999) 76 Cal.App.4th 420, 425; see also *In re Thierry S.* (1977) 19 Cal.3rd 727, 734, fn. 6.)

See also 18 U.S.C. § 5033, for a similar federal requirement.

Section 5033 requires that federal law enforcement agents also notify the parents of a juvenile’s rights, and that it be done “immediately” after the child is taken into custody.

A one-hour delay in notifying the parents of the juvenile’s *Miranda* rights was not unreasonable given the fact that it was done as soon as it was discovered that the arrested subject was a juvenile. *(United States v. Wendy G.* (9th Cir. 2001) 255 F.3rd 761.)

*Also,* when a minor taken before a probation officer pursuant to W&I § 626 (Alternative Dispositions for Minors in Temporary Custody When Juvenile Court Proceedings are not Required), and it is alleged that the minor is a person described in W&I §§ 601 (Status Offender) or 602 (Delinquent), the probation officer “shall” immediately advise the minor and his parent or guardian of rights equivalent to those provided in the *Miranda* decision. *(W&I § 627.5)*

*Follow-Up Requirements After Arrest:*

*Other Rights of the Arrestee:*

*Right to Access to an Attorney,* per P.C. § 825(b): Any attorney entitled to practice in the courts of record of California may, at the request of the prisoner or any relative of the prisoner, visit the prisoner.
Any officer having charge of the prisoner who willfully refuses or neglects to allow that attorney to visit a prisoner is guilty of a misdemeanor, and “shall forfeit and pay to the party aggrieved the sum of $500, to be recovered by action in any court of competent jurisdiction.”  (*Ibid.*)

While the section does not specify when an attorney, at the request of the prisoner or a relative, should be allowed to see the prisoner, it is suggested the request be honored as soon as is practical. The courts tend to be critical of any purposeful delay in allowing an in-custody suspect to consult with his attorney.  (See *People v. Stroble* (1951) 36 Cal.2nd 615, 625-626; “The conduct of the officers (refusing to allow defendant’s attorney access to him while officers obtained a confession) . . . was patently illegal.”

*However, see People v. Ledesma* (1988) 204 Cal.App.3rd 682, 695-696, and fn. 8:  Violating P.C. § 825(b) is not a constitutional violation requiring the suppression of the defendant’s statements where the defendant had otherwise waived his rights under *Miranda.*

**Right to Access to a Physician or Psychiatrist:** P.C. § 825.5:  Any physician or surgeon, including a psychiatrist, or psychologist with a doctoral degree and two years’ experience, licensed to practice in this state, employed by the prisoner or his attorney, shall be permitted to visit the prisoner while he or she is in custody.

*Note:* The statute provides no sanction for failing to comply with this provision.

**Right to Telephone Calls,** per P.C. § 851.5(a):  An arrested person has the right, immediately after booking and, except when physically impossible, no later than three (3) hours after arrest, to make at least three (3) completed telephone calls. The calls are to be free if completed in the local calling area, and are at the arrestee’s expense if outside the local area. The calls must be allowed immediately on request, or as soon as practicable. The calls may be made to:

- An attorney of the arrestee’s choice, public defender, or other attorney assigned to assist indigents (which may not be monitored).
- A bail bondsman.
- A relative or other person.
This information, including the phone number of the public defender or other attorney assigned to assist indigent defendants, must be posted. (Subd. (b))

An arrestee who is identified during the booking process as a custodial parent of a minor child is entitled to make two additional (for a total of five) local telephone calls for the purpose of arranging child care. (Subd. (c))

If the arrestee so requests, the three telephone calls shall be allowed “immediately,” or as soon as is practicable. (Subd. (d))

This section is not intended to “abrogate a law enforcement officer’s duty to advise a suspect of his or her right to counsel or of any other right.” (Subd. (e))

It is a misdemeanor to willfully deprive an arrested person of these rights. (Subd. (f))

The only recognized exception to this rule is “physical impossibility.” (Carlo v. City of Chino (9th Cir. 1997) 105 F.3rd 493.)

However, the alleged fact that defendants were denied right to call an attorney immediately after they were booked had no bearing on admissibility of any extrajudicial statements made prior to time when defendants were booked. (People v. Stout (1967) 66 Cal.2nd 184.)

Case Law:

Plaintiff’s civil rights were violated by denying her access to a telephone while she was jailed after her arrest on charges of driving while under the influence of alcohol. The state right to a post-booking telephone call (P.C. § 851.5) creates a liberty interest protected by the Fourteenth Amendment of the United States Constitution; and due process protections of prisoners’ liberty rights
were clearly established long before plaintiff was arrested in 1991. (*Carlo v. City of Chino, supra.*)

*However,* withholding permission to a motorist, arrested for driving a motor vehicle on a public highway while under the influence of intoxicating liquor, from telephoning an attorney within the statutory three-hour period after his arrest (*P.C. § 851.5*), was *not* a denial of due process where booking procedures commenced approximately two hours and twenty-five minutes from the time of arrest and where, if defendant had been permitted to make the call then, and as a result of legal advice consented to submit to a chemical test, the results of such test would have little or no probative value. (*Lacy v Orr* (1969) 276 Cal App 2nd 198.)

Police may require arrestee first to disclose telephone number of person to whom call is being placed, and then place the call and overtly listen to defendant's side of any non-attorney-client conversation without invading defendant’s right to privacy and without implicating his privilege against self-incrimination. (*People v. Siripongs* (1988) 45 Cal.3rd 548.)

*Also,* denial of arrested person's right to make telephone call to bail bondsman did not prejudice him where there was no sufficient showing that such a denial resulted in denial of fair trial in the matter or prevented him from obtaining and presenting evidence of his innocence. (*In re Newbern* (1961) 55 Cal 2nd 508.)

*Minors; W&I § 627(b):* Arrested juveniles shall be advised of, and have the right to make *two* (2) completed telephone calls upon being taken to a place of confinement and, except when physically impossible, within *one* (1) *hour* after being taken into custody.

The calls are to be to a parent or guardian, a responsible relative, or to the minor’s employer, and the second call to an attorney.
The calls are to be at public expense, if local, and made in the presence of a public officer or employee.

Willfully depriving a minor of his or her right to make these calls is a misdemeanor.

Violating this section is not grounds for excluding evidence.  (People v. Castille (2003) 108 Cal.App.4th 469, 489-490; vacated and remanded on other grounds.  See also People v. Lessie (2010) 47 Cal.4th 1152, 1161, fn. 2, and 1169-1170.)

Subd. (a) requires an officer to “take immediate steps” to notify a parent, guardian or responsible adult of the fact and location of a minor taken to juvenile hall or other place of confinement.

Other Statutory Obligations of the Arresting Officer:

P.C. § 834b(a): Law enforcement agencies are required to “fully cooperate” with the United States Immigration and Naturalization Service when it is suspected that an arrested person is in the United States in violation of federal immigration laws.

Subd. (b): Such cooperation is to include the following:

(1): Attempt to verify the legal immigration status of such person through questioning that person and demanding documentation.

(2): Notify the person of his or her apparent status as an alien who is present in the United States illegally and inform him or her that, apart from any criminal justice proceedings, he or she must either obtain legal status or leave the United States.

(3): Notify the California Attorney General and the United States Immigration and Naturalization Service of the apparent illegal status of the person and provide any additional information that may be requested by any other public entity.

Subd (c): “Any legislative, administrative, or other action by a city, county, or other legally authorized local
governmental entity with jurisdictional boundaries, or by a law enforcement agency, to prevent or limit the cooperation required by subdivision (a) is expressly prohibited.”

P.C. § 848: An officer making an arrest in obedience to a warrant must proceed with the arrestee as commanded by the warrant, or as provided by law.

P.C. § 849(a): An officer (or private person) making an arrest without a warrant shall, without unnecessary delay, take the prisoner not otherwise released before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

P.C. § 849(b): Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

The officer is satisfied that there are insufficient grounds for making a criminal complaint against the person. (Subd. (b)(1))

The person arrested was arrested for intoxication only, and no further proceedings are desirable. (Subd. (b)(2))

The person was arrested only for being under the influence of a controlled substance or drug and such person is delivered to a facility or hospital for treatment and no further proceedings are desirable. (Subd. (b)(3))

Note: It is also arguable that a law enforcement officer may choose to release a subject for whom probable cause does exist. There is nothing in the case or statutory law that says that P.C. § 849(b) is the exclusive authority for releasing an arrested prisoner.

Note, however, P.C. § 4011.10, prohibiting law enforcement from releasing a jail inmate for the purpose of allowing the inmate to seek medical care at a hospital, and then immediately re-arresting the same individual upon discharge from the hospital, unless the hospital determines this action would enable it to bill and collect from a third-party payment source.
**P.C. § 849(c):** Any record of arrest of a person released pursuant to P.C. § 849(b)(1) or (3) shall include a record of release, and shall thereafter be deemed a detention only.

**Civil Liability:** There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer acting within the scope of his or her authority, for false arrest or false imprisonment arising out of any arrest when:

- **P.C. § 836 (a), (b):** Such arrest was lawful or when the officer, at the time of the arrest, had *reasonable or probable cause* to believe the arrest was lawful.

- **P.C. § 838:** A magistrate orally ordered the officer to arrest a person who was committing a public offense in the magistrate’s presence.

- **P.C. § 839:** An officer was responding to an oral request for assistance in making an arrest.
Chapter 5

Searches and Seizures:

Things Subject to Search and Seizure:

- Evidence of a crime.
- Contraband.
- Instrumentalities of a crime.
- Fruits of a crime.

(People v. Thayer (1965) 63 Cal.2nd 635; Warden, Maryland Penitentiary v. Hayden (1967) 387 U.S. 294 [18 L.Ed.2nd 782]; Guidi v. Superior Court (1973) 10 Cal.3rd 1.)

Searches and Seizures:

Seizure: A seizure of property occurs when there is some meaningful interference with an individual’s possessory interest in that property.


Search: A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed upon.

E.g.: Taking a DNA sample via a “buccal swab” of the mouth is a search under the Fourth Amendment. (Friedman v. Boucher (9th Cir. 2009) 580 F.3rd 847, 852-853.)

Search vs. Seizure: A warrantless seizure of a container of contraband does not necessarily also allow for a warrantless search of that container. (Robey v. Superior Court [People] (2011) 200 Cal.App.4th 1.)

General Rule: In order for a search to be lawful, a search warrant, supported by probable cause, must first be obtained. (Fourth Amendment, United States Constitution; Art 1, § 13, California Constitution)

Search Warrant: “(A)n order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and bring it before the magistrate.” (P.C. § 1523)
**Probable Cause:** Roughly the same standards apply whether the issue is an arrest or a search. *(Skelton v. Superior Court* (1969) 1 Cal.3\textsuperscript{rd} 144, 150.)

See “Arrests,” above, and “Searches with a Search Warrant,” below.

**Presumptions:**

Searches and seizures are presumed, as a general rule, to be *unreasonable* in the absence of sufficient “*individualized suspicion*” of wrongdoing to support a finding of “*probable cause.*” *(Chandler v. Miller* (1997) 520 U.S. 305, 308 [137 L.Ed.2\textsuperscript{nd} 513, 519].)

*And then,* even with probable cause, searches without a *search warrant* are presumed to be *unlawful,* absent one of the narrowly construed exceptions to the search warrant exception. *(Mincey v. Arizona* (1978) 437 U.S. 385, 390 [57 L.Ed.2\textsuperscript{nd} 290, 298-299]; *In re Tyrell J.* (1994) 8 Cal.4\textsuperscript{th} 68, 76; reversed on other grounds.)

The *prosecution* bears the burden of justifying a warrantless search, requiring proof of a recognized exception to the search warrant requirement. *(Welsh v. Wisconsin* (1984) 466 U.S. 740, 749-750 [80 L.Ed.2\textsuperscript{nd} 732, 742-743]; *People v. James* (1977) 19 Cal.3\textsuperscript{rd} 99, 106.)

**Remedy for Violations:** *The “Exclusionary Rule:”* Warrantless searches, performed without probable cause and without an exception to the warrant requirement (or even when a warrant is used, but where the warrant is later determined to be legally defective), subjects any recovered evidence to *exclusion from being used as evidence* in court. *(Weeks v. United States* (1914) 232 U.S. 383 [58 L.Ed. 652].)

*The Fourth Amendment:* Although the *Fourth Amendment* was originally intended to restrict the actions of the federal government only, the same exclusionary rule, as a violation of the *Fourteenth Amendment* “*due process*” clause, is applicable to the states (which includes counties and municipalities) as well. *(Mapp v. Ohio* (1961) 367 U.S. 643 [6 L.Ed.2\textsuperscript{nd} 1081].)

*Reasoning:* Violating one’s *Fourth Amendment* rights is such a fundamental, important, issue that to do so is automatically a violation of the *Fourteenth Amendment* due process rights of the person subjected to the illegal search or seizure. *(Ibid.)*
Motion to Suppress: California tests the constitutionality of a search or seizure (i.e., Fourth Amendment issues) via the procedures as spelled out in P.C. § 1538.5.)

“In ruling on a motion to suppress, the trial court is charged with

(1) finding the historical facts;
(2) selecting the applicable rule of law; and
(3) applying the former to determine whether or not the rule of law as applied to the established facts has been violated.”


The appellate court then “review(s) the trial court’s resolution of the first inquiry (above), which involves questions of fact, under the deferential substantial-evidence standard, but subject(s) the second and third inquiries to independent review.” (People v. Parson, supra, citing People v. Ayala, supra., and People v. Weaver (2001) 26 Cal.4th 76, 924.)

Fruit of the Poisonous Tree: The evidence that is suppressed is limited to the direct products of the constitutional violation; i.e., the “fruit of the poisonous tree.” (Wong Sun v. United States (1963) 371 U.S. 471 [9 L.Ed.2nd 441].)


“Evidence obtained by such illegal action of the police is ‘fruit of the poisonous tree,’ warranting application of the exclusionary rule if, ‘granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’” (United States v. Crawford (9th Cir. 2004) 372 F.3rd 1048, 1054, quoting Brown v. Illinois (1975) 422 U.S. 590, at p. 599 [45 L.Ed.2nd 416].)

Not all courts are in agreement that such a remedy is reserved exclusively for constitutional violations. (See discussion in United States v. Lombera-Camorlinga (9th
Cir. 2000) 206 F.3rd 882, 886-887, and in the dissenting opinion, p. 893.)

Examples:

Observations made after an unlawful, warrantless entry into a structure cannot be used to establish probable cause for later obtaining a search warrant.  (*Murray v. United States* (1988) 487 U.S. 533, 540 [101 L.Ed.2nd 472, 482]; *Burrows v. Superior Court* (1974) 13 Cal.3rd 238, 251.)

A consent to search given “immediately following an illegal entry or search” is invalid because it “is inseparable from the unlawful conduct.”  (*People v. Roberts* (1956) 47 Cal.2nd 374, 377.)

Exceptions:

_Private persons_ (unless working as an “agent of law enforcement”) may violate a subject’s constitutional rights without threat of suppression, in that the constitutional protections apply to _government searches_ only.  (*People v. Johnson* (1947) 153 Cal.App.2nd 873.)

_A licensed private investigator_ who is acting in furtherance of a private interest, rather than for a law enforcement or government purpose, is not subject to the restrictions of the _Fourth Amendment_.  (*People v. Mangiefico* (1972) 25 Cal.App.3rd 1041, 1046-1047; *People v. De Juan* (1985) 171 Cal.App.3rd 1110, 1119.)


Even an _off-duty police officer_ “may” not be acting as a law enforcement officer in conducting a search, when he acts in his capacity as a private citizen, and through mere curiosity.  (*People v. Wachter* (1976) 58 Cal.App.3rd 311, 920-923; see also *People v. Peterson* (1972) 23 Cal.App.3rd 883, 893; off-duty police trainee acting out of concern for his own safety.)
Exception to Private Persons Exception: “Agents of Law Enforcement:”

Anyone acting at the request of, or under the direction of, a law enforcement officer, is an agent of the police and is held to the same standards as the police. (*People v. Fierro* (1965) 236 Cal.App.2nd 344, 347.)

Seizure of blood by a state hospital, working with law enforcement (i.e., an “agent” of law enforcement), taking and testing blood from expectant mothers and testing for drugs, held to be an illegal governmental search. (*Ferguson et al. v. City of Charleston* (2001) 532 U.S. 67 [149 L.Ed.2nd 205].)

In determining whether a person is acting as a police agent, two factors must be considered: (1) Whether the government knew of and acquiesced in the private search; and (2) whether the private individual intended to assist law enforcement or, instead, had some other independent motivation. The first factor requires evidence of more than mere knowledge and passive acquiescence by a police officer before finding an agency relationship. It takes some evidence of a police officer’s control or encouragement. As for the second factor, a dual purpose (e.g., to help the police and himself) is not enough. (*People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1564-1569; also rejecting California’s pre-Proposition 8 stricter standards.)

A civil rights action pursuant to 42 U.S.C. § 1983 was held to be proper against non-law enforcement employees of a private corporation that operated a federal prison under contract. (*Pollard v. GEO Group, Inc.* (9th Cir. 2010) 607 F.3rd 583.)

See “Good Faith,” below, and “Mistaken Belief in Existence of Probable Cause to Arrest or Search, an Arrest Warrant, or that a Fourth Waiver Exists, Based upon Erroneous Information received from Various Sources,” above.

The Taint has been Attenuated: “(G)ranting establishment of the primary illegality,” whether or not the resulting evidence is subject to suppression is a question of whether “the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” (Wong Sun v. United States (1963) 371 U.S. 471, 487-488 [9 L.Ed.2nd 441, 455].)

In determining whether the “primary taint” (i.e., an illegal search, detention or arrest) has been sufficiently “purged” requires consideration of three factors:

- The “temporal proximity” between the illegal act and the resulting evidence.
- The presence of any “intervening circumstances;”
- The “purpose and flagrancy” of the official misconduct.


A Miranda admonishment and waiver, alone, is legally insufficient to attenuate the taint of an illegal arrest. (Brown v. Illinois, supra; Kaupp v. Texas, supra.)

The fact that the defendant had an outstanding arrest warrant may, depending upon the circumstances, be sufficient of an intervening circumstance to allow for the admissibility of the evidence seized incident to arrest despite the fact that the original detention was illegal.
The circumstances to be considered are:

- The temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence;
- The presence of intervening circumstances (e.g., an arrest warrant);
- The flagrancy of the official misconduct.

(\textit{Id.}, at pp. 268-272; citing \textit{Brown v. Illinois} (1975) 422 U.S. 590 [45 L.Ed.2nd 416].)

Defendant, the passenger in a motor vehicle stopped for illegally tinted windows (\textit{V.C. § 26708(a)}), was arrested on an outstanding arrest warrant. Even had the traffic stop had been illegal, the discovery of the arrest warrant was sufficient to attenuate any possible taint of an illegal traffic stop. (\textit{People v. Carter} (2010) 182 Cal.App.4th 522, 529-530.)

In a federal asset forfeiture proceeding, the CEO of a marijuana dispensary filing an affidavit admitting to the dispensary’s connection to money’s illegally seized via a search warrant later determined to be invalid, even though the affidavit was filed some two months after the seizure, held to still be the product of the illegal search where the only way for the dispensary to get the money back was to file the affidavit in response to the Government’s attempt to retain the money. (\textit{United States v. $186,416.00 in U.S. Currency} (9th Cir. 2010) 590 F.3rd 942, 949-954.)

\textit{When the Purposes of the Exclusionary Rule are Not Served:}

The Exclusionary Rule is not intended to prevent all police misconduct or as a remedy for all police errors. “\textit{The use of the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights.}” (\textit{United States v. Smith} (9th Cir. 1999) 196 F.3rd 1034, 1040.)

“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” (\textit{Herring v.}}

The exclusionary rule should only be used when necessary to deter “deliberate, reckless, or grossly negligent conduct, or in some circumstances, recurring or systematic negligence.” (**Herring v. United States**, at p. 144 [129 S.Ct. at p. 702].)

The seizure of defendant’s vehicle based upon it having been reported, and in the computer system, as “stolen,” even though the defendant’s acquisition of the vehicle did not fit “neatly” into the elements of **V.C. § 10851** (i.e., the vehicle was purchased from a dealership, albeit with defendant providing the dealer with fraudulent information in his application for credit, after which defendant ceased making payments), did not make the seizure “unreasonable.” There was no bad faith on the part of the detective who entered the vehicle into the computer system as stolen. The seizing officers were entitled to rely upon the information as contained in the computer system. (**United States v. Noster** (9th Cir. 2009) 590 F.3rd 624, 629-633.)

But note that according to the Ninth Circuit Court of Appeal, a search incident to arrest that was lawful prior to the decision in **Arizona v. Gant** (2009) 556 U.S. 332 [173 L.Ed.2nd 485], is still subject to the new rule in **Gant**, applying the rule retroactively, in any case that was not yet final as of the date of the decision in **Gant** (April 21, 2009). The officer’s good faith in applying the prior rule is irrelevant. (**United States v. Gonzalez** (9th Cir. 2009) 578 F.3rd 1130.)

**Statutory-Only Violations:** Relevant evidence will not be suppressed unless suppression is required by the Fourth Amendment to the United States Constitution, or when a statute violated by law enforcement commands suppression by its terms. (**Cal. Const., Art. 1, § 28(d); In re Lance W.** (1985) 37 Cal.3rd 873, 886-887; **People v. Tillery** (1989) 211 Cal.App.3rd 1569, 1579; **People v. Lepeibet** (1992) 4 Cal.App.4th 1208, 1212-1213.)

See **P.C. § 632**, which makes it a felony for a person to eavesdrop on a “confidential communication,” and that the
result of any such eavesdropping will not be admissible in court. (Subd. (d))

Note: Not all courts are in agreement that such a remedy is reserved exclusively for constitutional violations. (See discussion in United States v. Lombera-Camorlinga (9th Cir. 2000) 206 F.3rd 882, 886-887, and in the dissenting opinion, p. 893.)

Examples of Statutory Violations Only:

- It is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (Atwater v. City of Lago Vista (2001) 532 U.S. 318 [149 L.Ed.2nd 549].), or even for a fine-only, infraction. (People v. McKay (2002) 27 Cal.4th 601, 607; see also United States v. McFadden (2nd Cir. 2001) 238 F.3rd 198, 204.)

- California’s statutory provisions require the release of misdemeanor arrestees in most circumstances. (E.g., see P.C. §§ 853.5, 853.6, V.C. §§ 40303, 40500) However, violation of these statutory requirements is not a constitutional violation and, therefore, should not result in suppression of any evidence recovered as a result of such an arrest. (People v. McKay, supra, at pp. 607-619, a violation of V.C. § 21650.1 (riding a bicycle in the wrong direction); People v. Gomez (2004) 117 Cal.App.4th 531, 539, seat belt violation (V.C. § 27315(d)(1)), citing Atwater v. City of Lago Vista, supra; People v. Bennett (July 21, 2011) 197 Cal.App.4th 907, 918.)

  See also Virginia v. Moore (2008) 553 U.S. 164 [170 L.Ed.2nd 559], driving on a suspended license.

• A “knock and notice” violation:

Violating the terms of P.C. §§ 844 and/or 1531 (California’s statutory “knock and notice” requirements) does not necessarily also violate the Fourth Amendment. (Wilson v. Arkansas (1995) 513 U.S. 927 [131 L.Ed.2nd 976]; People v. Zabelle (1996) 50 Cal.App.4th 1282.) Whether or not it does depends upon the circumstances. (See “Knock and Notice,” below.)

But even when such a violation is determined to have been done contrary to the dictates of the Fourth Amendment, the Exclusionary Rule has recently been held to be an inappropriate remedy, at least in most cases. (Hudson v. Michigan (2006) 547 U.S. 586 [165 L.Ed.2nd 56].)

Per Hudson, the suppression of evidence is only necessary where the interests protected by the constitutional guarantee that has been violated would be served by suppressing the evidence thus obtained. The interests protected by the knock and notice rules include human life, because “an unannounced entry may provoke violence in supposed self-defense by the surprised resident.” Property rights are also protected by providing residents an opportunity to prevent a forcible entry. And, “privacy and dignity” are protected by giving the occupants an opportunity to collect themselves before answering the door. (Ibid.)

The Court also ruled in Hudson that because civil suits are more readily available than in 1914 with the exclusionary rule was first
announced, and because law enforcement officers, being better educated, trained and supervised, can be subjected to departmental discipline, suppressing the product of a knock and notice violation is no longer a necessary remedy. (*Ibid.*)

The rule as dictated by *Hudson* (a search warrant case) is applicable as well as in a warrantless, yet lawful, arrest case, pursuant to *P.C. § 844.* (*In re Frank S.* (2006) 142 Cal.App.4th 142)

However, *Hudson* is not to be interpreted to mean that the Exclusionary Rule is to be scraped. Intentionally unlawful law enforcement actions will still be subject to the Exclusionary Rule where necessary to discourage future illegal police activities. (*People v. Rodriguez* (2006) 143 Cal.App.4th 1137; case remanded for a determination whether police fabricated probable cause for a traffic stop, which led to the discovery of an outstanding arrest warrant, the search incident thereto resulting in recovery of controlled substances.)

- Violation of a *government agency regulation* (i.e., not a statute or a constitutional principle) also does not necessitate suppression of the resulting evidence. (*United States v. Ani* (9th Cir. 1998) 138 F.3rd 390.)

- Possible violation of an Indian Reservation statute or rule, not involving a constitutional principle, will not result in the suppression of any evidence. (*United States v. Becerra-Garcia* (9th Cir. 2005) 397 F.3rd 1167, 1173.)

- Mistakenly collecting blood samples for inclusion into California’s DNA data base (See *P.C. § 296*), when the defendant did not actually have a qualifying prior conviction, is *not a Fourth Amendment* violation, but even if it were, it does not require the suppression of the mistakenly
collected blood samples, nor is it grounds to suppress the resulting match of the defendant’s DNA with that left at a crime scene. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1116-1129.)

**Doctrine of Inevitable Discovery:** Evidence seized unlawfully will be held to be admissible in those instances where, but for the illegal search, there is a “*reasonable possibility*” that the evidence would have been lawfully found by other means. (*Murray v. United States* (1988) 487 U.S. 533, 539 [101 L.Ed.2nd 472]; *Nix v. Williams* (1984) 467 U.S. 432 [ 81 L.Ed.2nd 377]; *People v. Superior Court [Walker]* (2006) 143 Cal.App.4th 1183, 1214-1217; *People v. Redd* (2010) 48 Cal.4th 691, 721.)

Inevitable discovery *does not* apply, however, merely because the officers had probable cause and could have gotten a search warrant. (*Hudson v. Michigan* (2006) 547 U.S. 586 [165 L.Ed.2nd 56]; *People v. Robles* (2000) 23 Cal.4th 789; *People v. Superior Court [Walker]*, supra, at p. 1215.)

Stopped and physically arrested for driving on a suspended license (with a prior conviction for the same), defendant was secured in the back seat of a patrol car. The subsequent search of his vehicle, resulting in the recovery of cocaine and an illegal firearm (defendant being a convicted felon) was found to be in violation of the rule of *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485], where it was held that once defendant is arrested and secured, a “*search incident to arrest*” of the subject’s vehicle is not lawful unless there is some reason to believe that evidence relevant to the cause of arrest may be found. (See “*Searches of Vehicles*,” below.) However, the evidence was held to be admissible anyway under the “*inevitable discovery rule*” in that the vehicle was to be impounded and subjected to an inventory search; (*United States v. Ruckes* (9th Cir. 2009) 586 F.3rd 713, 716-719.)

An injured person may be searched without a warrant or probable cause. It is reasonable for a police officer to attempt to identify an injured person. In fact, he has a duty to do so. Anything the officer sees in the process is admissible in court. (*People v. Gonzales* (1960) 182 Cal.App.2nd 276.)

Evidence of identity, as with defendant’s person itself, is not subject to suppression, “regardless of the nature of the violation
leading to his identity.”  (United States v. Gudino (9th Cir. 2004) 376 F.3rd 997.)

See also United States v. Garcia-Beltran (9th Cir. 2004) 389 F.3rd 864; fingerprints used for identity purposes only are not subject to suppression for a Fourth Amendment violation (i.e., illegal arrest here). Case remanded, however, for a determination whether defendant’s fingerprints were seized for “investigatory purposes” as opposed to establish identity, in which case they are subject to suppression.

It is a rule of law that neither a person’s body nor his or her identity is subject to suppression, “even if it is conceded that an unlawful arrest, search, or interrogation occurred.” (Immigration and Naturalization Service v. Lopez-Mendoza (1984) 468 U.S. 1032, 1039-1040 [82 L.Ed.2nd 778].)

For purposes of this rule, it makes no difference that the illegal arrest, search or interrogation was “egregious” in nature; e.g., the result of “racial profiling.” (United States v. Gudino, supra.)

Impeachment Evidence:

Evidence illegally seized may be introduced for the purpose of impeaching the defendant’s testimony given in both direct examination (Walder v. United States (1954) 347 U.S 62 [98 L.Ed. 503].) and cross-examination, so long as the cross-examination questions are otherwise proper. (United States v. Havens (1980) 446 U.S. 620 [64 L.Ed.2nd 559].)

California authority prior to passage of Proposition 8 (The “Truth in Evidence Initiative”), to the effect that evidence suppressed pursuant to a motion brought under authority of P.C. § 1538.5 is suppressed for all purposes (i.e., People v. Belleci (1979) 24 Cal.3rd 879, 887-888.), was abrogated by Proposition 8. Now, it is clear that suppressed evidence may be used for purposes of impeachment should the defendant testify and lie. (People v. Moore (1988) 201 Cal.App.3rd 877, 883-886.)
Asset Forfeiture Proceedings:

Evidence seized illegally may still be subject to asset forfeiture proceedings so long as there is admissible probable cause supporting the conclusion that the evidence is the product of the defendant’s illegal activity. (*United States v. $186,416.00 in U.S. Currency* (9th Cir. 2010) 590 F.3rd 942, 948-949.)

**Standing:**

*Defined:* The right of an individual to contest the illegality of a search and seizure. Only the person whose rights are being violated has “standing” to challenge an alleged governmental constitutional violation. (*Rakas v. Illinois* (1978) 439 U.S. 128, 138-139 [58 L.Ed.2nd 387, 397-398]; *Minnesota v. Carter* (1998) 525 U.S. 83 [142 L.Ed.2nd 373].)

Whether or not a person has “standing” to challenge the legality of a search is a mixed question of fact (i.e., determining the circumstances) and law (i.e., determining whether the facts justify a finding that the defendant has a legitimate expectation of privacy under the law). (*United States v. Singleton* (9th Cir. 1993) 987 F.2nd 1444, 1447; *United States v. $40,955 in United States Currency* (9th Cir. 2009) 554 F.3rd 752, 755-756.)

One must have a legitimate possessory interest in the property seized, or a legitimate privacy interest in the area searched, or a personal liberty interest that was infringed. (*See People v. Roybal* (1998) 19 Cal.4th 481.)

Claiming ownership of the property being seized does not establish that the defendant had a reasonable expectation of privacy in that property. The “possessory interest” must be a “legitimate” one; i.e., excluding contraband and other items not lawfully in the subject’s possession. (*See Rawlings v. Kentucky* (1980) 448 U.S. 98, 105-106 [65 L.Ed.2nd 633]; *United States v. Pulliam* (9th Cir. 2005) 405 F.3rd 782, 786; see also *United States v. $40,955 in United States Currency*, supra., at p. 756.)

See also *People v. Warren* (1990) 219 Cal.App.3d 619, 624: “(N)o privacy right guaranteed by the Fourth Amendment is infringed by the search and seizure of a known illicit substance.”

*Reasonable Expectation of Privacy:* The question really is whether the defendant, as opposed to someone else, had a “reasonable (or ‘legitimate’)
“expectation of privacy” in the place being searched or the items being seized. The federal cases have gotten away from using the term “standing” while moving towards a discussion of one’s “reasonable” or “legitimate expectation of privacy.” (Rakas v. Illinois, supra, at p. 143 [58 L.Ed.2nd at p. 401]; United States v. Davis (9th Cir. 2003) 332 F.3rd 1163, 1167; United States v. Caymen (9th Cir. 2005) 404 F.3rd 1196, 1199-1200.) California courts have been encouraged to do the same. (See People v. Ayala (2000) 23 Cal.4th 225, 254, fn. 3; People v. Magee (2011) 194 Cal.App.4th 178, 183, fn. 4.)

“The touchstone of Fourth Amendment analysis is whether a person has a ‘constitutionally protected reasonable expectation of privacy.’” (California v. Ciraolo (1986) 476 U.S. 207, 211 [90 L.Ed.2nd 210, 215].)

“(T)o say that a party lacks [F]ourth [A]mendment standing is to say that his reasonable expectation of privacy has not been infringed.” (Italics in original; United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3rd 684, 695; citing United States v. Taketa (9th Cir. 1991) 923 F.2nd 665, 669.)

Test: Whether or not a person has “standing” to challenge the constitutionality of a search has been described by the United States Supreme Court in Rakas v. Illinois, supra, as follows: “(W)hether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it” (Id., at p. 140.), “whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect” (Ibid.), or “whether the person who claims the protection of the Fourth Amendment has a legitimate expectation of privacy in the invaded place” (Id. at p. 143.). (People v. Stewart (2003) 113 Cal.App.4th 242, 249.)

“[S]ubjective expectations of privacy that society is not prepared to recognize as legitimate have no [Fourth Amendment] protection. (People v. Leon (2005) 131 Cal.App.4th 966, 974.)

“The absence of a right to exclude others from access to a situs is an important factor militating against a legitimate expectation of privacy.” (United States v. Bautista (9th Cir. 2004) 362 F.3rd 584, 589; citing Rawlings v. Kentucky (1980) 448 U.S. 98, 105 [65 L.Ed.2nd 633, 642].)

The existence of a “reasonable expectation of privacy” must be determined by an analysis of the “totality of the circumstances.”
Abandonment of property, eliminating any reasonable expectation of privacy in that property, is an issue of the defendant’s apparent intent as determined by an objective evaluation of the circumstances. The defendant’s actual intent is irrelevant. (*People v. Parson* (2008) 44 Cal.4th 332, 342-348.)

The issue is “whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.” (*Id.*, at p. 346.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (*People v. Thomas* (2011) 200 Cal.App.4th 338).

**Prior California Rule; “Vicarious Standing:”** Everyone charged with a criminal offense resulting from a search or seizure could challenge the constitutionality of that search or seizure, without the necessity of showing “standing.” (E.g., *People v. Martin* (1955) 45 Cal.2nd 755, 761.)


**Rules for Determining Standing:**

**Burden of Proof:** The defendant bears the burden of showing he or she had a reasonable expectation of privacy in the place searched or the thing seized. (*Rakas v. Illinois* (1978) 439 U.S. 128, 141, 231
However, the court has the discretion to order the prosecution to present its evidence before the defendant proves his standing. (*People v. Contreras* (1989) 210 Cal.App.3rd 450.)

Although the prosecution may not take “contradictory positions in order to defeat an asserted expectation of privacy,” the defendant is “not ‘entitled to rely on the government's allegations in the pleadings, or positions the government has taken in the case, to establish standing.’” (*United States v. Long* (9th Cir. 2002) 301 F.3rd 1095, at p. 1100, citing *United States v. Zermeno* (9th Cir. 1995) 66 F.3rd 1058, 1062.)

Factors to consider:

- Whether the defendant has a property or possessory interest in the thing seized or the place searched;
- Whether he has a right to exclude others from that place;
- Whether he has exhibited a subjective expectation that the place would remain free from governmental invasion;
- Whether he took normal precautions to maintain his privacy;
- Whether he was legitimately on the premises; and
- Whether the defendant was present at the place searched “for a commercial purpose” (no standing) or was there as an “overnight guest” (standing) with the knowledge and permission of an identifiable host.


On Appeal: Whether or not an individual’s expectation of privacy was objectively reasonable is reviewed by an appellate court “de novo.” (United States v. Bautista (9th Cir. 2004) 362 F.3rd 584, 588-589.)

Standing; Examples:

Vehicles:

The owner, or a borrower of vehicle with the owner’s permission (i.e., a person in lawful possession), has standing to challenge the search of the vehicle. (People v. Leonard (1987) 197 Cal.App.3rd 235, 238; People v. Nelson (1985) 166 Cal.App.3rd 1209; United States v. Kovac (9th Cir. 1986) 795 F.2nd 1509, 1510-1511, owner; United States v. Portillo (9th Cir. 1980) 633 F.2nd 1313, 1317, borrower.)

A passenger in a vehicle that he neither owns nor leases lacks standing to object to a search of areas within the vehicle, such as the glove compartment, the trunk, or underneath the seat. (Rakas v. Illinois (1978) 439 U.S. 128 [58 L.Ed.2nd 387]; United States v. Portillo (9th Cir. 1980) 633 F.2nd 1313, 1317; United States v Pulliam (9th Cir. 2005) 405 F.3rd 782, 785-786.)

But, the passenger as well as the driver has standing to object to the basis for a vehicle’s initial stop or detention. (Brendlin v. California (2007) 551 U.S. 249 [168 L.Ed.2nd 132].); see also People v. Lionberger (1986) 185 Cal.App.3rd Supp. 1; United States v. Twilley (9th Cir. 2000) 222 F.3rd 1092, 1095; United States v. Colin (9th Cir. 2002) 314 F.3rd 439, 442-443; People v. Lamont (2004) 125 Cal.App.4th 404.)

One who steals a car (People v. Shepherd, supra.) or who is simply an occupant of a stolen car (People v. Catuto (1990) 217 Cal.App.3rd 714; People v. Melnyk (1992) 4 Cal.App.4th 1532, 1533.), or is caught driving a stolen vehicle (People v. Carter (2005) 36 Cal.4th 1114, 1139-1142.) that is later searched, has no standing to challenge the later search of that car.
Defendant had no standing to challenge the illegal search of another person’s vehicle which resulted in recovery of information used to obtain a search warrant for defendant’s home.  (People v. Madrid (1992) 7 Cal.App.4th 1888, 1896.)

A person driving a rental vehicle, when the person is neither an authorized driver under the rental contract nor driving the vehicle with the renter’s permission, does not have standing to challenge the search of a vehicle.  (United States v. Thomas (9th Cir. 2006) 447 F.3rd 1191; noting that merely being an unauthorized driver, per the terms of the rental agreement, will not deprive a person of standing.  In this case, it was the defendant’s failure to present any evidence that he was driving the car with the permission of the person who rented it that deprived him of standing to contest the search of the car.)

The United States Supreme Court has recently reversed the California Supreme Court on the issue of whether the passenger is detained by virtue of being in the car when it is initially stopped, and held that at least in a private motor vehicle (as opposed to a taxi, bus, or other common carrier), the passenger in a vehicle stopped for a possible traffic infraction is in fact detained, giving him the right (i.e., standing) to challenge the legality of the traffic stop.  (Brendlin v. California (2007) 551 U.S. 249 [168 L.Ed.2nd 132].)

The owner of a vehicle, but who takes steps to disassociate himself from the vehicle by having someone else pay cash for the car and then putting the car and other documentation in the other person’s name (done because the defendant knew the car would be used to transport controlled substances), does not have standing to challenge an illegal entry into the car for the purpose of installing a GPS to track the vehicle.  (People v. Tolliver et al. (2008) 160 Cal.App.4th 1231, 1236-1241.)

Being “the exclusive driver” of defendant’s wife’s car gives the defendant standing to challenge the legality of the installation of a GPS (i.e., a search) on that vehicle.  (United States v. Jones (Jan. 23, 2012) __ U.S. __, ___ fn. 2 [132 S.Ct. 945; 181 L.Ed.2nd 911].)
Residential Visitors:

An overnight guest in a residence does have standing to contest an unlawful search. (Minnesota v. Olson (1990) 495 U.S. 91 [109 L.Ed.2nd 85]; People v. Hamilton (1985) 168 Cal.App.3rd 1058; Espinosa v. City and County of San Francisco (9th Cir. 2010) 598 F.3rd 528, 533-534.)

As an “occasional” guest at his girlfriend’s apartment, defendant had standing to challenge the entry of his girlfriend’s bedroom where the two of them stayed together, along with the search of his gym bag he kept under the bed. (United States v. Davis (9th Cir. 2003) 332 F.3rd 1163, 1167-1168.)

The estranged husband, when he regularly visited overnight with his children, had a key and unrestricted access, kept personal papers and clothing in a bedroom, and was present at the time of the search, has standing. (People v. Koury (1989) 214 Cal.App.3rd 676, 688.)

A Babysitter during the time he or she is engaged in babysitting activities has standing. (People v. Moreno (1992) 2 Cal.App.4th 577, 579, 587.)


Being a family member but not living there does not change the result. (People v. Rios, supra, at 592, fn. 4; citing In re Rudy F. (2004) 117 Cal.App.4th 1124, 1135.)

The temporary occupant of a house does not have standing to challenge the search of a bedroom he did not occupy, never entered, and had no permission to enter. (People v. Hernandez (1988) 199 Cal.App.3rd 1182, 1188.)

But see People v. Stewart (2003) 113 Cal.App.4th 242: A person who does not stay overnight, but who has a key and free reign of the house, coming and going as he pleases,
doing his laundry, cooking, and watching the T.V. in the house, and taking showers, etc., was held to have standing.

An overnight guest in a residence does have standing to contest an unlawful search (Minnesota v. Olson (1990) 495 U.S. 91 [109 L.Ed.2nd 85].), even if the guest is a drug smuggler. (United States v. Gamez-Orduno (9th Cir. 2000) 235 F.3rd 453.)

However, a visitor who is there for a limited time (e.g., 2½ hours), for an unlawful purpose (e.g., to package contraband), without any prior relationship with the lawful occupant, does not have standing. (Minnesota v. Carter (1998) 525 U.S. 83 [142 L.Ed.2nd 373].)

Defendant’s parents, where defendant conducted his marijuana dealings from his own room, maintained standing to challenge the search of defendant’s bedroom where they maintained the rights of access, possession, and exclusion of others. (United States v. $40,955 in United States Currency (9th Cir. 2009) 554 F.3rd 752, 756-757.)

However, the daughter (defendant’s sister?), who no longer lived in the house, did not have standing despite the fact that she had a key to the house and stored items there. (Id., at pp. 757-758.)

Merely claiming to be an overnight guest, or to otherwise having standing to contest the entry and/or search of a residence, is insufficient. There must be some evidence to the effect that the person did in fact have a reasonable expectation of privacy in the residence. (United States v. Reyes-Bosque (9th Cir. 2010) 596 F.3rd 1017, 1026-1029.)

Whether or not a visitor has standing to challenge law enforcement’s warrantless entrance into a residence depends upon that visitor’s purpose for being there. For instance, if visiting the legal residents, at least when the visitor does so on a regular basis and is free to come and go as he wishes without knocking, he likely has standing. But when that same person enters the residence for the purpose of destroying evidence while being chased by police, he does not. (People v. Magee (2011) 194 Cal.App.4th 178.)
The Fourth Amendment rights of homeowners are implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home. (Alderman v. United States (1969) 394 U.S. 165 [22 L.Ed.2nd 176].)

**Personal Property:**

No expectation of privacy in a gun given to another person (People v. McPeters (1992) 2 Cal.4th 1148, 1171.), or an opaque bag left, unsealed, in another person’s car (People v. Root (1985) 172 Cal.App.3rd 774, 778.), or a purse left in another’s vehicle. (People v Shepherd (1994) 23 Cal.App.4th 825, 827, 829.)

There is no expectation of privacy in a stolen computer (United States v. Wong (9th Cir. 2003) 334 F.3rd 831) or one that was obtained by fraud. (United States v. Caymen (9th Cir. 2005) 404 F.3rd 1196, 1200.)

There is no expectation of privacy in a duffle bag left in an apartment laundry room open to anyone, even though placed out of the way on a high shelf. (United States v. Fay (9th Cir. 2005) 410 F.3rd 589.)

But the owner of a gym bag the defendant kept under his girlfriend’s bed in her apartment had standing to challenge the search of that gym bag. (United States v. Davis (9th Cir. 2003) 332 F.3rd 1163, 1167-1168.)

Defendant had standing to challenge a wiretap order on his cellular telephone purchased by the defendant while using a fictitious name in that there is nothing illegal in the attempt to remain anonymous. (People v. Leon (2005) 131 Cal.App.4th 966, 974-977.)

A business that owns the company’s computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no reasonable expectation of privacy in the contents of the computer he is using. (United States v. Ziegler (9th Cir. 2006) 456 F.3rd 1138.)

Leaving a cell phone at the scene of a crime negates the suspect’s expectation of privacy in the contents of that cell phone.
phone, and is therefore abandoned property despite the suspect’s subjective wish to retrieve it, which he fails to act on. “Abandonment . . . is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.” (People v. Daggs (2005) 133 Cal.App.4th 361.)

Denying possession or ownership in a briefcase found in a vehicle defendant was driving will deprive that defendant of the right to later challenge the legality of the warrantless search of that briefcase. (United States v. Decoud (2006) 456 F.3rd 996.)

There is no expectation of privacy in the outside of a piece of mail sent to the defendant. “(B)ecause the information is foreseeable visible to countless people in the course of a letter reaching its destination, ‘an addressee or addressee generally has no expectation of privacy as to the outside of mail.’” (People v. Reyes (2009) 178 Cal.App.4th 1183, 1189-1192; quoting United States v. Osunegbu (1987 5th Cir.) 822 F.2nd 472, 380, fn. 3.)

In Reyes, an employee of a private postbox company spontaneously handed officers defendant’s mail when the officers inquired as to whether defendant had rented a box at that facility even though the employees didn’t “normally” hand over a clients’ mail absent a court order. Defendant was never told that his mail would be kept private.

A jail inmate talking over a jail telephone, where he is warned that his conversations were subject to monitoring, asking a friend to retrieve what officers understood to be a gun (although defendant only referred to it as “the thing”) from a container (also described in vague, generic terms) in the closet of his girlfriend’s home, does not waive any expectation of privacy defendant had in the container that was later retrieved by law enforcement and illegally searched without a search warrant. (United States v. Monghur (2009) 588 F.3rd 975, 978-981.)

Monghur differentiated these facts from a similar circumstance where defendant told law enforcement officers, clearly and unequivocally, that a particular
container contained contraband. The Court in the case found that such a concession waived any expectation of privacy defendant might have had in the container, thus allowing for a warrantless search of that container. (United States v. Cardona-Rivera (7th Cir. 1990) 904 F.2nd 1149.)

Abandoning a cigarette butt onto a public street constitutes a loss of one’s right to privacy in that butt, making it available to law enforcement to recover and test for DNA without a search warrant. (People v. Gallego (2010) 190 Cal.App.4th 388, 394-398.)

An Internet subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider. (People v. Stipo (2011) 195 Cal.App.4th 664, 668-669.)

Allowing another person unrestricted access to a mutually owned computer negates any expectation of privacy the first person might have had. A co-owner has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search. (United States v. Stanley (9th Cir. 2011) 653 F.3rd 946, 950-952.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (People v. Thomas (2011) 200 Cal.App.4th 338.)

Outside Common Areas:

Defendant, observed by police officers retrieving contraband from a hole in the ground in the common area behind an apartment complex, did not have any reasonable

**Businesses:** In evaluating a business, the Supreme Court has held that: “Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property.” (*Minnesota v. Carter* (1998) 525 U.S. 83, 90 [142 L.Ed.2d 373].)

“In the employment context, we have found a reasonable expectation of privacy to exist in an area ‘given over to [an employee’s] exclusive use.’ (*Schowengerdt v. General Dynamics* (9th Cir. 1987) 823 F.2d 1328, 1335.) O’Brien’s office was given over to O'Brien's exclusive use and contained his personal desk and files; . . .” (*United States v. Taketa* (9th Cir. 1991) 923 F.2d 665, 671.)

However; “An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual’s home.” (*United States v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 695; citing *New York v. Burger* (1987) 482 U.S. 691, 700 [96 L.Ed.2d 601].)

The employee of a liquor store had no standing to challenge the search of the counter area where she had no expectation of privacy. (*People v. Thompson* (1988) 205 Cal.App.3rd 1503.)

No expectation of privacy in documents seized from another’s business premises where the defendant had no control over the business and no possessory interest in the documents at the time of seizure. (*People v. Workman* (1989) 209 Cal.App.3rd 687, 696.)

No standing to challenge the search of containers left by defendant at an auto body shop where defendant was a “mere guest or invitee.” (*People v. Ayala* (2000) 23 Cal.4th 225, 253.)

A hospital employee has no reasonable expectation of privacy in the hospital’s mailroom. (*United States v. Gonzalez* (9th Cir. 2003) 328 F.3d 543.)

A business that owns the company’s computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no
reasonable expectation of privacy in the contents of the computer he is using. *(United States v. Ziegler* (9th Cir. 2006) 456 F.3rd 1138.)

Contrary to a small, family-owned business over which an individual exercises daily management and control (E.g., see *United States v. Gonzalez* (9th Cir. 2005) 412 F.3rd 1102.), challenging the legality of a search in a large business is much more complicated. Being the owner or manager of a business, alone, is not enough. The defendant must generally show some personal connection to the places being searched and the materials seized. Factors to consider in evaluating this personal connection include, but are not necessarily limited to:

- Whether the item seized is personal property or otherwise kept in a private place separate from other work-related material.
- Whether the defendant had custody or immediate control of the item when officers seized it.
- Whether the defendant took precautions on his own behalf to secure the place searched or things seized from any interference without authorization.

*(United States v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3rd 684, 698.)

*Renters with a Stolen Credit Card:* One who rents a hotel room with a stolen credit card does not have standing to challenge an unlawful entry of the room by law enforcement. *(People v. Satz* (1998) 61 Cal.App.4th 322.)

The Ninth Circuit has developed the rule that use of a stolen credit card alone is insufficient to negate the person’s expectation of privacy in his room. There has to be evidence that the management has, or is at least intending, to evict the tenant for that reason before the tenant’s expectation of privacy in is room becomes unreasonable. *(See United States v. Dorais* (9th Cir. 2001) 241 F.3rd 1124, 1127-1128.)

Despite renting a motel room with a stolen credit card, the defendant did not lose his standing to challenge an unlawful entry until the motel’s manager took some affirmative steps to repossess the room. *(United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584.)
Also, a defendant has not lost his expectation of privacy in his hotel room (which was later, after the fact, discovered to have been rented with a stolen credit card) by the hotel locking him out when he was locked out pursuant to a policy to do so after a dangerous weapon (a firearm) is found in the room by hotel employees. Locking him out, in this case, was not done with the intent to evict him. The fact that he was arrested before his room was searched also does not diminish his expectation of privacy in the room. Lastly, use of the stolen credit card does not negate the defendant’s expectation of privacy when its use is not known at the time, and therefore does not cause an intend to evict him because of its use. (United States v. Young (9th Cir. 2009) 573 F.3rd 711, 715-720.)

Another panel of the Ninth Circuit Court of Appeal reached the opposite result under similar circumstances, finding that a person does not have standing in a hotel room rented with a fraudulent credit card and other fraudulent documents. (United States v. Cunag (9th Cir. 2004) 386 F.3rd 888.)

These cases may perhaps be differentiated from Bautista and Young because in Bautista, the hotel manager was still trying to work out some method of payment. And in Young, there was no attempt by the hotel manager, who at the time was unaware that the credit card used to rent the room was stolen, to evict defendant.

Also, using counterfeit money to rent a motel room does not deprive the defendant of standing to challenge the warrantless entry of her motel room unless there is some proof that the defendant knew that the money she used was counterfeit (i.e., no intent to defraud) and that the motel manager has already attempted to evict the defendant or seek the help of law enforcement in such an eviction. (People v. Munoz (2008) 167 Cal.App.4th 126.)

Exposure to Public View: Observation of defendant’s growing marijuana plants from a neighbor’s property, without the neighbor’s knowledge or permission, looking into defendant’s adjacent back yard held to be lawful. Defendant did not have standing to challenge the trespass into the neighbor’s yard, and did not have a reasonable expectation of privacy in what was growing
in his own yard in that his marijuana plants were plainly visible. (*People v. Claeys* (2002) 97 Cal.App.4th 55.)

**Abandoned Property:**

Leaving all his belongings in a motel room, disappearing in the middle of the night and without making arrangements to extend his stay, it was held that defendant abandoned the motel room, his personal belongings in the room, and his vehicle in the parking lot. There being no reasonable expectation of privacy in these items due to this abandonment, defendant lost his standing to challenge the warrantless entry. (*People v. Parson* (2008) 44 Cal.4th 332, 342-348.)

Leaving a cell phone at the scene of a crime negates the suspect’s expectation of privacy in the contents of that phone, and is therefore abandoned property despite the suspect’s subjective wish to retrieve it, which he fails to act on. “Abandonment . . . is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.” (*People v. Daggs* (2005) 133 Cal.App.4th 361.)

Abandoning a cigarette butt onto a public street constitutes a loss of one’s right to privacy in that butt, making it available to law enforcement to recover and test for DNA without a search warrant. (*People v. Gallego* (2010) 190 Cal.App.4th 388, 394-398.)

Tricking a suspect out of an item of personal property and then testing it for DNA is another issue. But, as noted in *Gallego*, at p. 396, several courts from other jurisdictions have found such a tactic to be lawful. (See *Commonwealth v. Perkins* (Mass. 2008) 883 N.E.2nd 230; and *Commonwealth v. v. Bly* (Mass. 2007) 862 N.E.2nd 341; testing cigarette butts and a soda can left behind after an interview with police. *People v. LaGuerre* (2006) 29 A.D.3rd 822 [815 N.Y.S.2nd 211]; obtaining a DNA sample from a piece of chewing gum defendant voluntarily discarded during a contrived soda tasting test. *State v. Athan* (Wash. 2007) 158 P.3rd 27; DNA obtained.

© 2012 Robert C. Phillips. All rights reserved

243
from defendant’s saliva from licking an envelope he mailed to detectives in a police ruse.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS test testified that used mouthpieces were normally discarded in the trash. Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (*People v. Thomas* (2011) 200 Cal.App.4th 338.)

**Disclaiming Standing:** Generally, anyone who disclaims ownership of the place or item being searched will not normally be held to have standing. (*People v. Mendoza* (1986) 176 Cal.App.3rd 1127; and *People v. Dasilva* (1989) 207 Cal.App.3rd 43; *People v. Scott* (1993) 17 Cal.App.4th 405.)

But note *People v. Allen* (1993) 17 Cal.App.3rd 1214; disclaimer but one factor to consider when determining whether defendant had standing.

And see *United States v. Stephens* (9th Cir. 2000) 206 F.3rd 914, where the Ninth Circuit Court of Appeal has held that even denial of standing (i.e.; “That ain’t mine.”) concerning seized property during an illegal detention will not keep that property from being suppressed as the product of the unlawful detention.

Also, denial by a defendant that he possessed a gun, allegedly recovered by police from his waistband, does not defeat the defendant’s claim of standing when he later challenges the search of his person. (*People v. Dachino* (2003) 111 Cal.App.4th 1429.)


© 2012 Robert C. Phillips. All rights reserved
Determining Reasonableness: The reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. (United States v. Knights (2001) 534 U.S. 112, 118-119 [151 L.Ed.2nd 497, 505].)

See People v. Smith (2009) 172 Cal.App.4th 1354, where it was held that a public strip search of a probationer or parolee may in fact be unreasonable. But lowering a parolee’s pants and pulling back the elastic ban of his underwear only to the extent necessary to see the crotch area, while shielding the suspect from public view, is neither a strip search nor unreasonable.

Taking blood samples from a convicted person in the mistaken belief that the DNA and Forensic Identification Data Base and Data Bank Act of 1998 authorizes it, when the defendant is in fact a prisoner with a reduced expectation of privacy, is not unreasonable and does not require suppression of the result. (People v. Robinson (2010) 47 Cal.4th 1104, 1119-1120.)

Old Rule: Evaluating any Fourth Amendment search and seizure issue involved analyzing the law enforcement officer’s actions both from a “subjective” (i.e., in the officer’s own mind) and “objective” (as viewed by a reasonable person) viewpoint. If a contested search or seizure was not both subjectively held and objectively reasonable, the search or seizure would be found to be illegal. (See Katz v. United States (1967) 389 U.S. 347, 3612 [19 L.Ed.2nd 576, 588].)

New Rule: Subjective Motivations are Irrelevant: A police officer’s subjective motivations (or even his ignorance of the legality of the reasons) for conducting a search or seizure are irrelevant. The only issue is whether the Fourth Amendment was in fact violated. In other words, was a search or arrest lawful according to some statute or constitutional principle, even though the officer was not aware of it, or even thought, in his own mind, he believed he was in violation of the applicable law or principle? If the answer is “yes,” then (with limited exceptions, see below), the search or arrest is lawful. (Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89].)

“‘Reasonableness … is measured in objective terms by examining the totality of the circumstances’ [citation], and ‘whether a particular search meets the reasonableness standard “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”’ [Citations.]” (People v. Robinson (2010) 47 Cal.4th
1104, 1120 [104 Cal. Rptr. 3d 727, 224 P.3d 55]; see Bell v. Wolfish (1979), 441 U.S. 520 at p. 559 [“Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”]” (People v. Boulter (2011) 199 Cal.App.4th 761.)

Whren v. United States, supra, involved the use of a “pretext” to make a traffic stop (i.e., using a traffic infraction when the officers’ real motivation involved an issue not supported by the necessary reasonable suspicion), the U.S. Supreme Court deciding such a tactic was lawful so long as there was some lawful reason justifying the stop. (See “Pretext Stops,” above.)

The Rule of Whren:

Per Whren, so long as there is some lawful justification for making the stop, the officers’ subjective motivations are irrelevant. (Ibid; see also United States v. Miranda-Guerena (9th Cir. 2006) 445 F.3rd 1233.)

Arguably, the same theory applies to a search or seizure. So long as the search or seizure is lawful, it should matter not whether the officer, in his or her own mind, believed it to be lawful.

The “pretext stop” theory of Whren v. United States applies to civil parking violations as well as any criminal violation. (United States v. Choudhry (9th Cir. 2006) 461 F.3rd 1097.)

Also, a law enforcement officer’s actions, so long as objectively reasonable, might still result in the admissibility of illegally seized evidence because of the “good faith” exception. (United States v. Leon (1984) 468 U.S. 897 [82 L.Ed.2nd 677]; see also People v. Hull (1995) 34 Cal.App.4th 1448.) (See “Good Faith,” below.)

And see Arkansas v. Sullivan (2001) 532 U.S. 769 [149 L.Ed.2nd 944]: Because Whren involves an interpretation of the Fourth Amendment, individual states are not entitled to impose a stricter interpretation upon law enforcement unless they choose to use their own state constitution (i.e., “Independent State Grounds”) as their authority.
Note: California Courts’ ability to use “Independent State Grounds” as a basis for imposing stricter rules on law enforcement was eliminated with passage of Proposition 8 in June, 1982, and its “Truth in Evidence” provisions. (In re Lance W. (1985) 37 Cal.3rd 873.)

Limitations: Whren is not without exceptions:

When the pretext used for making a stop is to conduct an “administrative search,” such as inspecting the licensing of a taxicab, per local ordinance, or an inventory vehicle search, making a traffic stop is unlawful, and any products of that stop are subject to suppression. (People v. Valenzuela (1999) 74 Cal.App.4th 1202; Whren v. United States, supra, at pp. 811-812, 135 L.Ed.2nd at p. 97].)

When a stop or search is not a “run-of-the-mine” case, such as “cases where ‘searches or seizures [were] conducted in an extraordinary manner, usually harmful to an individual’s privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.’ (Citing Whren v. United States, supra, at p. 818.)” (United States v. Ibarra (9th Cir. 2003) 345 F.3rd 711, 715.)

The theory of Whren is limited to those circumstances where a police officer is aware of facts that would support an arrest. “(A)lthough Whren stands for the proposition that a pretextual seizure based on the illegitimate subjective intentions of an officer may be permissible, it does not alter the fact that the pretext itself must be a constitutionally sufficient basis for the seizure and the facts supporting it must be known at the time it is conducted.” (Moreno v. Baca (9th Cir. 2005) 431 F.3rd 633, 640; finding that a belatedly discovered arrest warrant and parole search conditions did not justify a detention and search.)

Contrary to the general rule, an officer’s motivations for conducting a search do matter in two limited situations; i.e., in “special needs” and “administrative-search” cases. (United States v. McCarty (9th Cir. Oct. 14, 2011) ___ F.3rd ___, __ [2011 U.S. App. LEXIS 18874]; child pornography observed during a lawful TSA administrative search may lawfully be used to establish probable cause to arrest.)
And Query: Would Whren validate a traffic stop when the officer’s real motivation is based upon prohibited “racial profiling?” No!

Balancing the constitutional principles involved (e.g., Fourteenth Amendment and Calif. Const. Art I, §§ 7, 15, equal protection and due process), and the state and federal statutes the officer would be violating (18 U.S. C. §§ 241, 242; 42 U.S.C. 1983; P.C. §§ 422.6(a), 13519.4; and CC § 52.1), a court will not uphold such a stop. (See also Baluyut v. Superior Court (1996) 12 Cal.4th 826; Equal Protection; and Shapiro v. Thompson (1969) 394 U.S. 618 [22 L.Ed.2nd 600]; Discrimination may be so arbitrary and injurious as to be deemed a Due Process violation.

The Supreme Court itself, in Whren, specifically noted that; “We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.” (Whren v. United States, supra, at p. 813 [135 L.Ed.2nd at p. 98].)

Discrimination by law enforcement officers based upon a person’s race in the providing of both protective and non-protective services is a constitutional equal protection violation. (Ae Ja Elliot-Park v. Manglona (9th Cir. 2010) 592 F.3rd 1003.)

Such “racial profiling” would be a Fourteenth Amendment “due process” violation. (Ibid.; United States v. Ibarra (9th Cir. 2003) 345 F.3rd 711, 714.)

Fourth Amendment vs. Fifth Amendment Issues: See People v. Pilster (2006) 138 Cal.App.4th 1395, 1405, noting that Fourth Amendment custody issues involve an analysis of the reasonableness of an officer’s actions, as opposed to a Fifth Amendment custody issues when discussing the need for an admonishment of one’s self-incrimination rights pursuant to Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2nd 694], where the issue is what a reasonable person in the suspect’s position would have believed.

“Posse Comitatus;” Use of the Military by Civilian Law Enforcement:

The Act: The so-called “Posse Comitatus Act” provides, in part; “[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the
Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.” (18 U.S.C. § 1385)

“Posse” means “to be able,” or “to have power.” “Comitatus” means “county.” At common law, “Posse Comitatus” referred to the power of the sheriff to summon aid from every male in the county over 15 years of age and not infirm to assist in preserving the peace. (See People v. Bautista (2004) 115 Cal.App.4th 229, 233, fn. 2.)

Some states, including California, still retain one form or another of this power. (See P.C. § 150; making it an infraction for any able-bodied person over the age of 18 to fail to assist a law enforcement officer requesting such assistance.)

Purpose: The federal Act was enacted to prevent the use of military personnel to help enforce civilian law, thus preventing the U.S. Government from becoming “a government of force,” i.e., run by the military. (People v. Bautista, supra, at p. 233, fn. 2.)

In 1981, Congress amended the Posse Comitatus Act to allow for certain military assistance in fighting the war on drugs. (See 18 U.S.C. §§ 371-378) However, these statutes were specifically “not [to] include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.” (18 U.S.C. § 375)

“[R]egular and systematic assistance by military investigative agents to civilian law enforcement in the investigation of local drug traffic” raises issues as to whether the “Posse Comitatus Act” has been violated. (People v. Blend (1981) 121 Cal.App.3d 215, 228.)

Case Law:

In People v. Blend (1981) 121 Cal.App.3d 215, 225-228, it was held that the Posse Comitatus Act was not violated when an active duty WAVE assisted local law enforcement with arranging the purchase of cocaine from the defendant, despite the cooperation of the Naval Investigative Service (NIS) which permitted the investigation to proceed on the base, provided the investigator with passes, and assisted in appellant's arrest.
Per the Court, the WAVE acted on her own initiative as a private citizen. Moreover, she was not regularly involved in law enforcement activities with the military, and her usefulness to civil law enforcement was unrelated to the fact that she was a WAVE.

The court also found that the cooperation by the NIS in permitting the investigation of appellant to continue on the base did not demonstrate a violation of the act, and there was no evidence that the NIS arranged or participated in a program to detect violation of the civil narcotics laws.

In People v. Bautista (2004) 115 Cal.App.4th 229, 232-237), use of an Army sergeant and his drug-sniffing dog that alerted on the defendant’s storage locker in which 100 pounds of marijuana was later found, did not constitute a violation of the “Posse Comitatus Act” because the sergeant did not participate in any stage of the investigation and search other than to point out the location of the defendant’s hidden drugs by smelling odors in a public place.

Sanctions for Violations: It is questionable whether the use of the Exclusionary Rule is a proper sanction for a violation of the “Posse Comitatus Act.”

The Fourth Circuit in United States v. Walden (4th Cir. 1974) 490 F.2nd 372, 376-377, found no indication of widespread violation of the Act or its policy and declined to adopt an exclusionary rule. The court stated that the statute was previously little known, that there was no evidence that the violation in this case was deliberate or intentional, that the policy expressed in the Posse Comitatus Act is for the benefit of the nation as a whole, and not designed to protect the personal rights of defendants. Noting that a rationale for adopting an exclusionary rule for Fourth Amendment violations is that available alternative remedies have proved ineffectual, the court expressed confidence that the military would take steps to ensure enforcement of the act.

However, the Court noted at page 377; “Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent.” (See also United States v. Wolffs (5th Cir. 1979) 594 F.2nd 77, 84-85.)
Chapter 6

Searches With a Search Warrant:

**Defined:** A “search warrant” is “an order in writing, in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or her to search for a person or persons, a thing or things, or personal property, and bring it before the magistrate.” (P.C. § 1523)

**Preference for Search Warrants:** No doubt because warrants are commanded by the Fourth Amendment, the courts have long shown a preference for using a search warrant whenever possible:

“In Jones v. United States [(1960)] 362 U.S. 257, 270 [4 L.Ed.2nd 697, 708] this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.” (United States v. Ventresca (1965) 380 U.S. 102, 106 [13 L.Ed.2nd 684, 687].)

**Why Search Warrants are Preferred:** There are a number of reasons why use of a search warrant to conduct any search is preferable even in those instances when one might not be legally required. For instance:

1. **Presumption of Lawfulness:** Use of a search warrant raises a presumption in a later motion to suppress evidence (per P.C. § 1538.5) that the search was lawful. The defense has the burden of proof in attempting to rebut this presumption. (Theodor v. Superior Court (1972) 8 Cal.3rd 77, 101; People v. Kurland (1980) 28 Cal.3rd 376.) This must be done by filing:

   **Motion to Quash:** Motion attacking the sufficiency of the probable cause in the warrant affidavit as it is written. (P.C. § 1538.5(a)(1)(B))

   Normally, only the warrant and affidavit themselves may be considered by the trial court in ruling on a motion to quash. An exception might be when a law enforcement officer’s testimony is necessary to interpret some of the language in the affidavit. (See People v. Christian (1972) 27 Cal.App.3rd 554.)

   **Motion to Traverse:** Motion attacking the truth of the information contained in the warrant affidavit. However, the defendant is entitled to an evidentiary hearing (i.e., referred to as a “Franks
hearing;” *Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2nd 667].) on this issue only after making a “substantial showing” that:

- The affidavit contains statements (or makes material omissions) that are *deliberately* false or were made with a *reckless* disregard for the truth (*Ewing v. City of Stockton* (9th Cir. 2009) 588 F.3rd 1218, 1223-1228.), (or omitted information which the magistrate would have wanted to know); and

- The affidavit’s remaining contents are reevaluated after the false statements are excised (or omitted material information is considered) to see if, as corrected, there is still sufficient evidence to justify a finding of probable cause. (*Franks v. Delaware* (1978) 438 U.S. 154, 155-156 [57 L.Ed.2nd 667, 672]; precluding the cross-examination of the affiant until the necessary showing is made. See also *People v. Wilson* (1986) 182 Cal.App.3rd 742, 747; *Theodor v. Superior Court* (1972) 8 Cal.3rd 77, 103; *People v. Cook* (1978) 22 Cal.3rd 67, 78; and *People v. Bradford* (1997) 15 Cal.4th 1229, 1297; *People v. Lewis et al.* (2006) 39 Cal.4th 970, 989; *United States v. Craighead* (9th Cir. 2008) 539 F.3rd 1073, 1080-1082; *Ewing v. City of Stockton* (9th Cir. 2009) 588 F.3rd 1218, 1223-1228); *United States v. Payton* (9th Cir. 2009) 573 F.3rd 859, 861; *People v. Scott* (2011) 52 Cal.4th 452, 475-476), or

- The affidavit contains information that is the direct product of a *Fourth Amendment* violation. (See *People v. Weiss* (1999) 20 Cal.4th 1073.)

*Note:* But remember, the defendant must have “standing” to challenge the collection of the illegal information in order to contest its inclusion in the warrant affidavit. See “Standing,” above.)

- A defendant who challenges a search warrant based upon an affidavit containing *omissions* bears the burden of showing that the omissions would have been material to the magistrates’ determination of probable cause. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297.)

Neglecting to include an informant’s criminal history could invalidate a warrant, in that the magistrate’s decision will usually require a determination of the informant’s credibility.
Omitting facts which would have supported a finding of probable cause had it been included is not grounds to traverse a warrant. (*People v. Lim* (2001) 85 Cal.App.4th 1289.)

Intentional or reckless misstatements and/or omissions in a search warrant affidavit are material errors whenever a magistrate would not have found probable cause absent those errors, and may result in potential civil liability for the affiant. (*Chism v. Washington State* (9th Cir. 2011) 661 F.3rd 380; where had the information been reported to the magistrate correctly, it would have been apparent that other parties had used the plaintiffs’ previously stolen credit card to purchase child pornography.)

For a plaintiff in a civil lawsuit to survive a summary judgment motion where it is alleged that there were material misstatements or omission in a search warrant, he must make a *substantial showing* that there were misstatements and/or omissions in the warrant affidavit were either *deliberately or recklessly* included (or, for an omission, excluded), and that but for the misstatements or omissions, the warrant not would have been approved by the magistrate. Purely negligent or unintentional mistakes in a search warrant affidavit are irrelevant to the validity of the warrant. In this case, the Court had no difficulty finding that the affiant’s misstatements and omissions were at the very least reckless. (*Ibid.*)

The affiant’s failure to disclose that the plaintiff’s son was in jail at the time of the issuance of the warrant, and for over six months prior, and therefore not only was not present in the home, but moreover could not have been involved in a described shooting or the storage of weapons used in it. Plaintiffs presented sufficient evidence to establish a genuine issue as to whether a detective’s
omission of this material fact was intentional or reckless, as opposed to merely negligent. Had the omitted facts of the son’s two-year sentence and custody status been included, it was extremely doubtful that an issuing judge would simply have issued the warrant or authorized nighttime service without more information. (Bravo v. City of Santa Maria (9th Cir. Dec. 9, 2011) __ F.3rd __ [2011 U.S. App. LEXIS 24383].)

Courts give the Prosecution the Benefit of the Doubt:

With the burden of attacking a search warrant upon the defendant, and the necessity of making a “substantial showing,” even before being allowed to hold an evidentiary hearing, it is extremely difficult for a defendant to successfully challenge a search conducted pursuant to a search warrant. (See People v. Wilson (1986) 182 Cal.App.3rd 742.)

“(W)here (the) circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner. . . . (R)esolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” (United States v. Ventresca (1965) 380 U.S 102, 109 [13 L.Ed.2nd 684, 689].)

This judicially mandated preference for warrants has specifically been adopted by the California Supreme Court. (People v. Superior Court [Johnson] (1972) 6 Cal.3rd 704, 711; People v. Mesa (1975) 14 Cal.3rd 466, 469.)

In a “Motion to traverse” a search warrant affidavit, only intentional or reckless inaccuracies are grounds for sanctions, and in those cases the sanction is limited to striking the inaccurate information, retesting the warrant affidavit for probable cause after striking that information. Unintentional or negligent misstatements are left in the affidavit. (Franks v. Delaware (1978) 438 U.S. 154 [57 L.Ed.2nd 667]; People v. Wilson (1986) 182 Cal.App.3rd 742.)
“Omissions or misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause.” (Ewing v. City of Stockton (9th Cir. 2009) 588 F.3rd 1218, 1224.)

Minor, technical errors will not likely result in any sanction. (See (People v. Stipo (2011) 195 Cal.App.4th 664, 670; listing the wrong time for an occurrence, missing the actual time by 20 minutes.)

Omitting an informant’s entire criminal history from a warrant affidavit may be grounds to invalidate the warrant. However, the warrant is still valid so long as that information wasn’t intentionally or recklessly left out, or if it wouldn’t have made a difference to the magistrate even if he’d known. (Garcia v. County of Merced (9th Cir. 2011) 639 F.3rd 1206, 1211-1212.)

2. Presumption of Unlawfulness: The absence of a search warrant raises a presumption that the search was unlawful, which the prosecution is required to rebut. (Mincey v. Arizona (1978) 437 U.S. 385, 390 [57 L.Ed.2nd 290, 298-299]; In re Tyrell J. (1994) 8 Cal.4th 68, 76, overruled on other grounds.)

The prosecution bears the burden of providing proof of a recognized exception to the warrant requirement, justifying a warrantless search. (Welsh v. Wisconsin (1984) 466 U.S. 740, 749-750 [80 L.Ed.2nd 732, 742-743]; People v. James (1977) 19 Cal.3rd 99, 106.)

3. Good Faith: Evidence seized pursuant to a search warrant will not be suppressed even if the warrant was defective so long as the officers acted in reasonable and objective good faith in relying upon the warrant and serving it. (United States v. Leon (1984) 468 U.S. 897 [82 L.Ed.2nd 677]; Massachusetts v. Sheppard (1984) 468 U.S. 981 [82 L.Ed.2nd 737]; People v. Rodrigues-Fernandez (1986) 182 Cal.App.3rd 742; United States v. Crews (9th Cir. 2007) 502 F.3rd 1130.)

The “Exclusionary Rule” is “restricted to those situations in which its remedial purpose is effectively advanced.” (Illinois v. Krull (1987) 480 U.S. 340, 347 [94 L.Ed.2nd 364, 373].)

The good faith reliance upon a state statute allowing for a warrantless administrative search was justified where the statute was not obviously unconstitutional. (Illinois v. Krull, supra; see also Michigan v. DeFillippo (1979) 443
U.S. 31, 37-38 [61 L.Ed.2nd 343, 439-350]; good faith reliance on an ordinance that was later declared to be unconstitutional.)

Application of the Exclusionary Rule is unwarranted where it would not result in appreciable deterrence to unlawful police conduct. (Arizona v. Evans (1995) 514 U.S. 1 [131 L.Ed.2nd 34]; An arrest based upon erroneous court records.)

The Exclusionary Rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective. (United States v. Leon, supra; see also Massachusetts v. Sheppard, supra.)

Similarly, the alleged unconstitutionality of a statute, the violation for which serves as the basis for a search warrant, is irrelevant so long as officers reasonably relied upon the statute’s validity at the time of the obtaining of the search warrant. (United States v. Meek (9th Cir. 2004) 366 F.3rd 705, 714.)

An officer’s reasonable reliance upon the advice of a prosecutor, although not conclusive, is some evidence of good faith. (Dixon v. Wallowa County (9th Cir, 2003) 336 F.3rd 1013, 1019; see also Stevens v. Rose (9th Cir. 2002) 298 F.3rd 880, 884.)

See also Johnston v. Koppes (9th Cir. 1988) 850 F.2nd 594, 596, listing four relevant factors in evaluating the officer’s good faith reliance on advice of a lawyer:

- Whether the attorney was independent;
- Whether the advice addressed the constitutionality of the proposed action;
- Whether the attorney had all the relevant facts; and
- Whether the advice was sought before or after the officer’s actions.

A defective search warrant description (i.e., lack of particularity) may be cured where the affidavit supplies the necessary particularity. However, the government has the
burden of proving that the officers who executed the warrant read and were guided by the contents of the affidavit. (United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3d 684, 706; citing United States v. Luk (9th Cir. 1988) 859 F.2d 667, 677.)

“(A) warrant issued by a magistrate normally suffices to establish’ that a law enforcement officer has ‘acted in good faith in conducting the search.’” “(E)vidence seized will not be excluded where officers rely on warrants that are later ruled to be invalid if their reliance was objectively reasonable.” (Citations omitted; People v. Stipo (2011) 195 Cal.App.4th 664, 673.)

A search warrant affidavit was held to be insufficient to establish probable cause even though the affiant depended on three informants. Each of the informants were found to be unreliable and corroborated only pedestrian details regarding defendant’s residence and vehicle. The affiant also determined that one of the alleged drug dealers had a history of narcotics offenses, but failed to include in the affidavit the dates or any details of those offenses. The informants’ statements did not include sufficient indicia of reliability to corroborate each other. One informant made an undetailed factual assertion based on hearsay, and the others made only conclusionary assertions that defendant and another individual were drug dealers. However, the “good faith” exception applied because broad language in several prior court decisions suggested that multiple unreliable informants could corroborate each other. Those cases could have led a reasonable officer to conclude that the affidavit presented a debatable question as to probable cause. (People v. French (2011) 201 Cal.App.4th 1307.)

Exceptions: However; “A police officer may not shift all of the responsibility for the protection of an accused’s Fourth Amendment rights to the magistrate by executing a warrant no matter how deficient it may be in describing the places to be searched and the items to be seized. An officer applying for a warrant is required to exercise reasonable professional judgment. [Citations]” (People v. Bradford (1997) 15 Cal.4th 1229, 1292.) Pursuant to United States v. Leon, supra, at pp. 922-923 [82 L.Ed.2d at pp. 698-699], and other cases (see below), the “Good Faith” exception does not apply when:
• The magistrate issuing the search warrant was misled by information in the affidavit that the affiant knew was false or would have known was false except for a reckless disregard for the truth. (See United States v. Crews (9th Cir. 2007) 502 F.3rd 1130, 1138-1139.)

This probably applies to material omissions in the warrant affidavit as well. (United States v. Flores (9th Cir. 1982) 679 F.2nd 173; United States v. Lefkowitz (9th Cir. 1980) 618 F.2nd 1313.)

• The issuing magistrate has “wholly abandoned his judicial role . . .” to the extent that no reasonably well-trained officer would rely upon the warrant. For example:

Issuing a warrant based upon a “bare bones” affidavit; i.e., one written in “conclusionary,” as opposed to “factual,” language. (See United States v. Harper (5th Cir. 1986) 802 F.2nd 115; and United States v. Maggitt (5th Cir. 1985) 778 F.2nd 1029, 1036.)

Where the judge becomes a part of the searching party, personally authorizing seizures during the search. (Lo-Ji Sales, Inc. v. New York (1979) 442 U.S. 319 [602 L.Ed.2nd 920].)


• A search warrant affidavit that is so lacking in the indicia of probable cause that official belief in the existence of probable cause is entirely unreasonable. (See United States v. Crews (9th Cir. 2007) 502 F.3rd 1130, 1135-1138.)

E.g.: The “bare bones” warrant, written in “wholly conclusionary statements” as opposed to factual allegations. (United States v. Maggitt, supra.; United States v. Barrington (5th Cir. 1986) 806 F.2nd 529, 542.)

Delay of 52 days between a controlled buy of almost a pound of marijuana and the execution of a
search warrant, despite the officer’s expert opinion and good faith belief that the seller would still have contraband in his residence (the sale taking place in a parking lot in another city), was held to be stale. The officer’s belief was not objectively reasonable, under the circumstances. (People v. Hulland (2003) 110 Cal.App.4th 1646.)

A warrant that failed to identify a particular suspect as an alleged “chemist” arriving from a foreign country, to provide any basis for the tip that a chemist was coming to the United States, or to describe any activity by the suspect that was indicative of setting up a meth lab, failed to make even a “colorable argument for probable cause.” (United States v. Luong (9th Cir. 2006) 470 F.3rd 898.)

• The warrant itself, as opposed to the affidavit, is so lacking in those specifics required of warrants that it cannot in good faith be presumed valid. (See Massachusetts v. Shepard (1984) 468 U.S. 981 [82 L.Ed.2nd 737].)

E.g.: The officer’s reliance on the magistrate’s probable cause determination is not objectively reasonable. I.e.: Should a reasonably well-trained officer have known that the search warrant was defective despite the magistrate’s authorization? (See People v. Lim (2001) 85 Cal.App.4th 1289, 1296-1297.)

In this regard, it adds to the officer’s good faith to have his warrants reviewed and approved by a deputy district attorney prior to taking it to a magistrate. (See People v. Camarella (1991) 54 Cal.3rd 592, 602-607.)

• Also, “Good Faith” is not applicable when the information upon which the warrant is based was gathered in an earlier illegal search. (United States v. Vasey (9th Cir. 1987) 834 F.2nd 782; People v. Baker (1986) 187 Cal.App.3rd 562; People v. Brown (1989) 210 Cal.App.3rd 849.)

However, it must be the defendant’s own Fourth Amendment rights that were violated. (People v. Weiss (1999) 20 Cal.4th 1073, 1081.) Information
gathered in violation of someone else’s Fourth Amendment rights, for which this defendant has no standing to challenge, may be used in a search warrant affidavit. (People v. Madrid (1992) 7 Cal.App.4th 1888, 1896.)

- An officer’s “good faith” is not grounds for denying a defendant’s motion to suppress based on a violation of the wiretap statutes (see below). (People v. Jackson (2005) 129 Cal.App.4th 129, 153-160.)

Exigent Circumstances:

The Ninth Circuit Court of Appeal has indicated that it might be appropriate to factor in exigent circumstances, such as necessary time restraints, in determining whether the “good faith” exception applies. (United States v. Weber (9th Cir. 1990) 923 F.2nd 1338, 1346; United States v. Ramos (9th Cir. 1991) 923 F.2nd 1346, 1355, fn. 18, overruled on other grounds.)

But claiming an exigency as an excuse for applying a good faith exception will not be upheld where the officers don’t treat the situation accordingly. (United States v. Luong (9th Cir. 2006) 470 F.3rd 898, 904; claiming that the dangerousness of a possible meth lab in a residential area justified application of the good faith exception was rejected when the officers waited seven hours to obtain the warrant and then three more hours before executing it.

Examples:

“Good Faith” applied to a warrant where the description of the property to be seized was erroneously left out of the warrant affidavit. (People v. Rodriguez-Fernandez (1991) 235 Cal.App.3rd 543; People v. Alvarez (1989) 209 Cal.App.3rd 660.)

Failure to restrict the description of the place to be searched to the defendant’s room, making the warrant “over-broad,” where that room was all that was in fact searched, was excused under the “good faith” rule. (People v. MacAvoy (1985) 162 Cal.App.3rd 746, 759-763.)

A warrant that failed to identify a particular suspect as an alleged “chemist” arriving from a foreign country, to
provide any basis for the tip that a chemist was coming to the United States, or to describe any activity by the suspect that was indicative of setting up a meth lab, failed to make even a “colorable argument for probable cause.”  (United States v. Luong (9th Cir. 2006) 470 F.3rd 898.)

4. **Ramey Inapplicable**: Arrests within a residence (See People v. Ramey (1976) 16 Cal.3rd 263; above.) during the service of a search warrant may be made without an arrest warrant.  (People v. McCarter (1981) 117 Cal.App.3rd 894, 908.)

5. **Consensual searches** may always be stopped by the subject withdrawing his or her consent; i.e., the suspect is in control of the extent and duration of the search.  (See People v. Martinez (1968) 259 Cal.App.2nd Supp. 943.)  Execution of a warrant, obviously, does not require the cooperation of the occupant.

6. **Informants** who do no more than provide probable cause in an affidavit for a search warrant may normally be kept confidential.  (E.C. § 1042(b))

7. An officer serving a search warrant, even if later found to be lacking in probable cause, is “acting in the performance of his (or her) duties” should a criminal offense in which this is an element (e.g., P.C. §§ 148 (Resisting Arrest), 243(b) (Battery on a Peace Officer) occur during the service of the warrant.  (People v. Gonzales (1990) 51 Cal.3rd 1179, 1222.)

**Problem: Mental Patients Detained per W&I § 5150: Seizure of Weapons:**

Although W&I § 8102(a) authorizes the “confiscation” of firearms or other deadly weapons owned, possessed, or under the control of a detained or apprehended mental patient, a search warrant must be used in order to lawfully enter the house and/or to search for weapons in those cases where there are no exigent circumstances and the defendant has not given consent.  (People v. Sweig (2008) 167 Cal.App.4th 1145 (petition granted, see below); rejecting the People’s argument that a warrantless entry to search for and seize the detainee’s firearms was justified under law enforcement’s “community caretaking” function.)

**P.C. § 1524(a)(10):** Search Warrants for Firearms and other Deadly Weapons:

The Sweig Court also found, however, that a search warrant is not permitted under P.C. § 1524 (see “Statutory Grounds for Issuance (P.C. § 1524(a)(1) through (8)),” below) when the defendant is detained pursuant to W&I § 5150 only.
The Court suggested that the Legislature should fix the problem with a legislative amendment to Section 1524.

As a result, the Legislature amended P.C.§ 1524 effective 1/1/10 to add new subdivision (a)(10), which now lists as a legal ground for the issuance of a search warrant the following: “When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in possession of, or in the custody or control of, a person described in W&I § 8102(a).”

The petition to the California Supreme Court on People v. Sweig was granted, making this case no longer available for citation, and then dismissed review on 10/11/09 when the above amendment to P.C. § 1524 was enacted.

Exigent Circumstances: See also Rupf v. Yan (2000) 85 Cal.App.4th 411, at pages 421-422, where a warrantless seizure of a mental patient’s firearms from his home was not challenged, the Court perhaps inferred an “exigent circumstance” when it noted that:

“The exercise of the police power to regulate firearms is clearly related to the public health, safety and welfare. (Citations.) Respondent identifies the object of the statute as providing a means whereby authorities can confiscate firearms in an emergency situation and may keep firearms from mentally unstable persons. The legislative history of the statute expressly recognizes the urgency and importance of such an objective . . . .” (Ibid.)

Non-Standard Types of Warrants:

- Telephonic Search Warrants:

  Telephonic search warrants, with an oral affidavit taken under oath and recorded and later transcribed, is statutorily provided for. (P.C. § 1526)

  Generally used during those hours when the courts are closed and a magistrate is otherwise not personally present, although there is no legal impediment to using this procedure during court hours.

  Typically, involves a four-way telephone conference call set up between the affiant, the magistrate, a deputy district attorney, and a tape recorder.
Such a warrant may also be obtained through the use of a telephone and either a facsimile ("fax") machine, a computer e-mail system, or a computer server, using procedures described in P.C. § 1526(b)(2))

- **Anticipatory Search Warrants:**

  Issuance of a warrant, conditioned upon the happening of a particular event (e.g., the delivery of illegal substances or articles to a particular address; i.e., a "triggering condition"), is legal. *(United States v. Grubbs* (2006) 547 U.S. 90, 93-97 [164 L.Ed.2nd 195]; *United States v. Garcia* (2nd Cir. 1989) 882 F.2nd 699; and see *United States v. Loy* (3rd Cir. 1999) 191 F.3rd 360, 364; listing cases upholding the concept.)

  "(T)he fact that the contraband is not ‘presently located at the place described in the warrant’ is immaterial, so long as ‘there is probable cause to believe that it will be there when the search warrant is executed.’ *United States v. Lowe*, 575 F.2d 1193, 1194 (6th Cir. 1978), . . . see *United States v. Dornhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988), . . . ." *(United States v. Garcia, supra., at p. 702.)*

  To be constitutional under the **Fourth Amendment**’s requirement that there be probable cause, two prerequisites of probability must be satisfied:

  - That there is a “fair probability” that contraband or evidence of a crime will be found in a particular place; and

  - That there is probable cause to believe the triggering condition will in fact occur.

  *(United States v. Grubbs, supra, see also United States v. Ruddell (9th Cir. 1995) 71 F.3rd 331, 333; and United States v. Hendricks (9th Cir. 1984) 743 F.2nd 653, 654-657; United States v. Goff (9th Cir. 1982) 681 F.2nd 1238, and United States v. Wylie (5th Cir 1990) 919 F.2nd 969, 974-975; “ . . . when it is known that contraband is on a sure course to its destination . . . .”)*

  California authority, questionable since the United States Supreme Court’s decision in *United States v. Grubbs, supra,* has held that; “(A)n anticipatory warrant may issue on clear showing that the police’s right to search at a certain location for particular evidence
of a crime will exist within a reasonable time in the future. (Citations)” People v. Sousa (1993) 18 Cal.App.4th 549, 558.)

Preparation and approval by a magistrate of an anticipatory search warrant has the tactical advantage of making the warrant effective immediately upon the happening of a “triggering event,” thus eliminating the delay between such an event and the eventual obtaining of a warrant.

Tip: State the contingency on the face of the warrant itself: E.g.; “THIS WARRANT IS LEGALLY EFFECTIVE AND CAN BE SERVED ONLY IF A SALE OF NARCOTICS TAKES PLACE AT THE PREMISES TO BE SEARCHED. (Initials of the magistrate)”

Failure of the warrant itself to clearly specify on its face the anticipatory nature of the warrant (i.e., that it is not to be served until the happening of a specific event, such as above) may invalidate the warrant. (United States v. Hotal (9th Cir. 1998) 143 F.3rd 1223; United States v. Vesikuru (9th Cir. 2002) 314 F.3rd 1116, 1123-1130; United States v. Grubbs (2006) 547 U.S. 90, 99-102 [164 L.Ed.2nd 195]; concurring opinion.)

The Federal Ninth Circuit Court of Appeal has indicated that if the warrant specifically incorporates an attached affidavit which describes the anticipatory nature of the warrant, this might suffice. However, the affidavit must then accompany the warrant to the scene of the search to be valid. (United States v. Hotal, supra.; United States v. McGrew (9th Cir. 1997) 122 F.3rd 847, 849-850.)

Other federal circuits have upheld the validity of an anticipatory warrant without the conditions specified on the warrant itself if: (1) Clear, explicit, and narrowly drawn conditions for the execution of the warrant are contained in the affidavit; and (2) Those conditions are actually satisfied before the warrant is executed. (See United States v. Moetamedi (2nd Cir. 1995) 46 F.3rd 225, 229; United States v. Rey (6th Cir. 1991) 923 F.2nd 1217, 1221; United States v. Dennis (7th Cir. 1997) 115 F.3rd 524, 529; United States v. Tagbering (8th Cir. 264
Under California law, while failure to describe the conditions precedent on the face of the warrant itself, or incorporate them by reference to the affidavit, is not necessarily fatal to the validity of the warrant, it is better practice to do so anyway. (*People v. Sousa*, *supra*, at p. 561.)

*Note:* If only to eliminate the issue, and because California cases may end up in the Ninth Circuit at some point, the better procedure is to describe the anticipatory nature of the warrant on the face of the warrant itself.

*Federal Rules:* According to the Ninth Circuit Court of Appeal, a copy of the document that describes the triggering conditions (i.e., the warrant itself, the affidavit, or any other attachments) must be presented to the lawful occupants (along with a copy of the warrant) upon the execution of the warrant. Failing to do so will invalidate the anticipatory search warrant as a Fourth Amendment violation. (*United States v. Grubbs* (9th Cir. 2004) 377 F.3rd 1072, as amended at 389 F.3rd 1306.)

See also *United States v. Vesikuru* (9th Cir. 2002) 314 F.3rd 1116, 1123-1124, holding that an “anticipatory warrant,” the conditions precedent for which being contained in the affidavit and incorporated into the warrant by reference, requires the presence of both the warrant and affidavit at the scene.

In that California interprets the Fourth Amendment differently, the general rule being that it is not required that a copy of the warrant be shown to, or left with, the occupants of the place being searched (see *People v. Calabrese* (2002) 101 Cal.App.4th 79.), it is likely that there also is no requirement that the conditions triggering an anticipatory search warrant be described in any documents given to the occupants.
**Sneak and Peek Warrants:**

A “sneak and peek” warrant is one which authorizes surreptitious entry of a premises, without notice, often during the nighttime, and provides that objects of the search are not to be seized but may only be noted, photographed, copied or otherwise recorded.

*Note:* No California case has ruled upon the legality of such a procedure.

Some courts, particularly the Federal Ninth Circuit Court of Appeal, are critical of such warrants for failure to require notice to the occupants, but have reluctantly upheld them. (See *United States v. Freitas* (9th Cir. 1986) 800 F.2d 1451; *United States v. Johns* (9th Cir. 1998) 851 F.2d 1131, 1134-1135.)

The federal courts are concerned that a “sneak and peak” warrant violates *Federal Rules of Criminal Procedure, Rule 41*. Rule 41 requires that the officer executing the warrant either give to the owner of the searched premises a copy of the warrant and a receipt for the property taken, or leave the copy and receipt on the premises. It also requires that the inventory be made in the presence of the owner of the premises “or in the presence of at least one credible person other than the applicant for the warrant.”

However, “a violation of Rule 41 . . . does not lead to suppression of evidence unless: (1) it is a ‘fundamental’ violation—that is, a violation that ‘in effect, renders the search unconstitutional under traditional fourth amendment standards’ [Citation], (2) ‘the search might not have occurred or would not have been so abrasive if the Rule had been followed [Citation]’ or (3) ‘there is evidence of intentional and deliberate disregard of a provision of the Rule.’ [Citation]” (United States v. Johns, supra., at p. 1134.)

Other courts have approved sneak and peak warrants so long as delayed notice is given, after approval by the magistrate that there is good cause for the delay. (United States v. Villegas (2nd Cir. 1990) 899 F.2d 1324, 1327.)

The Supreme Court, however, although never directly discussing the issue, has intimated that notice may be delayed if to do otherwise might defeat the purpose of the warrant. (Katz v. United
States (1967) 389 U.S. 347, 355, fn. 16 [19 L.Ed.2nd 576, 584];

discussing the lack of need for “prior notice” in a wiretap case.)

- **P.C. § 1524.1: AIDS Testing:** A search warrant requiring a criminal
suspect to submit to a blood test for the HIV virus may be issued by the
court after a request by a victim and a hearing showing probable cause to
believe that the accused committed a charged offense, and probable cause
to believe that blood, semen, or any other bodily fluid capable of
transmitting HIV has been transferred from the accused to the victim.

This provision is for the benefit of the victim, and, per the
requirements of the section, is not intended to serve as an aid in the
prosecution of any criminal suspect. (P.C. § 1524.1(a))

A judge may approve a search warrant upon finding probable
cause to believe the defendant committed a crime and that the
AIDS virus has been transferred from the accused to the victim
(Subd. (b)(1)), or the defendant is charged with one or more of a
specified list of sex offenses and there exists a police report
alleging an as of yet uncharged listed sex offense. (Subd. (b)(2))

A declaration by the victim’s mother “on information and belief,”
even though not being based on her personal knowledge, was
found to be legally sufficient to support a search warrant pursuant
to this section. *Hearsay* may be used to support the affidavit
required by this section. (*Humphrey v. Appellate Division of the
Superior Court* (2002) 29 Cal.4th 569.)

Because such a warrant is concerned with the public safety,
such a warrant comes within the less stringent requirement
of a “Special Needs” search. (*Id.,* a pp. 574-575.) (See
below.)

- **P.C. § 1524.2(b): Records of Foreign Corporations Providing Electronic
Communications or Remote Computing Services:** Foreign corporations
doing business in California, providing *electronic communications* or
*remote computing services* to the general public, must respond to a search
warrant issued by a California court and properly served, when asked for
records revealing the *identity of customers* using the services, *data* stored
by, or on behalf of, the customer, the *customer’s usage* of those services,
the *recipient or destination* of communications sent to or from those
customers, or the *content* of those communications.

“*Electronic communications services*” and “*remote computing
services*” is to be construed in accordance with the federal
Electronic Communications Privacy Act, 18 U.S.C. §§ 2701 et seq.

18 U.S.C. § 2701 refers to 18 U.S.C. § 2501, subdivision (15) of which defines “electronic communication service” as a “service which provides to users thereof the ability to send or receive wire or electronic communications.”

18 U.S.C. § 2501(1), (18): “Wire communication” includes “any aural transfer (i.e., one containing the human voice) made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station). . . .”

This includes telephone conversations. (Briggs v. American Air Filter Co., Inc. (5th Cir. 1980) 630 F.2nd 414; United States v. Harpel (10th Cir. 1974) 493 F.2nd 346.)

A “foreign corporation” is one that is qualified to do business in California pursuant to Corp. Code § 2105, although based in another state.

Per Corp. Code § 2105, foreign corporations must consent to service of process as a condition of doing business in California.

“Properly served” means that a search warrant has been delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed in Section 2110 of the Corporations Code.” (P.C. § 1524.2(a)(6))

Corp. Code § 2110 requires that an agent, in California, identified by the corporation as the person responsible for accepting service of process, including search warrants, be served.

The foreign corporation is required to provide the information requested within five (5) business days, which may be shortened or extended upon a showing of good cause, and to authenticate such records, thus making them admissible in court per Evid. Code §§ 1561, 1562. (P.C. § 1524.2(b))
The section further requires California corporations to honor out-of-state search warrants as if issued within this state. (P.C. § 1524.2(c))

- **P.C. § 1524.3(a): Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services:** Foreign corporations providing electronic communications or remote computing services must disclose to a governmental prosecuting or investigating agency, when served with a search warrant issued by a California court pursuant to P.C. § 1524(a)(7) (i.e., in misdemeanor cases), records revealing the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of that service, and the types of services the subscriber or customer utilized.

- **P.C. § 1524.3(b):** The governmental entity receiving subscriber records or information under this section is not required to provide notice to a subscriber or customer.

- **P.C. § 1524.3(d):** Upon a request of a peace officer, the provider shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to serve the provider with a search warrant. Records shall be retained for 90 days upon such request, and may be extended for an additional 90 days upon a renewed request by the peace officer.

**Requirement of a “Neutral and Detached” Magistrate:**

*Rule:* The lawful issuance of a search warrant requires a “neutral and detached” magistrate, as required by the Fourth Amendment. (*Coolidge v. New Hampshire* (1971) 403 U.S. 443 [29 L.Ed.2nd 564].)

Only bench officers who are designated “magistrates” and authorized to issue warrants are judges of the superior courts, justices of the state appellate courts, and justices of the state Supreme Court. (P.C. § 808)

This necessarily excludes court commissioners, judges pro tem, referees, and federal judges.

*Note:* The idea behind this theory is to insure that there is an impartial arbitrator between an over-zealous law enforcement officer, seeking to intrude upon a person’s privacy rights, and the person whose privacy rights are about to be intruded upon, who
may fairly determine whether *probable cause* exists sufficient to justify the intended government intrusion.

*Violations* of this rule have occurred when:

The state attorney general in charge of the investigation issued the warrant in his capacity as a justice of the peace. (*Coolidge v. New Hampshire*, supra.)

The magistrate personally participated in the search. (*Lo-Ji Sales, Inc. v. New York* (1979) 442 U.S. 319 [60 L.Ed.2nd 290].)

The magistrate was paid a fee for each warrant issued, with no compensation for warrants which were not approved. (*Connally v. Georgia* (1977) 429 U.S. 245 [50 L.Ed.2nd 444].)

The investigating deputy sheriff had the warrant issued by his father, a judge. (*O’Connor v. Superior Court* (1998) 65 Cal.App.4th 113: However, this warrant was saved by application of the “good faith” rule.)

**Composition of a Search Warrant**: A search warrant comes in *three* parts:

- *The Warrant* itself.
- *The Affidavit* to the Search Warrant.
- *The Receipt and Inventory* (or “Return”).

*First*: *The warrant itself*, signed by a magistrate, directing a peace officer to search a “particular” person, place or vehicle, for a “particular” person, thing, or list of property.

**P.C. §§ 1523, 1529**: Contents: The search warrant must include the following:

- The name of every person whose affidavit has been taken.
- The statutory grounds for issuance. (See P.C. §§ 1524, 1524.2 and/or 1524.3.)
- A description with *reasonable particularity* of the persons, places and vehicles to be searched.
- A description with *reasonable particularity* of the persons, things or property to be seized.
A warrant that fails to include a list of the things to be seized, at least where the list is not in an affidavit or other attachment that is incorporated by reference and which then accompanies the warrant to the scene of the search, is “facially deficient,” and in violation of the **Fourth Amendment**. ([Groh v. Ramirez](2004) 540 U.S. 551 [157 L.Ed.2nd 1068].)

Failure to list the property to be seized, or at the least a reference to, and incorporation of, a list of the property, is a **Fourth Amendment** violation, and constitutes a defect the officers writing the warrant, and/or supervising the search, should have been aware of. ([Ramirez v. Butte-Silver Bow County](9th Cir. 2002) 298 F.3rd 1022; finding that the affiant and supervising ATF agent did not have qualified immunity from civil liability in a civil suit for failing to list the property to be seized on the face of the warrant.)

And see [United States v. Celestine](9th Cir. 2003) 324 F.3rd 1095, describing “the policies that underlie the warrant requirement; providing the property owner assurance of the lawful authority of the executing officer, his need to search, and the limits of his power to search.”

- Authorization for a **nighttime search** (if necessary; see [P.C § 1533](#)).
- The **signature** of the magistrate.
- The **date** issued.

**Statutory Grounds for Issuance** ([P.C. § 1524(a)(1) through (11)):

(1): When the property to be seized was stolen or embezzled. ([Note]: Includes misdemeanors.)

(2): When the property or things to be seized were used as the means of committing a felony.

(3): When the property or things to be seized are in the possession of any person with the intent to use it as a means of committing a public offense (including misdemeanors), or in the possession of another to whom he may have
delivered it for the purpose of concealing it or preventing them from being discovered.

(4): When the property or things to be seized consist of any item or constitute any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

(5): When the property or things to be seized consists of evidence which tends to show that sexual exploitation of a child (per P.C. § 311.3), or possession of matter depicting sexual conduct of a person under the age of 18 years (per P.C. § 311.11), has occurred or is occurring. (See In re Duncan (1987) 189 Cal.App.3rd 1348.)

(6): When there is a warrant to arrest a person.

(7): When a provider of an electronic communication service or remote computing service has records or evidence, as specified in P.C. § 1524.3, showing that property was stolen or embezzled constituting a misdemeanor, or that property or things are in the possession of any person with the intent to use them as a means of committing a misdemeanor public offense, or in the possession of another to whom he or she may have delivered them for the purpose of concealing them or preventing their discovery.

(8): When the property or things to be seized include an item or any evidence that tends to show a violation of Labor Code § 3700.5, or tends to show that a particular person has violated L.C. § 3700.5.

L.C. § 3700.5 deals with the failure to secure the payment of compensation, which is defined as “every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence.” (L.C. § 3207)

(9): When the property or things to be seized include a firearm or any other deadly weapon at the scene of, or at the premises occupied or under the control of the person arrested in connection with, a domestic violence incident involving a threat to human life or a physical assault as
provided in P.C. § 12028.5(b). This section does not affect warrantless seizures already authorized under the statute.

(10): When the property or things to be seized include a firearm or any other deadly weapon that is owned by, or in possession of, or in the custody or control of, a person described in W&I § 8102(a).

W&I § 8102(a) lists any person who:

- Has been detained or apprehended for examination of his or her mental condition (e.g., per W&I § 5150); or
- Is a person described in W&I § 8100 ((a) mental patients receiving inpatient treatment, or (b) mental patients after having communicated a threat to a psychotherapist.)
- Is a person described in W&I § 8103 ((a) persons adjudicated to be a danger to others or as a mentally disordered sex offender, or (b) persons found to be not guilty by reason of insanity in serious cases, or (c) persons found to be not guilty by reason of insanity in other cases, or (d) persons found mentally incompetent to stand trial, or (e) persons placed under conservatorship, or (f) persons taken into custody as a danger to themselves or others, or (g) persons certified for intensive treatment.

(11): When the property or things to be seized include a firearm that is owned by, or in possession of, or in the custody or control of, a person who is subject to the prohibitions regarding firearms pursuant to Fam. Code § 6389, if a prohibited firearm is possessed, owned, in the custody of, or controlled by a person against whom a protective order has been issued pursuant to Fam. Code § 6218, the person has been lawfully served with that order, and the person has failed to relinquish the firearm as required by law.

See also P.C. §§ 1524.2(b) and 1524.3(a), re: Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services.
Case Law:

It is irrelevant that a peace officer lists an incorrect charged offense, justifying the issuance of the warrant, so long as there is some legal grounds for the issuance of the warrant under some statute. (*United States v. Meek* (2004) 366 F.3rd 705, 713-714; A “statutory variance in the affidavit is not fatal to the warrant’s validity.”)

The failure of the warrant to include a copy of the court’s official seal, if a violation at all (*28 U.S.C. § 1691*), is merely a technical violation and will not result in a finding that the warrant is legally insufficient. (*United States v. Smith* (9th Cir. 2005) 424 F.3rd 992, 1008.)

*Second: The affidavit to the search warrant:*

**Defined:** A sworn statement, sworn to by the affiant, describing the “probable cause” to search a particular person, place, or vehicle for a particular person, thing, or list of property. (*P.C. §§ 1525, 1527*)

Referred to as the “Statement of Probable Cause” in jurisdictions where a combined search warrant and affidavit form is used. (See *People v. Hale* (Oct. 20, 2005) 133 Cal.App.4th 942.)

“*Probable Cause:” In evaluating the sufficiency of a warrant affidavit; “The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” (Emphasis added; *Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2nd 527] see also *United States v. Ventresca* (1965) 380 U.S. 102, 108 [13 L.Ed.2nd 684, 689]; *United States v. Adjani* (9th Cir. 2006) 452 F.3rd 1140, 1145.)

California follows the *Gates* “*totality of the circumstances*” test. (*People v. Spears* (1991) 228 Cal.App.3rd 1, 17.)

“*In determining whether an affidavit is supported by probable cause, the magistrate must make a *practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . .*
there is a fair probability that contraband or evidence of a crime will be found in a particular place.” [Citation] The sufficiency of the affidavit must be evaluated in light of the totality of the circumstances. [Citation].” (People v. Garcia (2003) 111 Cal.App.4th 715, 721; quoting Fenwick & West v. Superior Court (1996) 43 Cal.App.4th 1272, 1278; People v. Lieng (2010) 190 Cal.App.4th 1213, 1228-1229.)

“The purpose of the exclusionary rule is . . . to deter illegal police conduct, not deficient police draftsmanship.” (People v. Superior Court [Nasmeh] (2007) 151 Cal.App.4th 85, 97.)

Note that Gates also describes the standard for probable cause in a search warrant affidavit as a “fair probability” (pg. 238) or a “substantial chance” (pg. 244, fn. 13) that contraband or evidence of a crime will be found in a particular place, which is arguably a lesser standard than as described in older California cases requiring a “substantial probability.” (E.g.; see People v. Cook (1978) 22 Cal.3rd 67, 84, fn. 6.)

“A search warrant must be supported by probable cause. (U.S. Const., Fourth Amend.; § 1525.) In determining whether probable cause exists, the magistrate considers the totality of the circumstances. (Illinois v. Gates (1983) 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527.) ‘Probable cause, unlike the fact itself, may be shown by evidence that would not be competent at trial. [Citation.] Accordingly, information and belief alone may support the issuance of search warrants, which require probable cause. [Citations.]’ (Humphrey v. Appellate Division (2002) 29 Cal.4th 569, 573, 127 Cal.Rptr.2d 645, 58 P.3d 476.)” (People v. Varghese (2008) 162 Cal.App.4th 1084, 1103.)

Probable cause must be shown for each of the items listed in the warrant as property to be seized, justifying its seizure. (People v. Frank (1985) 38 Cal.3rd 711, 726-728.)

Probable cause showing a sufficient “nexus” between the evidence to be seized and the place to be searched must also be established. (People v. Garcia (2003) 111 Cal.App.4th 715, 721.)
However, the Ninth Circuit Court of Appeal has shown a reluctance to find probable cause when it is based upon “a lengthy chain of inferences.” (United States v. Gourde (9th Cir. 2004) 382 F.3rd 1003; no probable cause to support the issuance of a search warrant when based upon the defendant’s known subscription to a child pornography website, unlimited access to the child pornography on the website, defendant’s failure to unsubscribe after two months, and an expert’s opinion that the above necessarily means that defendant would likely be in personal possession of child pornography.)

The fact that the person whose property (i.e., a computer in this case) is seized and searched is not at that time subject to arrest (i.e., no probable cause) does not mean that the seizure and search of that property is not lawful. (United States v. Adjani (9th Cir. 2006) 452 F.3rd 1140, 1146-1147.)

A warrant that establishes probable cause to search a vehicle for items missing from a possible homicide victim’s residence will necessarily also allow for the seizure of that vehicle for later examination at a police lab, and to search the vehicle for trace evidence related to the missing items, even if the seizure of the car and the search for trace evidence is not specifically mentioned in the warrant. (People v. Superior Court [Nasmeh] (2007) 151 Cal.App.4th 85, 94-98.)

A description of the affiant’s training and experience, the fact that persons involved in drug trafficking commonly conceal caches of drugs in their residences and businesses, the fact that one of the co-conspirator’s telephone was listed as being to that residence, and a description of coconspirators use of the defendant’s residence each time a sale of drugs was ordered, was sufficient to establish probable cause for a search warrant for that residence. (United States v. Garcia-Villalba (9th Cir. 2009) 585 F.3rd 1223, 1232-1234.)

A warrant affidavit need not include all of the information available to the police, so long as the omitted facts are not material, nor must a police officer ordinarily continue the investigation seeking further corroboration once the officer has probable cause. (Ewing v. City of Stockton (9th Cir. 2009) 588 F.3rd 1218, 1226-1227.)
A signal photograph of a nude minor (female child who is between 8 and 10 years old), by itself, is insufficient to establish probably cause for a search warrant. But a second such photo, under the “totality of the circumstances,” is enough. (United States v. Battershell (9th Cir. 2006) 457 F.3rd 1048.)

However, a single photograph of a nude minor (female of about 15 to 17 years of age), when combined with other suspicious circumstances (e.g., 15 computers in house found in complete disarray, with two minors not belonging to the defendant, where the defendant a civilian, is staying in military housing), may enough to justify the issuance of a search warrant. (United States v. Krupa (9th Cir. 2011) 658 F.3rd 1174, 1177-1179; but see dissent, pp. 1180-1185.)

Evidence of a person’s abnormal sexual interest in sixth grade girls, including inappropriate touching, does not establish probable cause to believe that the person might also have child pornography at home. (Dougherty v. City of Covina (9th Cir. 2011) 654 F.3rd 892.)

It is irrelevant that a theft victim is not identified by name in a search warrant affidavit so long as the theft of the victim’s property is otherwise sufficiently described. (People v. Scott (2011) 52 Cal.4th 452, 485-486.)

Where evidence of illegal guns and ammunition was recovered in the execution of a search warrant, the Court found that the magistrate had a substantial basis for concluding there was a fair probability that evidence of a crime would be found in defendant’s home. There was probable cause to believe defendant was the president of a local chapter of a motorcycle gang. The search warrant sought club documents not for their indication of membership in the gang, but because those documents detailed illegal activity. The warrant was not an unconstitutional general warrant. Any falsity about his status as the president was immaterial. (United States v. Vasquez (9th Cir. 2011) 654 F.3rd 880, 883-885.)

Minimum Contents: At a minimum, a warrant affidavit should include the following:

- The name or names of the affiant(s).
It is not necessary that the affiant be a sworn peace officer. “(T)here seems no reason why seeking one (i.e., a search warrant) should be confined to peace officers instead of unsworn members of law enforcement.” (People v. Bell (1996) 45 Cal.App.4th 1030, 1054-1055.)

A warrant may also be supported by affidavits from more than one person. (See Skelton v. Superior Court (1969) 1 Cal.3rd 144.)

- The statutory grounds for issuance. (See P.C. §§ 1524, 1524.2 and 1524.3.)

It is irrelevant that a peace officer lists an incorrect charged offense justifying the issuance of a warrant, so long as there is some legal grounds for the issuance of the warrant under some statute. (United States v. Meek (9th Cir. 2004) 366 F.3rd 705, 713-714; a “statutory variance in the affidavit is not fatal to the warrant’s validity.”)

- A physical description, with “reasonable particularity,” of the persons, places, things and vehicles to be searched.

A warrant’s description of the property to be searched will be reviewed by the appellate courts in a common sense and realistic fashion. (People v. Minder (1996) 46 Cal.App.4th 1784; United States v. Ventresca (1965) 380 U.S 102, 109 [13 L.Ed.2nd 684, 689].)

See “The ‘Reasonable Particularity’ Requirement,” below.

- A physical description, with “reasonable particularity,” of the persons, things or property to be seized.

See “The ‘Reasonable Particularity’ Requirement,” below.

- A detailed statement of the expertise (i.e., training and experience) of the affiant.
• A chronological narrative and factual (as opposed to conclusionary) description of the circumstances substantiating the officer’s conclusion that probable cause for a search exists. This would include:

  o Facts showing the commission of a crime (or crimes);

  o Facts connecting the listed suspect(s) to the crime(s);

  o Facts connecting the suspect(s) to the location(s), vehicle(s), and/or person(s) to be searched;

  o Facts connecting the property to be seized to the location(s), vehicle(s), and/or person(s) to be searched;

  o Facts describing how the descriptions were obtained.

The facts as described in the search warrant affidavit making up the “probable cause” for issuance of a warrant must be attested to by the affiant as the truth. Failing to do so may invalidate the warrant. See:

  People v. Hale (2005) 133 Cal.App.4th 942; not a fatal error, being one of “form” over “substance.”

  People v. Leonard (1996) 50 Cal.App.4th 878; finding it to be one of “substance” over “form,” and fatal to the validity of the warrant.

• Police reports, charts, maps, etc., may be used as exhibits, attached and incorporated by reference, but should not be used as a substitute for a statement of probable cause.

The term “incorporate by reference” is a term of art that is not always necessary to use. So long as the warrant affidavit makes reference to any attachments, it can be assumed that the magistrate considered it. (An Internet subscriber has no expectation of privacy in the subscriber information
he supplies to his Internet provider. (*People v. Stipo* (2011) 195 Cal.App.4th 664, 669-670.)

- **The affiant’s conclusion** (i.e., his/her opinion) based upon his or her training and experience, that:

  Probable cause exists for the search; and

  The item(s) sought will be found at the location(s) to be searched.


“(L)aw enforcement officers may draw upon their expertise to interpret the facts in a search warrant application, and such expertise may be considered by the magistrate as a factor supporting probable cause.” (*People v. Nicholls* (2008) 159 Cal.App.4th 703, 711; child molest case.)

- Justification for a *nighttime search*, if necessary.

The “*Reasonable Particularity*” Requirement (*P.C. §§ 1525, 1529*); **The persons, places, things and vehicles to be searched:**

The persons, places, things and vehicles to be searched must be described with sufficient detail so that an officer executing the warrant may, with reasonable effort, ascertain and identify the person, place, thing or vehicle, intended. (*People v. Grossman* (1971) 19 Cal.App.3rd 8, 11.)

“It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended.” (*Steele v. United States* (1925) 267 U.S. 498, 503 [69 L.Ed. 757].)

“The test for determining the validity of a warrant is [(1)] whether the warrant describes the place to be searched with ‘sufficient particularity to enable law enforcement officers to locate and identify the premises with reasonable effort,’ and [(2)] whether any reasonable probability exists that the
officers may mistakenly search another premises.”  (*United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 991-994, quoting *United States v. Mann* (9th Cir. 2004) 389 F.3rd 869, 876.)

In *Brobst*, the affiant had the wrong street number and the physical description matched other residences in the area as well. However, the officers took steps to verify that they had the right house (e.g., checking a tax/property map and asking neighbors) before executing the warrant. Also, the residence had defendant’s name posted on it. The search was upheld.

A warrant’s description of the property to be searched will be reviewed by the appellate courts in a *common sense* and *realistic* fashion.  (*People v. Minder* (1996) 46 Cal.App.4th 1784;  *United States v. Ventresca* (1965) 380 U.S 102, 109 [13 L.Ed.2nd 684, 689].)

The following factors will be considered by the court:

- Whether probable cause exists to seize all items of a particular type described in the warrant;

- Whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; *and*

- Whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

  (*United States v. Adjani* (9th Cir. 2006) 452 F.3rd 1140, 1148.)

Suggested Procedures:

The affiant should personally view the place, etc., to be searched in order to guarantee the accurateness of the description in the warrant.

Too much detail, so long as it is accurate, is better than not enough.
Use of photographs and/or diagrams, attached as exhibits, may be advisable.

More than one person, place or vehicle may be listed in a single warrant so long as there is probable cause described in the affidavit for each.

A later judicial finding that the search of one of the listed locations is not supported by probable cause will not necessarily affect the search of any of the other locations where the probable cause supporting the search of the other locations is in itself sufficient. *(People v. Joubert (1983) 140 Cal.App.3rd 946.)*

“*Good faith*” may save a warrant with a defective description. *(See People v. MacAvoy (1984) 162 Cal.App.3rd 746, 763-765.)*

The fact that the affiant himself is personally familiar with the place to be searched, and therefore could reasonably be expected to find it, has been held, at least in one case, to be a factor which will help to overcome errors in the description. *(People v. Amador (2000) 24 Cal.4th 387; wrong street number and faulty physical description not fatal when no other houses in the area could likely be mistaken for the place to be searched, and the affiant, who executed the warrant, was familiar with the place.)*

An incorrect address was not fatal to the warrant when two agents executing the warrant personally knew which premises were intended to searched and other circumstances helped to identify the correct house. *(United States v. Turner (9th Cir. 1985) 770 F.3rd 1508, 1511.)*

The “*curtilage*” of the home is included as a part of the home, whether or not specifically mentioned in the warrant. *(United States v. Gorman (9th Cir. 1996) 104 F.3rd 272.)*

But, what constitutes a part of the curtilage may be an issue. *(See United States v. Cannon (9th Cir. 2001) 264 F.3rd 875; the defendant’s storage areas attached to a second residence, rented to a third party, to the rear of the main residence, properly*
searched as within the curtilage of the main residence.)

Note: The better practice is to specifically include in the description of the place to be searched all places around the residence one might expect to find the items being searched for, thus eliminating the issue.

Because “(a) magistrate is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense (United States v. Angulo-Lopez (9th Cir. 1986) 791 F.2nd 1394, 1399.),” a search of a narcotics suspect’s vehicle, based upon no more than the affiant’s knowledge, gained through training and experience, that persons who traffic in drugs often secret more narcotics and other evidence in their vehicles, may be authorized. (United States v. Spearman (9th Cir. 1976) 532 F.2nd 132, 133.)

The same argument can be made for authorizing the search of a narcotics suspect’s person, even though away from his home. (United States v. Elliott (9th Cir. 2003) 322 F.3rd 710.)

The computer of a roommate, the roommate himself not being targeted, where there is probable cause to believe that the suspect has access to the roommate’s computer, was properly listed in the warrant affidavit as an item to be searched. The critical element in a search is not whether the owner of property to be searched is a suspect, but rather whether there is reasonable cause to believe that it contains seizable evidence. (United States v. Adjani (9th Cir. 2006) 452 F.3rd 1140.)

Getting a search warrant for a residence where it is believed that the suspect is at least staying part time, recognizing the person may have one domicile but several residences, is proper. (United States v. Crews (9th Cir. 2007) 502 F.3rd 1130, 1139; citing Martinez v. Bynum (1983) 461 U.S. 321, 339 [75 L.Ed.2nd 879].)

The wrong address listed in the warrant, caused by an address change effected by local authorities from one town to another, did not affect the validity of the search warrant when the officers could still reasonably ascertain the
correct house to be searched. *(United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 991-994; steps taken by the officers at the scene to verify that they were about to search the right house.)

The “Reasonable Particularity” Requirement (P.C. §§ 1525, 1529); The property to be seized:

*The property to be seized* must be described with sufficient particularity so that an officer with no knowledge of the facts underlying the warrant and looking only at the description of the property on the face of the warrant would be able to recognize and select the items described while conducting the search. (See *People v. Superior Court [Williams]* (1978) 77 Cal.App.3rd 69, 77; providing a complete discussion of cases approving and disapproving certain descriptions.)

In determining whether a warrant’s description of the items to be seized is sufficiently specific to be constitutional under the *Fourth Amendment*, a court must consider three issues:

- Whether probable cause exists to seize all items of a particular type described in the warrant;
- Whether the warrants sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and
- Whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

*(Millender v. County of Los Angeles* (9th Cir. 2010) 620 F.3rd 1016, 1024.)

*Note:* A writ of certiorari was granted by the United States Supreme Court in *Millender*, making it no longer available for citation until decided by that court. *(Messerschmidt v. Millender* (June 27, 2011) U.S. __ [131 S.Ct. 3057; 180 L.Ed.2nd 884].)
However, “a search warrant need only be reasonably specific, rather than elaborately detailed. . . . (T)he specificity required depends on the circumstances of the case and the type of items involved.” (Ewing v. City of Stockton (9th Cir. 2009) 588 F.3rd 1218, 1228; citing United States v. Brobst (9th Cir. 2009) 558 F.3rd 982, 993.)

“Particularity” refers to the requirement that the warrant must clearly state what is sought. “Breadth” deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. (United States v. Brobst (9th Cir. 2009) 558 F.3rd 982, 994-995; citing United States v. Towne (9th Cir. 1993) 997 F.2nd 537, 554; United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3rd 684, 702; Millender v. County of Los Angeles (9th Cir. 2010) 620 F.3rd 1016, 1024.)

Note: A writ of certiorari was granted by the United States Supreme Court in Millender, making it no longer available for citation until decided by that court. (Messerschmidt v. Millender (June 27, 2011) ___ U.S. ___ [131 S.Ct. 3057; 180 L.Ed.2nd 884].)

The description must “place a meaningful restriction on the objects to be seized . . .” (People v. Murray (1978) 89 Cal.App.3rd 809, 832.)

Documents or other evidence showing “dominion and control” (i.e., “D and C papers”) over the place being searched should be listed among the items for which the affiant wishes to search. (People v. Williams (1992) 3 Cal.App.4th 1535; People v. Rushing (1989) 209 Cal.App.3rd 618; People v. Nicolaus (1991) 54 Cal.3rd 551, 575.)

“Indicia tending to establish the identity of persons in control of the premises,” has been held to be specific enough to meet the “particularly” requirements for a search warrant. (Ewing v. City of Stockton (9th Cir. 2009) 588 F.3rd 1218, 1229.)
In an Internet sexual solicitation of a child case, the following items were held to be appropriate in a search warrant for the suspect’s house and vehicle: “(S)exually explicit material or paraphernalia used to lower the inhibition of children, sex toys, photography equipment, child pornography, as well as material related to past molestation such as photographs, address ledgers including names of other pedophiles, and journals recording sexual encounters with children,” as well as the defendant’s computer system, including “computer equipment, information on digital and magnetic storage devices, computer printouts, computer software and manuals, and documentation regarding computer use.” (*United States v. Meek* (9th Cir. 2004) 366 F.3rd 705, 714-716.)

So long as sufficiently described, it is not necessary that a warrant affidavit contain the actual photographs of what is alleged to be child pornography. (*United States v. Battershell* (9th Cir. 2006) 457 F.3rd 1048.)

But what is, and what is not, “child pornography” might be an issue. As a “starting point” for determining the existence of “lasciviousness” in a photo or photos, a court may use the following non-exclusive six factor test:

- Whether the focal point of the visual depiction is on the child’s genitalia or pubic area;
- Whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- Whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- Whether the child is fully or partially clothed, or nude;
• Whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
• Whether the visual depiction is intended or designed to elicit a sexual response in the viewer.


Things the affiant “hopes to find,” but for which there is no articulable reason to believe will be found, should not be listed. However, property that there is a “fair probability” would be found, given the nature of the offense, may be listed despite the lack of any specific evidence that such an item is in fact in the place to be searched. (See People v. Ulloa (2002) 101 Cal.App.4th 1000; computer containing Internet correspondence in a child molest case.)

See Millender v. County of Los Angeles (9th Cir. 2010) 620 F.3rd 1016, 1024-1033; officers, with probable cause to search for and seize a specific firearm included in the warrant a request to search for and seize all types of firearms, ammunition, and gang related paraphernalia, none of which was justified by the information available to the officers at the time.

Note: A writ of certiorari was granted by the United States Supreme Court in Millender, making it no longer available for citation until decided by that court. (Messerschmidt v. Millender (June 27, 2011) __ U.S. __ [131 S.Ct. 3057; 180 L.Ed.2nd 884].)

“Telephone calls” (i.e., authorization to intercept them while executing the warrant) should be listed where there is probable cause to believe the
telephone is being used for illegal purposes.  

The contents of a telephone call to a narcotics dealer’s home asking to buy narcotics, answered by the police executing a search warrant, are admissible as a judicially created exception to the Hearsay Rule.  (People v. Morgan et al. (2005) 125 Cal.App.4th 935.)

The Morgan Court further determined that the telephone call was “non-testimonial,” as described in Crawford v. Washington (2004) 541 U.S. 36 [158 L.Ed.2nd 177], and thus admissible over a Sixth Amendment, “right to confrontation” objection.  (People v. Morgan, supra, at pp. 946-947.)

Other courts have held that the contents of a telephone call are admissible as non-hearsay circumstantial evidence of the defendants’ dope dealing.  (People v. Nealy (1991) 228 Cal.App.3rd 447; and People v. Ventura (1991) 1 Cal.App.4th 1515.)

Tip: Asking for authorization to answer the telephone for the purpose of establishing “dominion and control” over the place being searched (E.g.; “Hello, is Doper John home?”) is also a good practice.

Computers, including disks, etc., based upon the affiant’s knowledge that criminals will often chronicle their criminal activities on their computers, may often be included. With sufficient probable cause connecting a computer to criminal activity, the computer and all its attachments, disks, etc., are subject to seizure and removal to a lab where it may be properly and carefully inspected by experts.  (United States v. Hay (9th Cir. 2000) 231 F.3rd 630; see also People v. Ulloa (2002) 101 Cal.App.4th 1000.)
See also *Guest v. Leis* (6th Cir. 2001) 255 F.3rd 325, 334-337; 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.

And *Mahlberg v. Mentzer* (8th Cir. 1992) 968 F.2nd 772; seizure of computer equipment, programs and disks not listed in the warrant upheld.

Seizure of computers in a homicide investigation justified by probable cause to believe that specific documentary evidence would reasonably be found in the defendant’s computer. (*United States v. Wong* (9th Cir. 2003) 334 F.3rd 831.)


The computer of a roommate, the roommate himself not being targeted, where there is probable cause to believe that the suspect has access to the roommate’s computer, was properly listed in the warrant affidavit as an item to be searched. The critical element in a search is not whether the owner of property to be searched is a suspect, but rather whether there is reasonable cause to believe that it contains seizable evidence. (*United States v. Adjani* (9th Cir. 2006) 452 F.3rd 1140.)

The seizure of defendant’s computer and all computer related items (e.g., compact disks, floppy disks, hard drives, memory cards, DVDs, videotapes, and other portable digital devices), based upon no more than the
discovery of one printed-out photo of child pornography, was lawful in that it was reasonable to conclude that the picture had come from his computer and that similar pictures were likely to be stored in it. *(United States v. Brobst (9th Cir. 2009) 558 F.3rd 982, 994.)*

Failure of the magistrate’s order to include an authorization to search defendant’s computer, even though in the statement of probable cause the affiant indicated a desire to search any possible computers found in defendant’s house, was a fatal omission. Searching defendant’s computer, therefore, went beyond the scope of the warrant’s authorization. *(United States v. Payton (9th Cir. 2009) 573 F.3rd 859, 861-864.)*

The fact that the issuing magistrate testified to an intent to allow for the search of defendant’s computers, and that the warrant included authorization to search for certain listed records which might be found in a computer, was held to be irrelevant. *(Id. at pp. 862-863.)*

But see *United States v. Giberson* (9th Cir. 2008) 527 F.3rd 882, where it was held that some circumstances might lead searching officers to a reasonable conclusion that documentary evidence they are seeking would be contained in computers found at the location, authorizing the search of those containers despite the failure of the warrant to list computers as things that may be searched. It was recommended, however, that the computer be seized and a second warrant be obtained authorizing its search.
Inadvertent changes to the language of a warrant and affidavit after it is signed by the judge create issues that could result in suppression of all, or maybe a part of, the evidence seized, depending upon the flagrancy of the violation. *(United States v. Sears* *(9th Cir. 2005)* 411 F.3rd 1124; severance and partial suppression held to be sufficient sanction where the officer used the wrong attachment describing the places to be searched and property to be seized which was different in only a few, minor ways.)*

*General Warrants:* Warrants without sufficient particularity (i.e., “general warrants”) are legally insufficient and invalid. *(Burrows v. Superior Court* *(1974)* 13 Cal.3rd 238, 249-250.)*

“The purpose of the ‘particularity’ requirement of the Fourth Amendment is to avoid general and exploratory searches by requiring a particular description of the items to be seized. [Citation]” *(People v. Bradford* *(1997)* 15 Cal.4th 1229, 1296; citing Collidge v. New Hampshire* *(1971)* 403 U.S 443, 467 [29 L.Ed.2nd 564, 583]; and Stanford v. Texas* *(1965)* 379 U.S. 476, 485 [13 L.Ed.2nd 432, 437].)*

“Particularity” is the requirement that the warrant must clearly state what is sought.

“Breadth” deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. *(United States v. SDI Future Health, Inc.* *(9th Cir. 2009)* 568 F.3rd 684, 702; Millender v. County of Los Angeles* *(9th Cir. 2010)* 620 F.3rd 1016-1024.)*

*Note:* A writ of certiorari was granted by the United States Supreme Court in *Millender*, making it no longer available for
citations until decided by that court.

(Messerschmidt v. Millender (June 27, 2011) U.S. __ [131 S.Ct. 3057; 180 L.Ed.2nd 884].)

This “particularity” requirement serves two important purposes. It:

- Limits the discretion of the officers executing the warrant; and
- Informs the property owner or resident of the proper scope of the search.

(United States v. Vesikuru (9th Cir. 2002) 314 F.3rd 1116, 1123-1124; (United States v. SDI Future Health, Inc., supra, at pp. 701-705.)

A search warrant and affidavit that fails to “particularly describe” and place “meaningful restrictions” on the property to be seized, violates the Fourth Amendment. (United States v. Bridges (9th Cir. 2003) 344 F.3rd 1010.)

Describing in the warrant itself (as opposed to the affidavit) the suspected criminal offense(s) might be enough to overcome an otherwise “overly broad” description of the property to be seized, in that it at least puts the searching officers on some notice as to the limits of their discretion. (Id., at p. 1018.)

An exception to this rule (i.e., “overly broad”) might be when the place being searched is a business, and it is alleged and substantiated in the affidavit that the business’s “entire operation was permeated with fraud.” (Id., at pp. 1018-1019; United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3rd 684, 703, and fn. 13.)

United States v. Smith (9th Cir. 2005) 424 F.3rd 992, 1004-1006.)

© 2012 Robert C. Phillips. All rights reserved
In Smith, an “extraordinarily broad” search warrant was held to be justified where it was determined that “the entirety of the businesses operated by (defendants) are criminal in nature.” (Id., at p. 1006.)

“(T)he more specificity the warrant describes the items sought, the more limited the scope of the search. Conversely, the more generic the description, the greater the risk of a prohibited general search. (Citation)” (People v. Balint (2006) 138 Cal.App.4th 200, 206.)

Seizure of “all computer media” is not too broad, given the difficulty in determining what might be on such media prior to a forensic examination by experts, at least so long as there is an explanation in the affidavit explaining why a wholesale seizure is necessary under the circumstances. (United States v. Hill (9th Cir. 2006) 459 F.3rd 966, 973-977.)

Use of language such as; “. . . including, but not limited to . . .” should not be used, in that such a description is too general, and legally insufficient to justify seizure of any property intended to be included under the “not limited to” phrase. (See United States v. Reeves (9th Cir. 2000) 210 F.3rd 1041, 1046-1047; United States v. Bridges, supra, at pp. 1017-1018.)

“Indicia tending to establish the identity of persons in control of the premises,” has been held to be specific enough. (Ewing v. City of Stockton (9th Cir. 2009) 588 F.3rd 1218, 1229.)

Items listed in a search warrant to be seized that are found to be “overbroad” may be severed without affecting the otherwise valid portions of the warrant. This is true whether the issue arises in a criminal (United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3rd 684, 707.) or a civil case. (Ewing v. City of Stockton (9th Cir. 2009) 588 F.3rd 1218, 1228-1229.)
**Supplementing the Affidavit:** To be legally effective, the affidavit may be supplemented by an examination, under oath, of the affiant by the magistrate. \(\text{(P.C. § 1526)}\)

The oral examination, however, will not be considered part of the probable cause unless reduced to writing and signed by the affiant. \(\text{(Charney v. Superior Court (1972) 27 Cal.App.3rd 888, 891.)}\)

Information not contained “within the four corners of a written affidavit given under oath” will not be considered and cannot be used to help establish probable cause. \(\text{(United States v. Luong (9th Cir. 2006) 470 F.3rd 898, 904, 905.)}\)

Note that there is some federal case authority to the contrary, from other circuits, allowing information known to the affiant and told to the magistrate to be considered. \(\text{(See United States v. Frazier (6th Cir. 2005) 423 F.3rd 526, 535-536; United States v. Legg (4th Cir. 1994) 18 F.3rd 240, 243.244; and see dissenting opinion in United States v. Luong, supra., at pp. 905-907.)}\)

**Combined Affidavit with Warrant:** Some authorities advocate the use of a combined search warrant and affidavit form with an attached declaration of probable cause. \(\text{(See People v. MacAvoy (1984) 162 Cal.App.3rd 746; and the Los Angeles County Search Warrant Manual, 12th Edition, Chapter I and Appendix A.)}\)

However, care must be taken to insure that the attached declaration of probable cause is “incorporated by reference,” signed, and sworn to by the officer, for the warrant to be legally sufficient. \(\text{(People v. Leonard (1996) 50 Cal.App.4th 878; defective warrant saved under “Good Faith” exception. See also United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3rd 684, 699-700.)}\)

Incorporation may be made simply by using “suitable words of reference.” \(\text{(Id., at pp. 699-700; citing United States v. Towne (9th Cir. 1993) 997 F.2nd 537, 545.)}\)

While no specific language is necessary, the Ninth Circuit has upheld such wording as; “Upon the sworn complaint made before me there is probable
cause to believe that the [given] crime . . . has been committed.”  (United States v. Vesikuru (9th Cir. 2002) 314 F.3rd 1116, 1120; see also United States v. SDI Future Health, Inc., supra, at pp. 699-700.)

The Ninth Circuit also requires that the incorporated affidavit is either attached physically to the warrant or at least accompanies the warrant while agents execute the search. (United States v. SDI Future Health, Inc., supra, at p. 699.)

Also, such a format potentially raises issues concerning the need to provide a copy of the affidavit to the suspect, along with the warrant. (See United States v. Gantt (9th Cir. 1999) 194 F.3rd 987, 1001, and fn. 7; affidavit needed to cure a deficiency in the description of the property to be seized; and United States v. Smith (9th Cir. 2005) 424 F.3rd 992, 1006-1008.)

Multiple Affiants/Affidavits:  There may be more than one affiant and/or more than one affidavit in support of a search warrant. (Skelton v. Superior Court (1969) 1 Cal.3rd 144; P.C. § 1527.)

Staleness: The information contained in the warrant affidavit must not be “stale.” (People v. Mesa (1975) 14 Cal.3rd 466, 470.) Information that is remote in time may be deemed to be too stale and therefore unreliable. (Alexander v. Superior Court (1973) 9 Cal. 3rd 387, 393.)

Delays of more than four weeks, at least in a narcotics sales case and absent some new evidence tending to show the continued presence of the controlled substances in question, are generally considered insufficient to demonstrate present probable cause. For instance:

See Hemler v. Superior Court (1975) 44 Cal.App.3rd 430, 433-434; delay of 34 days between controlled sale of heroin and the officer’s affidavit for the search warrant is stale.)

Delay of 52 days between a controlled buy of almost a pound of marijuana and the execution of a search warrant, despite the officer’s expert opinion that the seller would still have contraband in his residence (the sale taking place in a parking lot in
another city), was held to be stale. \textit{(People v. Hulland} (2003) 110 Cal.App.4\textsuperscript{th} 1646.)

A delay of two months and three weeks (82 days) between the purchase of methamphetamine and the obtaining of a search warrant for defendant’s house was too long. With the information being stale, the warrant was invalid as to him. It is irrelevant that defendant’s purchase of drugs was part of a nine-month investigation into a drug-trafficking conspiracy involving multiple suspects when there was no showing that defendant himself was involved at all during the two months and three weeks in question. \textit{(People v. Hirata} (2009) 175 Cal.App.4\textsuperscript{th} 1499.)

While “\textit{stale information}” by itself will not generally support a finding of probable cause, when combined with some evidence of a present criminal violation, an ongoing pattern of criminal activity may add up to sufficient probable cause. \textit{(People v. Mikesell} (1996) 46 Cal.App.4\textsuperscript{th} 1711; sometimes called an “\textit{historical warrant}”; see also \textit{People v. Medina} (1985) 165 Cal.App.3\textsuperscript{rd} 11, 20-21.)

A continuing criminal enterprise, with no reason to believe the defendant has moved from her home where she was known to have lived some six months earlier, negated any staleness issue. \textit{(People v. Gibson} (2001) 90 Cal.App.4\textsuperscript{th} 371, 380-381.)

Expert opinion that, under the circumstances, the sought-for property is likely still to be found on the premises to be searched will normally overcome an issue of staleness. (See \textit{United States v. Lacy} (9\textsuperscript{th} Cir. 1997) 119 F.3\textsuperscript{rd} 742; 10-month old information concerning the receiving of child pornography.)

But see \textit{People v. Hulland, supra}, where the officer’s expert opinion was held to be insufficient to overcome a staleness (52 days) issue in a narcotics sales case.

“If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the
information stale.” (People v. Carrington (2009) 47 Cal.4th 145, 164; quoting People v. Hulland, supra, at p. 1652.)

In Carrington, the California Supreme Court held that it there was a “fair probability” that defendant would still have stolen checks in her home even after two months when some of the checks remained outstanding, as well as a key to the business that she’d burglarized. (People v. Carrington, supra., at pp. 163-164.)

Evidence that the defendant’s criminal activities are a continuing offense, with no reason to believe that the defendant know he was being investigated, and every reason to believe that defendant would retain incriminating evidence, a search warrant will not be held to be based upon stale information. (People v. Stipo (May 16, 2011) 195 Cal.App.4th 664, 672-673; a computer-hacking enterprise.)

Fingerprints: Note Hayes v. Florida (1985) 470 U.S. 811 [84 L.Ed.2nd 705], for the proposition that a warrant may authorize the temporary detention, without probable cause, of a person for the purpose of taking fingerprints if:

- There is at least a “reasonable suspicion” that the suspect committed a criminal act;

- There is a reasonable basis for believing that fingerprints will establish or negate the suspect’s connection with that crime; and

- The procedure used is carried out with dispatch.

Note: The Court in Hayes specifically declined to decide whether this would include transporting the subject to the station for fingerprinting. Because a non-consensual transportation is generally considered to be an arrest, requiring full-blown “probable cause” (See “Detentions,” above), it is strongly suggested that the procedure be conducted in the field.

See also Davis v. Mississippi (1969) 394 U.S. 721, 727-728 [22 L.Ed.2nd 676, 681-682]; noting that the taking of fingerprints of a person who is merely subject to a temporary detention is lawful.
And Note Virgle v. Superior Court (2002) 100
Cal.App.4th 572, 574; where the Court referred to
Hayes with approval.

Description of the facts and circumstances that comprise the
probable cause: “Conclusionary,” as opposed to “factual,”
allegations by the affiant are legally insufficient. (Barnes v. Texas
(1965) 380 U.S. 253 [13 L.Ed.2nd 818].)

Note: The affiant must describe the facts and
circumstances which comprise the probable cause, so that a
magistrate may independently evaluate the existence or
nonexistence of sufficient facts to justify issuance of the
warrant. Merely listing the affiant’s conclusions, without
describing the facts and circumstances that lead to the
affiant’s conclusions, is legally insufficient.

Using terms such as “pornography” and “harmful matter”
without describing what it is the affiant believes is
pornographic, is a conclusionary statement that may
invalidate a warrant. (People v. Hale (2005) 133
Cal.App.4th 942; warrant saved by other language in the
affidavit from which the magistrate could infer the
pornographic nature of the pictures.)

“Good Faith:” Officers obtaining a search warrant in “good faith”
and acting in reasonable reliance on an otherwise facially valid
warrant, issued by a neutral and detached magistrate, will not
require suppression of evidence even when the warrant is later
found to be lacking in probable cause. (United States v. Leon
(1984) 468 U.S. 897 [82 L.Ed.2nd 677].)

See “Good Faith,” above.

Use of Hearsay: Use of hearsay in an affidavit, or even “double
(i.e., multiple level) hearsay,” is okay “so long as there [is] a
substantial basis for crediting the hearsay.” (United States v.
Ventresca (1965) 380 U.S 102, 108 [12 L.Ed.2nd 684, 688-689],
quoting Jones v. United States (1960) 362 U.S. 257, 272 [4
L.Ed.2nd 697, 708]; People v. Superior Court [Bingham] (1979)
91 Cal.App.3rd 463, 469.) and, in fact, is usually unavoidable.
(People v. Magana (1979) 95 Cal.App.3rd 453, 460, 462.)
See also City of Santa Cruz v. Municipal Court (1989) 49 Cal.3d 74, 87-88; People v. Smith (1976) 17 Cal.3d 845, 850.

Each level of hearsay, however, must be shown in the affidavit to be reliable. (See People v. Superior Court [Bingham], supra; Caligari v. Superior Court (1979) 98 Cal.App.3d 725; People v. Love (1985) 168 Cal.App.3d 104.)

Miranda: Statements taken in violation of the defendant’s Miranda rights (Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2d 694].), so long as not coerced or involuntary, may be used in an affidavit adding to the probable cause. (United States v. Patterson (9th Cir. 1987) 812 F.2nd 1188, 1193; People v. Brewer (2000) 81 Cal.App.4th 442.)

Third Party’s Fourth Amendment Violation: Evidence obtained in violation of someone else’s (i.e., someone other than the present defendant’s) Fourth Amendment (search and seizure) rights may be used as part of the probable cause in a search warrant affidavit, unless the defendant can show that he has “standing” (i.e., it was his reasonable expectation of privacy that was violated) to challenge the use of the evidence. (People v. Madrid (1992) 7 Cal.App.4th 1888, 1896.)

“Standing” depends upon a showing that it was the defendant’s own constitutional rights which were violated. (People v. Shepherd (1994) 23 Cal.App.4th 825, 828.)

See “Standing,” above.

Information in a search warrant affidavit that is the product of a violation of the defendant’s own Fourth Amendment rights will be excised from the affidavit. The redacted affidavit will then be retested to determine whether probable cause still exists. (People v. Weiss (1999) 20 Cal.4th 1073, 1081.)

Privileged Information:

Information that comes into the hands of law enforcement that may be “privileged information,” obtained without any “complicity” on the part of law enforcement, may be used as a part of the probable cause justifying the issuance of the search warrant. (People v. Navarro (2006) 138 Cal.App.4th
The issue is one of a Fifth (and Fourteenth) Amendment “due process” violation. (People v. Navarro, supra.)

Being a “passive recipient of privileged information” shows a lack of “complicity.” (Id., at pp. 158-162.)

To show that law enforcement was not just a passive recipient of privileged information, the defendant must prove that:

- The government (i.e., law enforcement) knew a lawyer-client relationship existed between the defendant and its informant;
- The government deliberately intruded into that relationship; and
- The defendant was prejudiced as a result.

(Ibid, citing United States v. Kennedy (10th Cir. 2000) 225 F.3rd 1197, 1194-1195.)

Law enforcement officers gaining access to, and reading, privileged material (defendant’s notes to his attorney), a Sixth Amendment violation, did not require dismissal of the case or any other sanctions absent evidence that defendant was somehow disadvantaged by the violation. In this case, jail sheriff’s deputies looked at notes defendant had written to his attorney. However, there was no evidence that any of the information discovered by this violation was passed onto the prosecutors. None of the deputies were witnesses in the case. There being no prejudice, defendant’s motion to dismiss was properly denied. (People v. Ervine (2009) 47 Cal.4th 745, 764-772.)

When a prosecutor instructs her investigator to eavesdrop on an attorney-client conversation in a courtroom holding cell, such an act is so egregious to warrant dismissal of the case. (Morrow v. Superior Court (1994) 30 Cal.App.4th 1252.)
However, law enforcement officers intentionally eavesdropping on an attorney-client conversation that takes place at the offices of the law enforcement agency, without the complicity of a prosecutor, is not so egregious as to require dismissal. Exclusion of the discovered information, and any products of that information, is sufficient a remedy under the circumstances. (People v. Shrier et al. (2010) 190 Cal.App.4th 400.)

Nighttime Searches: Justification for a nighttime search must be established in the warrant affidavit by establishing “good cause,” risking the possible suppression of evidence if it is not. (P.C. § 1533; Tuttle v. Superior Court (1981) 120 Cal.App.3rd 320, 328.)

But see Rodriguez v Superior Court (1988) 199 Cal.App.3rd 1453, 1470; suggesting that because a night search does not violate any constitutional principles, evidence discovered during a nighttime search without judicial authorization should not result in suppression of any evidence.

“Nighttime” for purposes of executing a search warrant is between 10:00 p.m. and 7:00 a.m. (P.C. § 1533) The search need only be commenced before 10:00 p.m. It is irrelevant how long after 10:00 p.m. it takes to finish the search. (People v. Zepeda (1980) 102 Cal.App.3rd 1, 7-8.)

The test for determining “good cause” is as follows: “(T)he affidavit furnished the magistrate must set forth specific facts which show a necessity for service of the warrant at night rather than between the hours of 7 a.m. and 10 p.m. This means that the magistrate must be informed of facts from which it reasonably may be concluded that the contraband to be seized will not be in the place to be searched during the hours of 7 a.m. to 10 p.m.” (People v. Watson (1977) 75 Cal.App.3rd 592, 598.)

The need for a nighttime search may be shown by a description of “some factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified by the exigencies of the situation.” (People v. Kimble (1988) 44 Cal.3rd 480, 494.)

Note: While typically this is an issue in the searches of residences, the statute (P.C. § 1533) is not so restricted. Therefore, a search warrant authorizing the search of a
person, vehicle, or other container may also require a “nighttime endorsement” if executed at night.

Leaving a Copy at the Scene: It is not legally required that a copy of the affidavit be left at the scene (United States v. Celestine (9th Cir. 2003) 324 F.3d 1095, 1107.), at least when the place to be searched and the property to be seized is sufficiently described in the search warrant itself. (United States v. McGrew (9th Cir. 1997) 122 F.3d 847.)

See “Leaving a Copy of the Warrant, Affidavit and/or Receipt and Inventory,” below.

P.C. § 964: Victim and Witness Confidential Information: P.C. § 964 requires the establishment of procedures to protect the confidentiality of “confidential personal information” of victims and witnesses. The section is directed primarily at prosecutors and the courts, but also contains a provision for documents filed by law enforcement with a court in support of search and arrest warrants; i.e., an affidavit.

“Confidential personal information” includes, but is not limited to, addresses, telephone numbers, driver’s license and California identification card numbers, social security numbers, date of birth, place of employment, employee identification numbers, mother’s maiden name, demand deposit account numbers, savings or checking account numbers, and credit card numbers. (Subd. (b))

Third: The “Receipt and Inventory” (or “Return”): This document is self-descriptive. It is used to list the property seized as a result of the service of the search warrant. (P.C. § 1535)

The original is returned to the Court with the original warrant and affidavit.

A copy is left with the person from whom property is taken, or left at the place searched, as a receipt of for those items taken by the searching officers.

P.C. § 1535 is not to be interpreted as a requirement to show to the suspect, or to leave a copy of at the scene, the search warrant itself. (People v. Calabrese (2002) 101 Cal.App.4th 79.)
Sources of Information Establishing Probable Cause:

Other Police Officers: Suspect information or other criminal activity information received from other peace officers, either verbally, at pre-shift briefings, from department-originated notices, etc., or when communicated via radio through the police dispatcher, is considered reliable and generally establishes probable cause to arrest or search by itself. (*People v. Hill* (1974) 12 Cal.3
d 731, 761; *People v. Ramirez* (1997) 59 Cal.App.4
d 1548.)

This is sometimes referred to as having received information through “official channels,” which refers to when it comes from any law enforcement source. (*People v. Lara* (1967) 67 Cal.2
d 365, 371.) Examples:

- Police radio broadcasts.
- Pre-shift briefings.
- “A.P.B.s” (i.e., an “All-Points Bulletin”) and similar law enforcement generated memos.

*But:* Eventually, law enforcement may be required in court to trace the information back to its source in order to disprove an accusation that the information establishing probable cause was “manufactured in the police station;” i.e., that it was the result of speculation or other unreliable source. (*People v. Orozco* (1981) 114 Cal.App.3
d 435.)

This is sometimes referred to as the “*Harvey/Madden rule,*” based upon authority in *People v. Harvey* (1958) 156 Cal.App.2
d 516, and *People v. Madden* (1970) 2 Cal.3
d 1017, or an “*Ojeda motion,*” based upon *Ojeda v. Superior Court* (1970) 12 Cal.App.3
d 909.)

However, an exception to the “*Harvey/Madden rule*” is generally found when the responding officers find the situation at the scene to be consistent with the substance of the radio call. When the source of the information is corroborated by what is found at the scene, there is no longer any purpose in further corroboration by calling as a witness the source of that information. (*In re Richard G.* (2009) 173 Cal.App.4
d 1252, 1258-1260; disagreeing with *In re Eskiel S.* (1993) 15 Cal.App.4
d 1638, which required strict compliance with *Harvey/Madden.*)

“When the reason for a rule ceases, so should the rule itself.” (*Civ. Code § 3510*)

© 2012 Robert C. Phillips. All rights reserved
Citizen Informants: Private persons motivated to provide law enforcement with information of criminal wrongdoing purely through a sense of good citizenship, without expecting any benefit or reward in return.

Information from a “citizen informant” establishes probable cause by itself, at least as to facts within the informant’s personal knowledge, absent known or suspected facts or circumstances that cast doubt upon the reliability of the information provided. *(People v. Ramey* (1976) 16 Cal.3rd 263, 269.)

*Note:* This assumes that the witness has the expertise necessary to interpret what it is he sees. E.g., a witness telling law enforcement that he has observed a person using a controlled substances would have to be able to establish that he has the training or experience to recognize what the controlled substance looks like.

“It may . . . be stated as a general proposition that private citizens who are witnesses to or victims of a criminal act, absent some circumstances that would cast doubt upon their information, should be considered reliable.” *(People v. Ramey,* supra, at pp. 268-269; see also *People v. Duncan* (1973) 9 Cal.3rd 218; and *People v. Hogan* (1969) 71 Cal.2nd 888, 890.) The victim of a crime will usually qualify. *(People v. Griffin* (1967) 250 Cal.App.2nd 545, 550.)

“We have distinguished between those informants who ‘are often criminally disposed or implicated, and supply their “tips” . . . in secret, and for pecuniary or other personal gain’ and victims or chance witnesses of crime who ‘volunteer their information fortuitously, openly, and through motives of good citizenship.’ [Citation.] O. and J. (juvenile victims in this case) neither concealed their identity to shield themselves from liability for false statements nor offered information for any ulterior or pecuniary motive. . . . The trial court correctly deemed the children presumptively reliable.” *(Humphrey v. Appellate Division of the Superior Court* (2002) 29 Cal.4th 569, 576.)

But see *Gillan vs. City of San Marino* (2007) 147 Cal.App.4th 1033, 1045; where the alleged victim of a crime was held to be not credible, but then cites the general rule: “Typically, information from a victim or a witness to
a crime, “absent some circumstance that would cast doubt upon their information,” is enough to establish probable cause. Such a victim or witness is generally considered to be reliable. “Information provided by a crime victim or chance witness alone can establish probable cause if the information is sufficiently specific to cause a reasonable person to believe that a crime was committed and that the named suspect was the perpetrator. [Citation.] ‘Neither a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities.’ [Citation]”

The Ninth Circuit Court of Appeal disagrees: “In establishing probable cause, officers may not solely rely on the claim of a citizen witness that [s]he was a victim of a crime, but must independently investigate the basis of the witness’s knowledge or interview other witnesses.” (Citations omitted; Hopkins v. Bonvicino (9th Cir. 2009) 573 F.3rd 752, 767.)

The identity of the citizen informant need not always be disclosed, but sufficient facts for the magistrate to conclude that the informant does so qualify as a citizen informant must be made available. (People v. Lombera (1989) 210 Cal.App.3rd 29, 32.)

Some involvement with criminal activity does not preclude one from being classified as a “citizen informant.” (People v. Schulle (1975) 51 Cal.App.3rd 809.) But the informant’s motivation for providing the information must be examined.

Information that initially came to police from an anonymous informant was deemed to be reliable when the informant was contacted and readily admitted being the source of the anonymous information. Once contacted by law enforcement, he provided information without hesitation, expecting nothing in return. As such, he was a “citizen informant” even after changing his story about how he came to know some of the information. Information from a citizen informant, as opposed to an informant who is looking for some reward of benefit for himself, and which is provided out of apparent good citizenship, is presumed to be reliable. (People v. Scott (2011) 52 Cal.4th 452, 475-476.)

**Reliable (“Tested”) Informants:** Informants who provide information with the expectation of some favor or personal gain from law enforcement in return, when he/she is known to have provided law enforcement with truthful information concerning criminal activity in the past.
The presumption is, absent some reason to disbelieve him, that such an informant is reliable. (See People v. Prewitt (1959) 52 Cal.2d 330, 334-337; People v. Metzger (1971) 22 Cal.App.3d 338, 345; People v. Dumas (1973) 9 Cal.3d 871; People v. McFadin (1982) 127 Cal.App.3d 751.)

Such an informant commonly has a criminal record, pending criminal case, and/or some present involvement in criminal activity.

The expected favor or personal gain is sometimes referred to as a “benefit.” A “benefit” is defined as “any consideration or advantage the informant was offered, promised, or received in exchange for the information provided.” Such a benefit includes, but is not necessarily limited to:

- Monetary payments of any kind, including, but not limited to, money, room and board, or use of an automobile.
- Leniency shown in arrest or booking, requesting appropriate bail, or contesting the source of the bail per P.C. § 1275.
- Leniency shown in filing appropriate charges or enhancements.
- Delay in arraignment or other court dates.
- Reduction of charges, period of custody or other condition of probation or sentence, including favorable input by a prosecutor or law enforcement officer.
- Relocation of the informant or the informant’s family.
- Use immunity or transactional immunity, formal or informal.
- Favorable action with other governmental agencies, civil courts, or private interests (such as employers).

(Source: San Diego District Attorney “Cooperating Individual and Immunity” Manual, 1997, Chapter 1, p. 3.)
Such a person has a proven track record of giving reliable information in the past. A single prior incident may establish reliability (See People v. Gray (1976) 63 Cal.App.3d 282, 288.), although in such a case, some corroboration of the informant’s information may be necessary.

Having given some bad information in the past does not necessarily disqualify an informant from being labeled “reliable.” (People v. Barger (1974) 40 Cal.App.3d 662; People v. Murphy (1974) 42 Cal.App.3d 81.) However, facts showing why in this case the informant is to be believed may be necessary, or other corroboration of his/her information.

Note: In practice, law enforcement most often seeks to corroborate even a reliable informant’s information just because, being motivated by personal gain, such a person’s credibility is almost always something that should be substantiated before acting upon his or her information.

Unreliable (“Untested”) Informants: A person who provides information with the expectation of receiving some favor or personal gain in return (i.e., a “benefit”), but either without the prior track record of having given truthful information, has provided untruthful information in the past, or as of yet, has not been used before as an informant.

Information from an untested or unreliable informant is not presumed to be credible in the absence of corroborating information. Such an individual must be corroborated before he/she can be used to establish probable cause. (People v. Superior Court [Johnson] (1972) 6 Cal.3d 704, 712; People v. Love (1985) 168 Cal.App.3rd 104.)

However, it has been held that two untested informants, acting independently, may be sufficient to corroborate each other. (People v. Balassy (1973) 30 Cal.App.3d 614, 621.)

However, a search warrant affidavit was held to be insufficient to establish probable cause even though the affiant depended on three informants. Each of the informants were found to be unreliable and corroborated only pedestrian details regarding defendant’s residence and vehicle. The affiant also determined that one of the alleged drug dealers had a history of narcotics offenses, but failed to include in the affidavit the dates or any details of those offenses. The informants’ statements did not include sufficient indicia of reliability to corroborate each other.
One informant made an undetailed factual assertion based on hearsay, and the others made only conclusionary assertions that defendant and another individual were drug dealers. However, the good faith exception applied because broad language in several prior court decisions suggested that multiple unreliable informants could corroborate each other. Those cases could have led a reasonable officer to conclude that the affidavit presented a debatable question as to probable cause. (People v. French (2011) 201 Cal.App.4th 1307.)

See “Corroboration,” below, under “Anonymous Informants.”

Use of an informant as a prosecution witness who knowingly provides perjured testimony may, if material, be a Fifth and Fourteenth Amendment “due process” violation and result in a reversal of a defendant’s conviction. (Maxwell v. Roe (9th Cir. 2010) 628 F.3rd 486.)

Anonymous Informants: One who provides information to law enforcement (often via a telephone call) while refusing to identify him or herself.

Because it is impossible to determine the motivations or credibility of an anonymous informant, such information is not considered reliable by itself. (Wilson v. Superior Court (1956) 46 Cal.2nd 291, 294.)


Anonymous information from at least two separate sources might, depending upon the circumstances, establish probable cause. (People v. Coulombe (2001) 86 Cal.App.4th 52.)

Corroboration: “Because unverified information from an untested or unreliable informant is ordinarily unreliable, it does not establish probable cause unless it is ‘corroborated in essential respects by other facts, sources or circumstances.’ [Citations.] For corroboration to be adequate, it must pertain to the alleged criminal activity; accuracy of information regarding the suspect generally is
insufficient. [Citation.] Courts take a dim view of the significance of ‘pedestrian facts’ such as a suspect’s physical description, his residence and his vehicles. [Citation.] However, the corroboration is sufficient if police investigation has uncovered probative indications of criminal activity along the lines suggested by the informant. [Citation.] Even observations of seemingly innocent activity provide sufficient corroboration if the anonymous tip casts the activity in a suspicious light. [Citations.]” (People v. Johnson (1990) 220 Cal.App.3d 742, 749; People v. Gotfried (2003) 107 Cal.App.4th 254.)

Corroboration comes in many forms. For example:

In a narcotics case, using the informant, a different informant, or an undercover law enforcement officer, to attempt to make a purchase of narcotics while under strict surveillance (i.e., a “controlled buy”), is a common method of corroborating the informant’s information.

Surveillance, records checks, and other forms of more traditional investigative work help to corroborate an informant’s information.

Statements from an informant which are “against the informant’s own ‘penal interest’ (i.e., potentially subjecting the informant to criminal liability)” may be sufficient corroboration. (People v. Mardian (1975) 47 Cal.App.3d 16, 33; Ming v. Superior Court (1970) 13 Cal.App.3d 206, 214; United States v. Todhunter (9th Cir. 2002) 297 F.3d 886, 890.)

Anonymous information corroborated by accurately predicting a suspect’s future behavior may itself also establish probable cause. (See Illinois v. Gates (1983) 462 U.S. 213 [76 L.Ed.2nd 527].)

See also; “Anonymous Information,” under “Detentions,” above.

Confidential Informants:

Problem: Whether classified as a “Citizen Informant,” a “Tested Informant,” or an “Untested Informant,” law enforcement may seek to keep the informant’s identity confidential. This is typically necessitated by the danger inherent in the practice of informing on criminal suspects.
Rule: An informant’s identity, if the informant is used properly and when the case is charged appropriately (i.e., charging offenses to which the informant is not a percipient witness, only), may often be kept confidential. (See E.C. §§ 1041, 1042(b), (c) and (d))

“It is well settled that California does not require disclosure of the identity of an informant who has supplied probable cause for the issuance of a search warrant where disclosure is sought merely to aid in attacking probable cause.” (Theodore v. Superior Court (1972) 8 Cal.3rd 77, 88.)

Restrictions: It is only when the court determines that there is a “reasonable possibility” that the informant can give evidence on the issue of guilt which might result in defendant’s exoneration, that the informant’s identity will have to be revealed. (Honore v. Superior Court (1969) 70 Cal.2nd 162, 168.)

Revealing the Informant’s Identity: In practice, an informant’s identity will have to be revealed only:

- When he or she was an eyewitness to (i.e., a “percipient witness”), or an actual participant in, the crime or crimes charged; or
- When he or she might otherwise be able to provide evidence favorable to the defendant. (People v. Goliday (1963) 8 Cal.3rd 771, 778-779.)

Merely because an informant was a percipient witness does not mean that his identity must be revealed. But an in camera hearing must be held in order to determine whether the informant is a material to defendant’s innocence. (Davis v. Superior Court [People] (2010) 186 Cal.App.4th 1272, 1276-1278.)

Procedure: In order to avoid having to reveal an informant’s identity, we use his or her information only to establish probable cause. A search warrant is issued based upon that probable cause. Then, the suspect is charged only with the offenses revealed upon the search and/or arrest of the suspect; matters to which the informant is not a witness.

Motions to Reveal the Identity of an Informant:
It is the burden on the defendant to make a sufficient showing that the unnamed informer does in fact have information which would be material to the defendant’s innocence. (*Price v. Superior Court* (1970) 1 Cal.3rd 836, 843; *Davis v. Superior Court [People]* (2010) 186 Cal.App.4th 1272, 1276.)

In order to discharge his burden of proving the informant is a material witness, the defendant need not show what the informant would testify to, nor even that the informer could give testimony favorable to him. (*Price v. Superior Court*, *supra*.)

However, bare speculation or unsupported conclusions that the informant is a “*material witness*” are insufficient to discharge a defendant’s burden. The defendant must produce evidence or a declaration articulating the theory of his defense or demonstrating in what manner he would be benefited by disclosure of the informant’s name. (*People v. McCoy* (1970) 13 Cal.App.3rd 6, 12-13; *People v. Thomas* (1970) 12 Cal.App.3rd 1102, 1112-1113.)

A defense attorney’s affidavit “*on information and belief*” is, as a matter of law, an insufficient factual showing, and is therefore not sufficient justification for divulging an informant’s identity. (*People v. Oppel* (1990) 222 Cal.App.3rd 1146, 1153.)

When the informant “merely pointed the finger of suspicion at the defendant,” disclosure of the informant’s identity is not required. (*People v. Wilks* (1978) 21 Cal.3rd 460, 469; *People v. McCoy*, *supra*, at p. 13.)

*“Luttenberger” Motions:*

Upon a “*substantial preliminary showing*” of the need for discovery made by the defense, the court may order that the prosecution provide records and other background information concerning a confidential informant. (*People v. Luttenberger* (1990) 50 Cal.3rd 1.)
However, in order to justify an in camera hearing on this issue, at which the court must review the informant’s history and other relevant information related to credibility, the defendant need only raise a “reasonable doubt” concerning the informant’s veracity. *(People v. Estrada* (2003) 105 Cal.App.4th 783.)

If, after such an in camera review, the court finds the necessary “substantial preliminary showing” of information that tends to contradict material representations made in the affidavit, or constitutes material omissions from it, the court should then order the disclosure of the documents to the defendant. Based upon this information, a “Franks hearing, per Franks v. Delaware” *(1978) 438 U.S. 154 [57 L.Ed.2nd 667]*, may be appropriate. (See above.)

*Note:* The purpose is to challenge the reliability of the information obtained from a confidential informant, without necessarily revealing the informant’s identity.

If the defense can meet its burden of showing some need for the information and some proof that there is something of some substance in existence (beyond merely speculating that some adverse information exists), the court should inspect the documents in camera, deleting any reference to the informant’s identity before providing the information to the defense. *(People v. Luttenberger, supra.)*

The danger is in insuring that the court does not inadvertently give away too much information, affording the defense the opportunity to figure out who the informant is.

*An Informant Sworn Before a Magistrate; a “Skelton Warrant:)”*

If an informant can give a “factual” (as opposed to a “conclusionary”) description of some on-going criminal activity, but does not fit within any of the preceding categories of reliable informants, and his information cannot be corroborated, he may nevertheless be deemed reliable if he personally testifies and swears to the truth of his information before the issuing magistrate. *(Skelton v. Superior Court* *(1969) 1 Cal.3rd 144.)*
Sometimes referred to as a “Skelton warrant,” where the magistrate is allowed to observe the informant’s demeanor and appearance, the magistrate can evaluate his credibility just as with any other witness.

The informant’s transcribed testimony (and the tape of that testimony) before the magistrate becomes the search warrant affidavit.

P.C. § 1111.5: Neither a jury nor a judge may convict a defendant, find a special circumstance true, nor use a fact in aggravation, based on the uncorroborated testimony of an in-custody informant.

Probable Cause Issues:

Anonymous information, where sufficiently corroborated by accurately predicting a suspect’s future behavior, may establish probable cause sufficient to obtain a search warrant. (Illinois v. Gates (1983) 462 U.S. 213 [76 L.Ed.2nd 527].)


Searches of a Residence:

Stolen Property: When property has been stolen by a defendant and has not yet been recovered, a fair probability exists that the property will be found at the defendant’s home. A magistrate can reasonably conclude that a suspect’s residence is a logical place to look for specific incriminating items where there exists probable cause to believe that the defendant stole them. (People v. Carrington (2009) 47 Cal.4th 145, 161-164.)

The Cleland Warrant; Narcotics: Arrest of a person for selling narcotics, or in the possession of narcotics for purposes of sale, plus an experienced narcotics officer’s expert opinion, has been held to be probable cause to believe he has evidence of this illegal activity in his home. (People v. Cleland (1990) 225 Cal.App.3rd 388, 392-393; People v. Aho (1985) 166 Cal.App.3rd 984, 991-993; People v. Johnson (1971) 21 Cal.App.3rd 235, 242-246; United States v. Pitts (9th Cir. 1993) 6 F.3rd 1366, 1369; United States v. Terry (9th Cir. 1990) 911 F.2nd 272.)

Probable cause was found to believe defendant was a narcotics seller’s source of supply and that he would have evidence of his crimes in his apartment where the
defendant was at the scene during, or shortly before, three separate narcotics transactions and he was followed to his apartment as he used “countersurveillance (driving) techniques” on one occasion. (*United States v. Chavez-Miranda* (9th Cir. 2002) 306 F.3rd 973.)

*But:*  

While such circumstances provide the necessary probable cause to satisfy the **Fourth Amendment** search purposes, they do not provide an exigent circumstance excusing the lack of a search warrant. (*People v. Koch* (1989) 209 Cal.App.3rd 770, 778-781.)

Also, *simple possession* of a controlled substance, without indications that the defendant is a drug dealer, will *not* likely be sufficient to justify a search warrant for the defendant’s home, despite an expert officer’s opinion to the contrary. (*People v. Pressey* (2002) 102 Cal.App.4th 1178.)

*And,* knowing that a person is selling contraband *from a business,* when the seller is *not* an employee or owner of the business, *does not,* by itself, establish probable cause to believe that more contraband will be found in the business. (*People v. Garcia* (2003) 111 Cal.App.4th 715.)

**Trashcan Searches:** Fresh marijuana stem and leaf cuttings found in a trashcan in front of a residence establishes probable cause justifying the issuance of a search warrant for the residence. (*People v. Thuss* (2003) 107 Cal.App.4th 221.)

**Computer Searches:**

Probable cause supporting the issuance of a search warrant may be based entirely upon circumstantial evidence together with reasonable inferences there from. Receipt of child pornography in numerous (e.g., nine) e-mails from various sources (e.g., two) to various screen names (e.g., two) supports an inference of knowing possession of that pornography. (*United States v. Kelley* (9th Cir. 2007) 482 F.3rd 1047.)

A properly qualified expert officer’s opinion, connecting common characteristics of a child molester with known facts related to a
child molest and the molester’s act of hiding his computer, 
establishes probable cause supporting a search warrant for that 

Where a search warrant specifies certain documents to be seized, 
and a computer is found under circumstances where it is 
reasonable to believe that the computer has been used to generate 
those documents or otherwise contain the information from which 
the documents came, then the computer may be seized (and 
probably searched) even though not mentioned in the search 
warrant.  (United States v. Giberson (9th Cir. 2008) 527 F.3rd 882, 
886-889.)

Troubled by the wholesale seizure of computerized information of 
a private business keeping medical information, where the 
government case agent perused the seized computer files and 
found incriminating information related to many other individuals 
for whom there was no probable cause, five justices of an en banc 
panel of the Ninth Circuit Court of Appeal has proposed waiving 
the “plain view” doctrine in such cases as a condition of issuing 
such a search warrant.  (United States v. Comprehensive Drug 
Testing, Inc. (9th Cir. 2010) (9th Cir. 2009) 621 F.3rd 1162, 1178-
1180; incorporating the facts as described at 513 F.3rd 1085.)

A signal photograph of a nude minor (female child who is between 
8 and 10 years old), by itself, is insufficient to establish probably 
cause for a search warrant. But a second such photo, under the 
“totality of the circumstances,” is enough.  (United States v. 
Battershell (9th Cir. 2006) 457 F.3rd 1048.)

However, a single photograph of a nude minor (female of about 15 
to 17 years of age), when combined with other suspicious 
circumstances (e.g., 15 computers in house found in complete 
disarray, with two minors not belonging to the defendant, where 
the defendant a civilian, is staying in military housing), may 
enough to justify the issuance of a search warrant.  (United States 
v. Krupa (9th Cir. 2011) 658 F.3rd 1174, 1177-1179; but see 
dissent, pp. 1180-1185.)

An Internet subscriber has no expectation of privacy in the 
subscriber information he supplies to his Internet provider. 
(People v. Stipo (2011) 195 Cal.App.4th 664, 668-669.)

See “Searches of Containers,” below.
Use of a Search Warrant:

Rule: The use of a search warrant as a prerequisite to a lawful search is a constitutional requirement, pursuant to the Fourth Amendment.

The Fourth Amendment prohibits all unreasonable searches and seizures, and it is a cardinal principle that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” (Katz v. United States (1967) 389 U.S. 347, 357 [19 L.Ed.2nd 576, 585].)

“Evidence which is obtained as a direct result of an illegal search and seizure may not be used to establish probable cause for a subsequent search.” (United States v. Wanless (9th Cir. 1989) 882 F.2nd 1259, 1465.)

This includes “verbal evidence,” (i.e., a suspect’s admissions or confession), as well as physical evidence, when obtained as a direct product of an illegal detention, arrest or search. (See United States v. Crews (9th Cir. 2007) 502 F.3rd 1130, 1135.)

Exceptions: There are a limited number of such “well-delineated exceptions” to the general rule, however. For instance:

- “Exigent Circumstances” excuse the absence of a search warrant, at least up until when the “exigency” no longer exists. (People v. Bacigalupo (1991) 1 Cal.4th 103, 122-123.)

  “Exigent Circumstances:” Any instance where the officers have no opportunity to obtain a warrant without risking the loss or destruction of evidence, the fleeing of suspects, or the arming of a suspect. (See People v. Seaton (2001) 26 Cal.4th 598.)

  See “Exigent Circumstances,” above.

- “Consent:” A “consent” to search excuses the absence of a search warrant, or even probable cause. (Florida v. Bostick (1991) 501 U.S. 429 [115 L.Ed.2nd 389].)

  Such consent, however, must be freely and voluntarily obtained. (Bumper v. North Carolina (1968) 391 U.S. 543, 548 [20 L.Ed.2nd 797, 802].)
See “Consent,” below.

- **“Inevitable Discovery:”**

  The effects of an otherwise illegal warrantless search (i.e., suppression of the resulting evidence) may be offset in those instances where the evidence would have “inevitably” been found anyway through some source independent of the illegal search. (Nix v. Williams (1984) 467 U.S. 431, 443 [81 L.Ed.2nd 377, 387]; People v. Boyer (2006) 38 Cal.4th 412, 447-454.)

  However, the “inevitable discovery” doctrine does not apply just because a search warrant could have been obtained had the searching officers asked for one. This argument would negate the need to ever seek a warrant, effectively repealing the Fourth Amendment. (People v. Robles (1998) 64 Cal.App.4th 1286.)

  The fact that the evidence would have inevitably been discovered anyway must be established by the People by “a preponderance of the evidence.” (United States v. Young (9th Cir. 2009) 573 F.3rd 711, 721-723; where it was not shown that the hotel where its employees discovered the defendant’s firearm would not have merely stored the weapon and return it to defendant, as according to its policy. [See also the dissent, pp. 723-729, arguing that the inevitable discovery rule applied].)

- **“Searches of Vehicles:”**

  Probable cause to believe that a lawfully stopped vehicle contains contraband justifies a warrantless search of the vehicle, including the trunk, despite the absence of additional exigent circumstances. (People v. Chavers (1983) 33 Cal.3rd 462; People v. Superior Court [Valdez] (1983) 35 Cal.3rd 11; People v. Varela (1985) 172 Cal.App.3rd 757.)

  The search may be as broad as could have been authorized by a search warrant, including any closed containers within the vehicle. (United States v. Ross (1982) 456 U.S. 798 [72 L.Ed.2nd 572]; California v. Acevedo (1991) 500 U.S. 565 [114 L.Ed.2nd 619]; People v. Chavers, supra.)

  See “Searches of Vehicles,” below.
• “Searches of Persons with Probable Cause:” A person may be searched without a warrant any time the officer has “probable cause” to believe the person may have contraband or other seizable property on him. (*People v. Coleman* (1991) 229 Cal.App.3rd 321.)

See “Searches of Persons,” below.

• “Searches Incident to Arrest:”


However, see *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485], severely limiting the ability to conduct a search incident to arrest in a vehicle, finding *Belton* to be inapplicable in the situation where the arrestee has already been removed from the vehicle and secured, thus negating any reasonable possibility that the arrestee could reach for a weapon or destroy evidence in the vehicle.

See “Searches Incident to Arrest,” under “Searches of Persons,” below.

• “Administrative/Regulatory Searches:”

“Pervasively” or “Closely Regulated Businesses:” The courts have indicated that a warrant is *not* necessary in those cases where the place to be searched is commercial

See “Administrative/Regulatory Searches,” below.

Crime Scene Searches: Generally, once any exigencies no longer justify an immediate entry, entering or re-entering a building to investigate a criminal offense, or even to continue a search already begun due to exigent circumstances that existed upon the initial entry, requires a search warrant. For example:


Bank Records: Pursuant to California’s Right to Privacy Act (Gov’t Code §§ 7460-7493), there are six (6) lawful methods of obtaining a criminal suspect’s bank records:

- Customer Authorization: (Gov’t. Code § 7473):
  
The authorization must be in writing.
  Records sought must be very specifically identified.
  Must include a phrase informing the customer that he/she has a right to withdraw consent.

- Administrative Subpoena or Summons (Gov’t. Code § 7474):
  
  Requires notice to the customer and the bank.
  Customer has ten days to move to quash the subpoena.

- Search Warrant (Gov’t. Code § 7475):
  
The customer will be notified by the bank unless the search warrant contains an order that notice be delayed.
The request to defer notice to the customer must be justified in the affidavit on the grounds that notification would impede the investigation, and the court finds this to be “good cause.”

The normal ten-day period for service and return of the warrant may be extended if the bank cannot reasonably make the records available within ten days.

A search warrant for bank records was held to be valid in *People v. Meyer* (1986) 183 Cal.App.3d 1150.)

- **Judicial Subpoena or Subpoena Duces Tecum (Gov’t. Code § 7476):**
  
  Notice must be given to the customer in most situations. May be used in NSF (i.e., “non-sufficient funds” cases). (See *Gov’t. Code § 7476(c)*)

- **Police Request ( Gov’t. Code § 7480):**
  
  May obtain certain types of financial information (e.g., dishonored checks and overdrafts) upon certification to the financial institution, in writing, that the checks were used fraudulently. (*Gov’t. Code § 7480(b)*: The section provides for a statement of account and other records for 30 days before and after the alleged illegal act.)

  Such information may also be provided by the bank to a county adult protective services office or to a long-term care ombudsman.

  May also receive, upon request, information as to whether a person has an account and the account number. (*Gov’t. Code § 7480(c)*)

- **Victimized Financial Institution turns over Records (Gov’t. Code § 7470(d)):**
  
  When the bank is the victim of a crime committed by a customer, it may lawfully turn over the customer’s bank records without the need of a court order. (*People v. Nosler* (1984) 151 Cal.App.3d 125; *People v. Nece* (1984) 160 Cal.App.3d 285.)
Note: The above listed requirements and provisions are not exclusive. The referenced Government Code sections must be consulted. (See also Burrows v. Superior Court (1974) 13 Cal.3rd 238; and People v. Blair (1979) 25 Cal.3rd 640, regarding constitutional limitations upon the seizure of financial records.)

Mortgage Fraud Records:

P.C. § 532f(a): Mortgage Fraud: Intentionally using a misrepresentation, misstatement, or omission, in the mortgage lending process, or facilitating it’s use, with the intent that it be relied upon by the lender, or receiving the funds as a result of the above, or filing with the county recorder any document in connection with a mortgage loan transaction knowing it contains a misrepresentation, misstatement, or omission, with a loss of over $400, is a felony (wobbler).

Subd. (c) contains provisions for a peace officer investigating mortgage fraud to obtain relevant real estate records via a court order, obtained upon the officer submitting an ex parte court application made under penalty of perjury, alleging that there is reasonable cause to believe that the records sought are material to an on-going investigation. Provisions are made for the sealing of such application and other procedures for obtaining the necessary records.

Subd. (g) provides for an affidavit from the custodian of records authenticating the records, laying the foundation to meet any hearsay objections to admission of the records into evidence.

Credit Card Information: Charges made by a credit card holder cannot be obtained except by search warrant or other judicial order. (People v. Blair (1979) 25 Cal.3rd 640, 652.)


Telephone Records:

Unlisted Numbers: A search warrant is necessary in order to obtain the name and address of the holder of an unlisted telephone
number from the telephone company. (People v. Chapman (1984) 36 Cal.3rd 98.)

Note: Under federal constitutional standards, obtaining phone records without a warrant is not illegal. (Smith v. Maryland (1979) 442 U.S. 735 [61 L.Ed.2nd 220].) Therefore, although seizing such records without a warrant is in violation of California law, doing so will not result in the suppression of the records. (People v. Bencomo (1985) 171 Cal.App.3rd 1005, 1015; People v. Martino (1985) 166 Cal.App.3rd 777, 786, fn. 3.)

Telephone Calls Made: Telephone company records relating to telephone calls made are also protected and require a warrant. (People v. McKunes (1975) 51 Cal.App.3rd 487.)

Note: Telephone toll records are maintained in “billing rounds,” covering approximately 30 days, but not necessarily corresponding with a calendar month.

An affidavit should contain facts, information, and opinion justifying the time period for which toll call records are sought.

Certification for Non-Disclosure: Pursuant to California Public Utilities Commission decision number 93361, dated July 21, 1981, the telephone company must notify the customer of a search warrant issued for his telephone records unless there is a “certification for non-disclosure” contained on the face of the search warrant.

Provides for a 90-day delay in notice, which can be extended another 90 days.

The “certification of non-disclosure” is a statement that notification will impede the investigation of the offense being investigated.

Justification for the delayed notice must be included in the warrant affidavit.

Pen Registers and Trap and Trace: Installation of a “pen register” and/or a “trap and trace device” may be accomplished by use of a search warrant, at least under state rules. (People v. Larkin (1987) 194 Cal.App.3rd 650, 654.)
A “pen register” is a device that records or decodes electronic or other impulses that identify the numbers dialed or transmitted on the telephone line to which such device is attached.

A search warrant, or an order for the installation of a pen register or trap and track device, must be obtained from a court of “general jurisdiction”; i.e., from a Superior Court judge.

A “trap and trace” device is a device that captures the incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

18 U.S.C. § 3121 was amended as a part of the “Patriot Act,” Pub. L. No. 107-56, to expand these definitions to include processes that capture routing, addressing, or signaling information transmitted by an electronic communication facility, thus permitting the interception of information from computers and cells phones, as well as from land-line telephones.

Federally, use of a pen register is not considered to be a search, and therefore does not require a search warrant. (Smith v. Maryland (1979) 442 U.S. 735, 745-746 [61 L.Ed.2nd 220, 229-230].)

The same rule is applicable to a “mirror port,” which is similar to a pen register, but which allows the government to collect the “to” and “from” addresses of a person’s email messages, the IP addresses of the websites the person visits, and notes the total volume of information sent to or from the person’s account. (United States v. Forrester (9th Cir. 2008) 512 F.3rd 500.)

The Federal Electronic Communication Privacy Act (18 U.S.C. §§ 3121-3127) expressly authorizes a state investigative or law enforcement officer to apply for “an order,” as opposed to a search warrant, or an extension of an order, authorizing the installation and use of either a pen register or a “trap-and-trace” device, when a request is made in writing, under oath, to a court of “competent
jurisdiction” of the state, and is otherwise not prohibited by state law.

18 U.S.C. § 2123 requires the applicant to state that the information likely to be obtained is relevant to an ongoing criminal investigation (as opposed to the probable cause required for a warrant).

An order is good for no more than 60 days. Extensions, for up to 60 days, may be obtained upon making a separate application.

The order shall direct that it be sealed pending further order of the court.

Even if the procedures described in these statutes are violated, suppression of evidence is not an appropriate remedy. (United States v. Forrester (9th Cir. 2007) 495 F.3rd 1041, 1051.)

However, citing pre-Proposition 8 authority (People v. Blair (1979) 25 Cal.3rd 640.), which rejected the rationale of Smith v. Maryland, supra, the California Attorney General is of the opinion that despite the lack of legal authority to suppress the resulting evidence (due to passage of Proposition 8 in June, 1982), obtaining pen register or trap and trace information based upon an ex parte court order (as opposed to a search warrant), being in violation of the California Constitution (Art. I, § 13, as well as Art. I, § 1), is “prohibited by state law.” The federal authorizing statutes, therefore, which allow for a court order obtained by state law enforcement officers “(u)less prohibited by State law” (18 U.S.C. § 3122(a)(2)), do not apply to California because such a procedure is prohibited by state law. (86 Opinion of Attorney General Bill Lockyer 198 (2003).)

The California Attorney General, in this same opinion, also noted that Gov’t. Code § 11180 similarly does not allow for an “Administrative Subpoena” due to the lack of a prior judicial review as required by the California Constitution.

See also, 69 Ops. Cal. Atty. Gen. 55 (1986): A California magistrate may authorize the installation
Because a search warrant, if used, is only good for 10 days (P.C. § 1534), a new warrant must be obtained for each succeeding 10-day period.

Information received from a pen register and/or a trap and trace device, recording “call data content” (i.e., “CDC,” data about call origination, length, and time of call), are not protected by the wiretap statutes. There is no expectation of privacy in such information, per Smith v. Maryland (1979) 442 U.S. 735 [61 L.Ed.2nd 220]. (United States v. Reed (9th Cir. 2009) 575 F.3rd 900, 914-917.)

Use of a pen register and trap and trace device, except maybe when combined with other forms of electronic surveillance, is not enough alone to establish the required “necessity” to justify the issuance of a wiretap warrant. (United States v. (9th Cir. 2009) 585 F.3rd 1223, 1228, citing United States v. Gonzalez, Inc., (9th Cir. 2005) 412 F.3rd 1102, 1113.)

P.C. § 1524.2: Out-of-State Electronic Communications Information: This section authorizes the service of a search warrant for information related to the identity of customers, data stored by, or on behalf of, the customer, the customer’s usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications, upon a “foreign corporation” which provides “electronic communications services or remote computing services to the general public.”

“Electronic communications services” and “remote computing services” is to be construed in accordance with the federal Electronic Stored Communications Privacy Act, 18 U.S.C. §§ 2701 et seq.

18 U.S.C. § 2701 refers to 18 U.S.C. § 2501, subd. (15) of which defines “electronic communication service” as a “service which provides to users thereof the ability to send or receive wire or electronic communications.”

18 U.S.C. § 2501(1), (18): “Wire communication” includes “any aural transfer (i.e., one containing the human voice) made in whole or in part through the
use of facilities for the transmission of 
communications by the aid of wire, cable, or other 
like connection between the point of origin and the 
point of reception (including the use of such 
connection in a switching station) . . . .”

This includes telephone conversations. (Briggs v. American Air Filter Co., Inc. (5th Cir. 1980) 630 F.2nd 414; United States v. Harpel (10th Cir. 1974) 493 F.2nd 346.)

E-mail records of a business may only be obtained from an Internet Service Provider (ISP) via a search warrant. The defendant enjoyed a reasonable expectation of privacy in his emails vis-a-vis his ISP. Thus, government agents violated his Fourth Amendment rights by compelling the ISP to turn over the emails without first obtaining a warrant based on probable cause. However, because the agents relied in good faith on provisions of the Stored Communications Act, the Exclusionary Rule did not apply. (United States v. Warshak (6th 2010) 631 F.3rd 266.)

A “foreign corporation” is one that is qualified to do business in California pursuant to Corp. Code § 2105, even though based in another state.

“Properly served,” as required by the statute, necessitates “(d)elivery by hand of a copy of any process against a foreign corporation;

(a) to any officer of the corporation or its general manager in this state, or if the corporation is a bank to a cashier or an assistant cashier,

(b) to any natural person designated by it as agent for the service of process, or

(c) if the corporation has designated a corporate agent, to any person named in the latest certificate of the corporate agent filed pursuant to Section 1505 . . .” (P.C. § 1524.2(a)(6), referencing Corp. Code § 2110)
Per Corp. Code § 2105, foreign corporations must consent to service of process as a condition of doing business in California.

The foreign corporation is required to provide the information requested within five (5) business days, which may be shortened or extended upon a showing of good cause, and to authenticate such records, thus making them admissible in court per Evid. Code §§ 1561, 1562. (P.C. § 1524.2(b))

The section further requires California corporations to honor out-of-state search warrants as if issued within this state. (P.C. § 1524.2(c))

These are procedural requirements for introducing the resulting records into evidence at trial, and irrelevant to the use of the same records for probable cause purposes for a follow-up search warrant. (People v. Stipo (2011) 195 Cal.App.4th 664, 670-672.)

P.C. § 1524.3(a): Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services: Foreign corporations providing electronic communications or remote computing services must disclose to a governmental prosecuting or investigating agency, when served with a search warrant issued by a California court pursuant to P.C. § 1524(a)(7) (i.e., in misdemeanor cases), records revealing the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber to or customer of that service, and the types of services the subscriber or customer utilized.

P.C. § 1524.3(b): The governmental entity receiving subscriber records or information under this section is not required to provide notice to a subscriber or customer.

P.C. § 1524.3(d): Upon a request of a peace officer, the provider shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a search warrant or a request in writing and an affidavit declaring an intent to serve the provider with a search warrant. Records shall be retained for 90 days upon such request, and may be extended for an additional 90 days upon a renewed request by the peace officer.
Wiretaps and Eavesdropping: Both the federal Congress and California’s Legislature, expressing concern over the potential for violating privacy rights (see *Alderman v. United States* (1969) 394 U.S. 165 [22 L.Ed.2nd 176]), have enacted statutes controlling the use of wiretaps by law enforcement.

Federal rules are contained in the *Omnibus Crime Control and Safe Streets Act of 1968* (Title III, 18 U.S.C. §§ 2510 et seq.). However, in that California’s state statutes are more restrictive (see *People v. Jones* (1973) 30 Cal.App.3rd 852.), it is generally accepted that if a police officer acts in compliance with P.C. §§ 629.50 et seq., he or she will also be in compliance with the federal requirements.

*Alderman v. United States*, *supra*: The Fourth Amendment rights of homeowners are implicated by the use of a surreptitiously planted listening device to monitor third-party conversations that occurred within their home.

The *Omnibus Crime Control and Safe Streets Act of 1968* authorizes the states to enact their own wiretap laws only if the provisions of those laws are at least as restrictive as the federal requirements for a wiretap set out in Title III. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 146-147; *People v. Otto* (1992) 2 Cal.4th 1088, 1098.)

P.C. § 630: *Statement of Legislative Purpose*: Recognizing the advances in science and technology that have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and the resulting invasion of privacy involved, the Legislature enacted the following statutes for the purpose of protecting the right of privacy of the people of this state.

It is not the intent of the Legislature, however, to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date (i.e., January 2, 1968) of this Chapter.

This section pertaining to wiretapping and other electronic devices is a general provision declaring a broad legislative purpose; section 633 is the specific section dealing with the classes exempted from the two preceding sections prohibiting wiretapping and it is only the officers named in the latter section who are exempt from the sanctions imposed by §§ 631 and 632. (55 *Op. Cal. Atty. Gen.* 151)

The restrictions on eavesdropping apply for the benefit of a person outside the state as well, so long as one party to a telephone conversation is in California. (Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal.4th 95.)

The Recording of prisoner telephone conversations, even to the outside world, would fall within the restrictions of both the federal and state wiretap statutes unless the inmate is put on notice that his conversations may be monitored and/or recorded.

Under Title III; “(I)t shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication where . . . one of the parties to the communication has given prior consent to such interception.” (Italics added; 18 U.S.C. § 2511(2)(c))

Based upon this, it has been held that where a sign has been posted indicating that “telephone calls may be monitored and recorded,” inmates are on notice, and his or her “decision to engage in conversations over those phones constitutes implied consent to that monitoring and takes any wiretap outside the prohibitions of Title III.” (People v. Kelly 103 Cal.App.4th 853, 858; warrantless recording of defendant’s telephone conversations to parties on the outside approved.)

Such warning signs also take such telephone calls outside the search warrant provisions of California’s wiretap statutes (P.C. §§ 629.50 et seq.) as well. (Id., at pp. 859-860.)
P.C. § 631: Wiretapping:

The prohibitions on wiretaps make illegal the following:

- The use of any machine, instrument, or contrivance, or in any other manner, to intentionally tap, or make an unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or

- Without the consent of all the parties to a communication, or in any unauthorized manner, to read, attempt to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or

- The use or attempt to use in any manner or for any purpose, or to communicate in any way, any information so obtained; or

- To aid, agree with, employ, or conspire with anyone to do any of the above.

Punishment: Violation is punishable by a fine of $2,500, and/or one year in county jail or 16 months, two or three years in prison, or by both such fine and imprisonment. The fine increases to $10,000 with a prior conviction for any of the offenses listed in this Chapter.

Violation of wiretapping statutes may also be a **Fourth Amendment** violation if the illegal wiretap also violates a person’s legitimate expectation of privacy. (**United States v. Shrylock** (9th Cir. 2003) 342 F.3rd 948, 978.)

Subd. (b): Exceptions: The section does not apply to:

- Any public utility engaged in the business of providing communications services and facilities, when for the purpose of construction, maintenance,
conduct or operation of the services and facilities of the public utility; or

- The use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility; or

- Any telephonic communication system used for communication exclusively within a state, county, city and county, or city correctional facility.

**Prisoner Visitors:** A phone used during a physical visitation by a prisoner and his or her visitor does *not* meet the requirements of a “wire communication,” not using a line in interstate or foreign commerce. It is therefore not subject to the wiretap restrictions of **P.C. § 631.** (*People v. Santos* (1972) 26 Cal.App.3rd 397, 402.)

**Subd. (c): Non-Admissibility:** The section also provides for the non-admissibility of any evidence derived through a violation of this section, except as proof of such violation.

**Similar restrictions** are contained in:

- **P.C. § 632:** Electronic eavesdropping, in general.
- **P.C. § 632.5:** Cellular radio telephone communications.
- **P.C. § 632.6:** Cordless telephone communications.
- **P.C. § 632.7:** Recording communications between cellular radio telephones and cordless telephones, or between these and a landline telephone.

**Note:** A “controlled telephone call” made by a victim or witness to a suspect for the purpose of obtaining incriminating statements from the suspect, at law enforcement’s request (See **P.C. §§ 632, 633**), is not a privacy violation or an illegal Fourth Amendment search. (*United States v. White* (1971) 401 U.S. 745 [28 L.Ed.2nd 453].)

P.C. § 633.8: *Eavesdropping in Hostage or Barricading Situations*:

A peace officer may use an electronic amplifying or recording device to eavesdrop on and/or record, any oral communication within a particular location in response to the taking of a hostage or the barricading of a location if:

**b(1)** The officer reasonably determines that an emergency situation exists involving the immediate danger of death or serious physical injury to any person;

**b(2)** The officer reasonably determines that the emergency situation requires that eavesdropping occur immediately; and

**b(3)** There are grounds upon which an order could be obtained pursuant to 18 U.S.C. § 2516(2) for the offenses specified in it.

*Note:* 18 U.S.C. § 2516(2) permits the interception of wire, oral, or electronic communications when the interception may provide evidence of the commission of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crimes dangerous to life, limb, or property, and is punishable by imprisonment for more than one year.

Only a peace officer who has been designated by either a district attorney or by the Attorney General may make the three determinations listed above.

A peace officer is not required to knock or announce his or her presence before entering or before installing or using any electronic amplifying or recording devices.

An application for an order approving eavesdropping must be made within 48 hours *after* the eavesdropping has begun.

Compliance with P.C. § 629.50 (setting forth the requirements of a wiretap application) is required.
A judge is prohibited from granting an eavesdropping application in anticipation of an emergency situation.

A judge is required to grant the application in a barricade or hostage situation where there is probable cause to believe that an individual is committing, has committed, or is about to commit an offense listed in 18 U.S.C. § 2516(2) (see Note above) and only if the peace officer has fully complied with the requirements of this section.

Any oral communications overheard must be recorded, and in such a manner as to protect the recording from alterations.

A “barricading” occurs when a person refuses to come out from a covered or enclosed position, or when a person is held against his or her will and the captor has not made a demand.

A “hostage situation” occurs when a person is held against his or her will and the captor has made a demand.

A peace officer who makes the decision to use an eavesdropping device is not required to undergo wiretap training pursuant to P.C. § 629.94.

A peace officer is required to stop using an eavesdropping device when the barricade or hostage situation ends, or upon the denial by a judge for an order approving eavesdropping, whichever occurs first.

Nothing in this new section is intended to affect the admissibility of evidence.

P.C. §§ 629.50 through 629.98 regulate the implementation of “wiretaps” and the use of information obtained thereby, including derivative evidence, and are listed in detail below. (See People v. Jackson (2005) 129 Cal.App.4th 129, 144-159.)

P.C. § 629.50: Requirements for a Wiretap Order:

An application for a wiretap order authorizing the interception of a wire, electronic pager, or electronic cellular telephone communication shall:
- Be made in writing upon the personal oath or affirmation of:

  The Attorney General,

  Chief Deputy Attorney General,

  Chief Assistant Attorney General, Criminal Law Division, or

  A District Attorney, or the person designated to act as District Attorney in the District Attorney’s absence.

- Be made to:

  The presiding judge of the Superior Court, or

  Another judge designated by the presiding judge, or

  The highest judge listed on an “ordered list” of additional judges, upon a determination that none of the above judges are available.

- Include all of the following information:

  The identity of the investigative or law enforcement officer making the application,

  The identity of the investigative or law enforcement officer authorizing the application,

  Failure to identify the authorizing official should not invalidate the subsequent wiretap order. (See United States v. Callum (9th Cir. 2005) 410 F.3rd 571, discussing the corresponding federal statute; 18 U.S.C. § 2518(4)(d).)

  But where the failure to include information identifying the Department of Justice as authorizing
a wiretap application makes it impossible for a judge to conclude from the face of the application that it had been in fact so authorized. will invalidate the warrant. (United States v. Staffeldt (9th Cir. 2006) 451 F.3rd 578; an attached memorandum purportedly identifying the Department of Justice as authorizing the wiretap application was, due to human error, the wrong memorandum.)

The identity of the law enforcement agency that is to execute the order,

A statement attesting to a review of the application and the circumstances in support thereof by the chief executive officer or his or her designee (who must be identified by name) of the law enforcement agency making the application,

A full and complete statement of the facts and circumstances relied upon by the applicant to justify his or her belief that an order should be issued, including:

Details as to the particular offense that has been, is being, or is about to be committed,

The fact that conventional investigative techniques have been tried and were unsuccessful, or why they reasonably appear to be unlikely to succeed or to be too dangerous,

A particular description of the nature and location of the facilities from which, or the place where the communication is to be intercepted,

A particular description of the type of communication sought to be intercepted, and
The identity, if known, of the person committing the offense and whose communications are to be intercepted, or if that person’s identity is not known, then the information relating to the person’s identity that is known to the applicant.

Wiretap authority is tied to specific communications facilities or locations (including a specific telephone or cell phone), and not individual suspects. So when a previously unknown coconspirator is identified, it is not necessary to cease the eavesdropping nor make application to the court for a new order. (United States v. Reed (9th Cir. 2009) 575 F.3d 900, 910-912.)

A statement of the period of time for which the interception is required to be maintained:

And if the nature of the interception is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter, and

A full and complete statement of the facts concerning all previous applications known to the individual authorizing and to the individual making the application, to have been made to any judge of a state or federal court for authorization to intercept wire, electronic pager, or wire or electronic
communication involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each of those applications.

This requirement may be satisfied by making inquiry of the California Attorney General and the United States Department of Justice and reporting the results of these inquiries in the application.

Note: Use of a wiretap to combat a large conspiracy, given the greater threat to society, allows for the use of greater discretion by the courts to allow the government to use wiretaps. (United States v. McGuire (9th Cir. 2002) 307 F.3rd 1192, 1198.)

Failure to show that all traditional investigative methods have been tried and determined to be inadequate will result in a suppression of any evidence obtained from the resulting wiretaps. (United States v. Gonzalez, Inc. (9th Cir. 2006) 437 F.3rd 854; see 18 U.S.C. § 2518.)

However, law enforcement officials need not exhaust every conceivable investigative technique before seeking a wiretap order. (United States v. Lococo (9th Cir. 2008) 514 F.3rd 860; see also United States v. Rivera (9th Cir. 2008) 527 F.3rd 891; United States v. Reed (9th Cir. 2009) 575 F.3rd 900, 908-910.)

“The necessity for the wiretap is evaluated in light of the government’s need not merely to collect some evidence, but to ‘develop an effective case against those involved in the conspiracy.’” (Id., at p. 909, quoting United States v. Rivera, supra, at p. 902, and
The fact that a pen register could have been used, with its limited value in collecting necessary information, does not mean that the necessity for a wiretap had not been established. “The necessity for the wiretap is evaluated in light of the government’s need not merely to collect some evidence, but to ‘develop an effective case against those involved in the conspiracy.” (United States v. Decoud (9th Cir. 2006) 456 F.3rd 996, 1006-1007; the fact that the informant had been sent to prison, and that a surveillance had been detected, helped to establish the need for a wiretap.)

If the application is for the extension of an order, a statement setting forth the number of communications intercepted pursuant to the original order, and the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain results.

An application for a modification of the original order may be made when there is “probable cause” to believe that the target of a wiretap is using a facility or device that is not subject to the original order.

The modified order is only good for that period that applied to the original order. The application must provide all the information required of the original order and a statement of the results thus far obtained from the interception, or a reasonable explanation for the failure to obtain results.

The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

The fact that the application was made to a “successor judge” designated by the presiding judge
to hear applications if the first-named judge is unavailable did not violate the requirements under this section. (*People v. Munoz* (2001) 87 Cal.App.4th 239, 242.)

A judge must accept a facsimile copy of the signature that is required on an application for a wiretap order.

The original signed document is to be sealed and kept with the application.

**P.C. § 629.51: Definitions:**

“*Wire Communication:*” “(A)n any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of a like connection in a switching station), furnished or operated by any person engaged in providing or operating these facilities for the transmission of communications.”

See also *People v. Von Villas* (1992) 11 Cal.App.4th 175, at p. 224, defining “*wire communication*” as “any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign commerce . . . .”

A phone used during a physical visitation by a prisoner and his or her visitor does not meet the requirements of a “*wire communication,*” not using a line in interstate or foreign commerce. It is therefore not subject to the wiretap restrictions of **P.C. § 631.** (*People v. Santos* (1972) 26 Cal.App.3rd 397, 402.)

But cloned cell phones are included. (*United States v. Staves* (2004) 383 F.3rd 977.)
“Electronic pager communication:” “(A)ny tone or digital display or tone and voice pager communication.

“Electronic cellular telephone communication:” “(A)ny cellular or cordless radio telephone communication.

“Aural Transfer:” “(A) transfer containing the human voice at any point between and including the point of origin and the point of reception.”

The audio portion of a videotape would seem to fall within this definition. (United States v. Shrylock (9th Cir. 2003) 342 F.3rd 948, 977; “The videotapes contained both video and audio portions. The audio portions are governed by the federal wiretap statute, 18 U.S.C. §§ 2510 et seq.”)

P.C. § 629.52: Authority to Issue a Wiretap Order:

Upon application made per P.C. § 629.50 (see above), a judge may enter an ex parte order, as requested or modified, authorizing the interception of;

- Wire,
- Electronic pager, or
- Electronic communication;

When such communication is initially intercepted within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines, on the basis of the facts submitted by the applicant, all of the following:

- There is probable cause to believe that an individual is committing, has committed, or is about to commit, one of the following offenses:

  1. Importation, possession for sale, transportation, manufacture, or sale of controlled substances in violation of H&S §§ 11351, 11351.5, 11352, 11370.6, 11378, 11378.5, 11379, 11379.5, or 11379.6, when:

     The substance contains heroin cocaine, PCP, methamphetamine, or their analogs; and
The substance exceeds ten (10) gallons by liquid volume or three (3) pounds of solid substance by weight,

2. Murder,

3. Solicitation to commit murder,

4. A felony involving a destructive device, per P.C. §§ 18710, 18725, 18715, 18740, 18730, 18745, 18750, 18755, 18720 (formerly, P.C. §§ 12303, 12303.1, 12303.2, 12303.3, 12303.6, 12308, 12309, 12310 or 12312, respectively),

5. Aggravated kidnapping, as specified in P.C. § 209,

6. Any felony violation of P.C. § 186.22 (gang crimes),

7. A felony violation of the offenses involving weapons of mass destruction as described in P.C. §§ 11418, relating to weapons of mass destruction, 11418.5, relating to threats to use weapons of mass destruction, or 11419, relating to restricted biological agents, or

8. An attempt or conspiracy to commit any of the above-mentioned crimes;

- There is probable cause to believe that particular communications concerning the illegal activities will be obtained through that interception, including, but not limited to, communications that may be utilized for locating or rescuing a kidnap victim;

- There is probable cause to believe that the facilities from which, or the place where the wire, electronic pager, or electronic communication are to be intercepted:
Are being used, or are about to be used, in connection with the commission of the offense, or

Are leased to, listed in the name of, or commonly used by the person whose communications are to be intercepted; and

- Normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or reasonably appear to be too dangerous.

“The requirement of necessity is designed to ensure that wiretapping is neither ‘routinely employed as the initial step in criminal investigation’ (United States v. Giordano (1974) 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341) nor ‘resorted to in situations where traditional investigative techniques would suffice to expose the crime.’ (United States v. Kahn (1974) 415 U.S. 143, 153, fn. 12.)” (People v. Leon (2007) 40 Cal.4th 376, 385.)

“(I)t is not necessary that law enforcement officials exhaust every conceivable alternative before seeking a wiretap.” (Ibid.)

The necessity requirement of subdivision (d) of this section (and the similar federal requirement under 18 U.S.C. § 2518(1)(c) & (3)(c)) was met based upon the trial court’s finding that the evidence against the defendant was purely circumstantial, witnesses against the defendant wished to remain anonymous, questioning of the defendant was not likely to produce any additional evidence, and that the defendant was likely to call friends from his jail cell and have them destroy evidence if he discovered that he was the focus of the new murder investigation.
Similarly, where a dangerous conspiracy is being investigated (e.g., the “Montana Freemen”), where infiltration would be dangerous and difficult, and informants were generally uncooperative, this requirement is met. (United States v. McGuire (9th Cir. 2002) 307 F.3rd 1192, 1197.)

But see United States v. Blackmon (9th Cir. 2001) 273 F.3rd 1204, citing United States v. Carneiro (1988) 861 F.2nd 1171, 1181, for the proposition that a conspiracy does not loosen the standard of proof on this issue.

And even when informants are used, a finding that such informants “could not possibly reveal the full nature and extent of the enterprise and its countless, and at times disjointed, criminal tentacles,” satisfied this requirement. (United States v. Shrylock (9th Cir. 2003) 342 F.3rd 948, 975-976; see also United States v. Gomez (9th Cir. 2004) 358 F.3rd 1221.)

It is not necessary that the government prove that it pursued “to the bitter end . . . every non-electronic device.” (Citation). “(T)he adequacy of the showing concerning other investigative techniques is ‘to be tested in a practical and common sense fashion [citation] that does not ‘hamper unduly the investigative powers of law enforcement agents.’” (People v. Leon (2007) 40 Cal.4th 376, 392.)

It was not necessary that investigators have attempted to provide cloned cell phones for defendant’s use as a prerequisite to applying for a wiretap warrant in that monitoring cloned cell phones itself would require a

The necessity for a wiretap is evaluated in light of the government’s need not merely to collect some evidence, but to develop an effective case against the defendants. An “effective case” means “proof beyond a reasonable doubt,” not merely to get an indictment. Where the investigation of a drug-distribution conspiracy was stalled at information obtained from a pen register and trap and trace device, obtaining a series (i.e., 4) of wiretaps was held to be lawful. (*United States v. García-Villalba* (9th Cir. 2009) 585 F.3rd 1223, 1227-1234; rejecting defendant’s argument that by the time a wiretap for a fourth cell phone was obtained, law enforcement was relying upon an impermissible “cascading theory of necessity.”) Examples of factors used to establish a necessity for a wiretap (pp. 1228-1230):

- Pen register and trap and trace device does not reveal the contents of the defendants’ conversations.
- Physical surveillance was impossible due to main defendant living in a rural location.
- Defendants used counter-surveillance techniques.
- A trash search was impossible due to main defendant living in a rural location.
- Search warrants, subpoenas, interviews and arrests would have terminated the investigation before all the coconspirators were found.
- Confidential informants could not be developed.

*Note:* Use of pen registers and trap and trace devices, except maybe when combined with other forms of electronic surveillance,
is *not* enough alone to establish necessity for a wiretap. (*United States v. Garcia-Villalba*, *supra*, at p. 1228, citing *United States v. Gonzalez, Inc.*, (9th Cir. 2005) 412 F.3rd 1102, 1113.)

It is where the intercepted communications were first heard by federal government agents that determines which federal court has jurisdiction for purposes of filing the resulting criminal prosecution, at least under the federal rules; i.e., **18 U.S.C. § 2518(3)**. (*United States v. Luong* (9th Cir. 2006) 471 F.3rd 1107.)

**P.C. § 629.53: Judicial Guidelines:** The Judicial Council may establish guidelines for judges to follow in granting an order authorizing the interception of any wire, electronic pager, or electronic communication.

**P.C. § 629.54: Contents of the Wiretap Order:**

An order authorizing the interception of any wire, electronic digital pager, or electronic cellular telephone communication *shall* specify *all of the following*:

- The identity, if known, of the person whose communications are to be intercepted, or if the identity is not known, then that information relating to the person’s identity known to the applicant,

- The nature and location of the communication facilities as to which, or the place where, authority to intercept is granted,

- A particular description of the type of communication sought to be intercepted, and a statement of the illegal activities to which it relates,

- The identity of the agency authorized to intercept the communications and of the persons making the application, *and*

- The period of time during which the interception is authorized including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.
P.C. § 629.56: Oral Approval in Lieu of Court Order:

Upon the informal application by the Attorney General, Chief Deputy Attorney General, Chief Assistant Attorney General, Criminal Division, or a District Attorney, or a person to act as District Attorney in the District Attorney’s absence, the presiding judge of the Superior Court, or the first available judge designated as provided in P.C. § 629.50, may grant oral approval for an interception, without a court order, if he or she determines all of the following:

- There are grounds upon which an order could be issued under this chapter, and
- There is probable cause to believe that an emergency situation exists with respect to the investigation of an offense enumerated in P.C. § 629.52, and
- There is probable cause to believe that a substantial danger to life or limb exists justifying the authorization for immediate interception of a private wire, electronic digital pager, or electronic cellular telephone communication before an application for an order could with due diligence be submitted and acted upon.

Approval for an interception under this section shall be conditioned upon filing with the judge by midnight of the second full court day after the oral approval, a written application for an order which, if granted consistent with this chapter, shall also recite the oral approval under this subdivision and be retroactive to the time of the oral approval.

P.C. § 629.58: Duration of a Wiretap Order:

No order entered under this chapter shall authorize the interception of any wire, electronic pager, or electronic cellular telephone, or electronic communication for a period longer than:

- Necessary to achieve the objective of the authorization, nor in any event,
• Thirty (30) days.

The 30-day limit on a wiretap begins on the day of the initial interception, or 10 days after the issuance of the wiretap order, whichever comes first.

Extensions of an order may be granted in accordance with P.C. § 629.50 and upon the court making the findings required by P.C. § 629.52.

The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event longer than thirty (30) days.

Every order and extension thereof shall contain a provision that the authorization to intercept shall:

• Be executed as soon as practicable,

• Be conducted so as to minimize the interception of communications not otherwise subject to interception under this chapter, and

• Terminate upon attainment of the authorized objective, or in any event at the time expiration of the term designated in the order or any extensions.

Where the target of the wiretap order is discovered to be using an alias, and changes his name during the life of the order, agents did not fail to “minimize” the interception of conversations not related to the investigation by continuing to eavesdrop on the target while he uses the new name. (United States v. Fernandez (9th Cir. 2008) 527 F.3rd 1247.)

In the event the intercepted communication is in a foreign language, an interpreter of that foreign language may assist peace officers in executing the authorization provided in this chapter, provided that:

• The interpreter has had the same training as any other interceptor authorized under this chapter, and
The interception shall be conducted so as to minimize the interception of communications not otherwise subject to interception under this chapter.

P.C. § 629.60: Progress Reports:

Whenever an order authorizing an interception is entered, the order shall require reports in writing or otherwise to be made to the judge who issued the order:

- Showing the number of communications intercepted pursuant to the original order; and

- A statement setting forth what progress has been made towards achievement of the authorized objective, or

- A satisfactory explanation for its lack of progress, and the need for continued interception.

The judge shall order that the interception immediately terminate if he or she finds that:

- Progress has not been made, and

- The explanation for its lack of progress is not satisfactory, or

- No need exists for continued interception.

The reports shall:

- Be filed with the court at least every ten (10) days, or more frequently if ordered by the court; and

- Be made by any reasonable and reliable means, as determined by the judge.

When a defendant moved to suppress evidence on the grounds the reports required under P.C. § 629.60 were inadequate or untimely, the State had the burden to show there was no error. However, the violation did not contravene a central purpose of California's Presley-Felando-Eaves Wiretap Act of 1988, P.C. §§ 629.50 et seq., or the purpose of the provision was achieved despite
any error. Under that framework, the trial court did not err in denying defendants' motion to suppress wiretap evidence because the wiretaps were obtained legally and minimized. (*People v. Roberts et seq.* (2010) 184 Cal.App.4th 1149.)

**P.C. § 629.61:** Report to Attorney General:

A court order authorizing an interception shall require a report in writing or otherwise to be made to the Attorney General, showing:

- What persons, facilities, places or any combination of these, are to be intercepted; and

- The action taken by the judge on each application.

The report shall be made at the interval that the order may require, but not less than ten (10) days after the order was issued.

The report shall be made by any reasonable and reliable means, as determined by the Attorney General.

The Attorney General may issue regulations prescribing the collection and dissemination of information collected.

The Attorney General shall, upon the request of an individual making an application for an interception order, provide any information known as a result of these reporting requirements, as required by P.C. § 629.50(a)(6).

**P.C. § 629.62:** Annual Report to the Legislature, etc.:

The Attorney General *shall* prepare and submit an annual report to the Legislature, the Judicial Council, and the Director of the Administrative Office of the United States Court on interceptions conducted under the authority of this chapter during the preceding year.

Information for this report shall be provided to the Attorney General by any prosecutorial agency seeking an order pursuant to this chapter.

The report *shall* include *all* of the following data:

- The number of orders or extensions applied for,
- The kinds of orders or extension applied for,
- The fact that the order or extension was granted as applied for, was modified, or was denied,
- The number of wire, electronic pager, and electronic cellular telephone devices that are the subject of each order granted,
- The period of interceptions authorized by the order, and the number and duration of any extensions of the order,
- The offense specified in the order or application, or extension of any order,
- The identity of the applying law enforcement officer and agency making the application and the person authorizing the application,
- The nature of the facilities from which, or the place where communications were to be intercepted,
- A general description of the interceptions made under the order or extension, including:
  - The number of persons whose communications were intercepted.
  - The number of communications intercepted.
  - The percentage of incriminating communications intercepted.
  - The percentage of other communications intercepted, and
  - The approximate nature, amount, and costs of the manpower and other resources used in the interceptions,
- The number of arrests resulting from interceptions made under the order or extension, and the offenses for which arrests were made,
• The number of trials resulting from the interceptions,

• The number of motions to suppress made with respect to the interceptions, and the number granted or denied,

• The number of convictions resulting from the interceptions and the offenses for which the convictions were obtained, and a general assessment of the importance of the interceptions,

• Except with regard to the initial report required by this section, the information required by the preceding five (5) paragraphs (excluding the immediately preceding paragraph about the number of convictions) with respect to orders or extensions obtained in a preceding calendar year,

• The date of the order for service of inventory made pursuant to P.C. § 629.68, confirmation of compliance with the order, and the number of notices sent.

• Other data that the Legislature, the Judicial Council, or the Director of the Administrative Office shall require.

The annual report shall include a summary analysis of the above. The Attorney General may issue regulations prescribing the content and form of the reports required to be filed by a prosecutorial agency.

The Attorney General’s annual report shall be filed no later than April of each year.

The Attorney General shall, upon the request of an individual making an application for an interception order, provide any information known as a result of these reporting requirements that would enable the individual making an application to comply with the requirements of P.C. § 629.50(a)(6).
P.C. § 629.64: Recording, Sealing and Retaining Intercepted Communications:

The contents of any wire or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on any recording media.

The recording of the contents of any wire or electronic cellular telephone communication shall be done in a way that:

- Will protect the recording from editing or other alterations, and
- Will ensure that the audiotape recording can be immediately verified as to its authenticity and originality, and
- Any alteration can be immediately detected.

The monitoring or recording device used shall be of a type, and shall be installed, to preclude any interruption or monitoring of the interception by any unauthorized means.

Immediately upon the expiration of the period of the order, or extensions thereof, the recordings shall be made available to the judge issuing the order.

The recording shall be sealed under the direction of the judge. The presence of the seal, or a satisfactory explanation for the absence of the seal, shall be a prerequisite for the use or disclosure of the contents of any wire or electronic cellular telephone communication or evidence derived therefrom under P.C. § 629.78, below.

See United States v. McGuire (9th Cir. 2002) 307 F.3rd 1192, 1201-1205, where the FBI in a federal wiretap provided satisfactory reasons for delaying the sealing where they had the court’s permission, the judge was in another district, and they took steps to protect the recordings pending the sealing.

Information received from a pen register and/or a trap and trace device, recording “call data content” (i.e., “CDC,” data about call origination, length, and time of call), are not protected by the wiretap
statutes. There is no expectation of privacy in such information, per *Smith v. Maryland* (1979) 442 U.S. 735 [61 L.Ed.2nd 220]. (*United States v. Reed* (9th Cir. 2009) 575 F.3rd 900, 914-917.)

Custody of the recordings *shall* be where the judge orders.

Recordings *shall* be retained for a minimum of ten (10) years, and shall be destroyed thereafter only upon an order of the issuing or denying judge.

Duplicate recordings may be made for use or disclosure pursuant to P.C. §§ 629.74 and 629.76 (below) for investigations.

The sealing order may be oral or written, and the physical sealing of the tapes need not be done in the judge’s presence. (*People v. Superior Court [Westbrook]* (1993) 15 Cal.App.4th 41, 47-51; discussing former P.C. § 629.14, now § 629.64.)

**P.C. § 629.66:** Application and Orders to be Sealed:

The application and orders made pursuant to this chapter *shall* be:

- Sealed by the judge.
- Kept where the judge orders.
- Disclosed only upon a showing of *good cause* before a judge.
- may be made to the defendant and at trial.
- Retained for ten (10) years, and thereafter destroyed only upon order of the issuing or denying judge.

**P.C. § 629.68:** Notice to Parties to Intercepted Communications:

Within a reasonable time, but no later than ninety (90) days:

- After termination of the period of an order or extensions thereof; *or*

- After filing of an application for an order of approval under P.C. § 629.56 which has been denied;
The issuing judge shall issue an order that shall require the requesting agency to serve:

- Persons named in the order or application, and
- Other known parties to intercepted communications;

An inventory which shall include notice of all of the following:

- The fact of the entry of the order, and
- The date of the entry and the period of authorized interception, and
- The fact that during the period wire, electronic digital pager, or electronic communication, cellular telephone communications were or were not intercepted.

Upon the filing of a motion, the judge may, in his or her discretion, make available to the person or his or her counsel for inspection the portions of the intercepted communications, applications and orders that the judge determines to be in the interest of justice.

On an ex parte showing of good cause to a judge, the serving of the inventory required by this section may be postponed.

The period of postponement shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted.

**P.C. § 629.70: Discovery Prerequisite to Use in Evidence:**

A criminal defendant shall be notified that he or she was identified as the result of an interception, such notice being before a plea of guilty or at least ten (10) days before trial, hearing or proceeding in the case other than an arraignment or grand jury proceeding.

The defendant is also entitled to a copy of all recorded interceptions, a copy of the court order, and accompanying application and monitoring logs, at least ten (10) days
before trial, hearing or proceeding in the case other than a grand jury proceeding.

As a prerequisite to admissibility into evidence or other disclosure in any trial, hearing, or other proceeding, except a grand jury proceeding, of the contents of any intercepted wire, electronic pager, or electronic cellular telephone communication, or any evidence derived there from, each party shall be furnished not less than ten (10) days before such trial, hearing, or proceeding, with:

- A transcript of the contents of the interception, and
- A copy of all recorded interceptions, and
- A copy of the court order, accompanying application, and monitoring logs.

The ten (10) day period may be waived by the judge if he or she finds that it was not possible to furnish the party with the above information ten days before trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving that information.

The court may issue an order limiting disclosure to the parties upon a showing of good cause.

**P.C. § 629.72: Motions to Suppress:**

*Any person* in any trial, hearing or proceeding may move to suppress:

- Some or all of the contents of any intercepted wire, electronic pager, or electronic communication, or
- Any evidence derived there from;

Only on the basis that the contents or evidence were obtained in violation of:

- The **Fourth Amendment,** or
- The terms of this Chapter.

This Chapter having been enacted subsequent (1995-1996) to the passage of
Proposition 8 (1982), and by a two/thirds vote of the Legislature, makes effective this statutory exclusionary rule. (People v. Leon (2005) 131 Cal.App.4th 966, 977-978.)

A suppression motion shall be made, determined, and subject to review in accordance with the procedures set forth in P.C. § 1538.5.

As such, in order to warrant an evidentiary hearing and the cross-examining of the affiant to a wiretap search warrant, the defendant must first meet the requirements of Franks v. Delaware (1978) 438 U.S. 154 [57 L.Ed.2nd 667]. I.e., defendant must first make a substantial preliminary showing that a false statement was deliberately or recklessly included in the affidavit submitted in support of the wiretap application, and that such false statement was material to the court’s finding of necessity. (United States v. Shrylock (9th Cir. 2003) 342 F.3rd 948, 976-977.)

“Evidence obtained from an unlawful wiretap may only be suppressed if the wiretap violated the United States Constitution or a procedure intended to play a central role in the legislative scheme and the purpose of that procedure was not achieved in some other manner.” (People v. Jackson (2005) 129 Cal.App.4th 129, 148-153; finding also that California’s Truth in Evidence provisions (i.e., Proposition 8) do not prevent the suppression of evidence obtained in violation of the wiretap statutes. Pp. 152-153.)

Case law:

An officer’s “good faith” is not grounds for denying a defendant’s motion to suppress based on a violation of the wiretap statutes. (People v. Jackson, supra, at pp. 153-160.)

Failure to raise a search issue or one dealing with compliance with the statutory requirements of a wiretap waive (i.e., “forfeit”) that issue for purposes of appeal. (People v. Davis (2008) 168 Cal.App.4th 617, 625-632.)
P.C. § 629.74: Disclosure to Other Law Enforcement Agencies:

The Attorney General, any Deputy Attorney General, District Attorney, Deputy District Attorney, or any peace officer, who by any means authorized by this Chapter has obtained knowledge of the contents of any wire, electronic digital pager, or electronic cellular telephone communication, or evidence derived therefrom, may disclose the contents to:

- Anyone referred to in this section (above),
- Any investigative or law enforcement officer defined in 18 U.S.C. § 2510(7), or
- Any judge or magistrate;

To the extent disclosure is:

- Permitted per P.C. § 629.82, and
- Appropriate to the proper performance of the official duties of the individual making or receiving the disclosure.

No other disclosure, except to a grand jury, of intercepted information is permitted prior to a public court hearing by any person regardless of how the person may have come into possession thereof.

P.C. § 619.76: Use of Intercepted Information:

The Attorney General, any Deputy Attorney General, District Attorney, Deputy District Attorney, or any peace officer or federal law enforcement officer;

Who, by means authorized by this Chapter, has obtained knowledge of the contents of any wire, electronic pager, or electronic cellular communication, or evidence derived there from;

May use the contents or evidence to the extent the use:

- Is appropriate to the proper performance of his or her official duties; and
Is permitted by P.C. § 629.82.

P.C. § 629.78: Disclosure of Intercepted Information in Testimony:

Any person who has received by any means authorized by this Chapter any information concerning a wire, electronic pager, or electronic cellular telephone communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Chapter;

May, per P.C. § 629.82, disclose the contents of that communication or derivative evidence;

While giving testimony under oath or affirmation in any criminal court proceeding or in any grand jury proceeding.

P.C. § 629.80: Privileged Communications:

No otherwise privileged communication intercepted in accordance with this Chapter shall lose its privileged character.

Note: See Evid. Code, §§ 900 et seq. for the statutory privileges.

When a peace officer or federal law enforcement officer, while engaged in the intercepting of wire, electronic pager, or electronic communication pursuant to this Chapter, intercepts a privileged communication;

- He or she shall immediately cease the interception for at least two (2) minutes.

- After two (2) minutes, interception may be resumed for up to thirty (30) seconds during which time the officer shall determine if the nature of the communication is still privileged.

- If still privileged, the officer shall again cease interception for at least two (2) minutes.

- After two (2) minutes, the officer may again resume interception for up to thirty (30) seconds to redetermine the nature of the communication.
• The officer shall continue to go online and offline in this manner until the time that the communication is no longer privileged or the communication ends.

The recording device shall be metered so as to authenticate upon review that interruptions occurred as set for in this section.

See People v. Reyes (2009) 172 Cal.App.4th 671, 681-687, noting the minimization requirements under 18 U.S.C. § 2518(5) and discussing the “standing” of one of the defendants to raise the issue even though it was not her phone that was tapped, and United States v. McGuire (9th Cir. 2002) 307 F.3rd 1192, 1199-1203, discussing the “minimization” of intercepted fax communications under the federal statutes.

What is required in the way of “minimization” depends upon the circumstances. The minimization requirement is lessened when there is uncertainty as to the scope of the conspiracy, or when co-conspirators are talking. (People v. Reyes, supra.)

P.C. § 629.82: Interception of Communications Relating to Crimes Other Than Those Specified in the Authorization Order:

For crimes listed in P.C. § 629.52(a), or listed in P.C. § 667.5(c) as a “violent felony:”

If a peace officer or federal law enforcement officer, while engaged in the intercepting of wire, electronic digital pager, or electronic communication pursuant to this Chapter;

Intercepts wire, electronic pager, or electronic communication relating to crimes other than those specified in the order of authorization, but which are listed in P.C. § 629.52(a), or listed in P.C. § 667.5(c) as a “violent felony:”

• The contents thereof, and evidence derived therefrom, may be disclosed or used as provided in P.C. § 629.74 and 629.76; and

• The contents thereof, and evidence derived therefrom, may be used under P.C. § 629.78
when authorized by a judge if the judge
finds, upon subsequent application, that the
contents were otherwise intercepted in
accordance with the provisions of this
Chapter.

The “subsequent application” shall be made as soon
as practicable.

See 18 U.S.C. § 2517(5) for federal rules relative to
the disclosure of intercepted communications
involving offense other than those specified in a
federal judge’s authorization or approval.

For other than P.C. § 629.52(a) crimes or P.C. § 667.5(c)
vieulent felonies:

If a peace officer or federal law enforcement
officer, while engaged in the intercepting of wire,
electronic pager, or electronic communication
pursuant to this Chapter;

Intercepts wire, electronic pager, or electronic
communication relating to crimes other than those
specified in the order of authorization and which are
not listed in P.C. § 629.52(a) or P.C. § 667.5(c):

• The contents thereof, and evidence derived
therefrom, may not be disclosed or used as
provided in P.C. § 629.74 and 629.76,

• Except to prevent the commission of a
public offense.

• The contents thereof, and evidence derived
therefrom, may not be used under P.C. §
629.78, except where:

The evidence was obtained through
an independent source, or

The evidence would have been
inevitably discovered anyway, and

The use is authorized by a judge who
finds that the contents were
intercepted in accordance with the provisions of this Chapter.

Right to Notice and Copy: The use of the contents of an intercepted wire, electronic pager, or electronic cellular telephone communication relating to crimes other than those specified in the order of authorization to obtain a search or arrest warrant entitles the person(s) named in the warrant to:

- Notice of the intercepted wire, electronic digital pager, or electronic cellular telephone communication; and

- A copy of the contents thereof that were used to obtain the warrant.

Section 629.82(a) extends the “plain view” doctrine to information communicated by someone other than the person identified in the wiretap order about a crime other than the one which justified the tap. (People v. Jackson (2005) 129 Cal.App.4th 129, 145.)

P.C. § 629.84: Criminal Punishment for Violations:

Any violation of this Chapter is punishable by:

- A fine not exceeding two thousand five hundred dollars ($2,500.00), or

- Imprisonment in the county jail not exceeding one year, or

- Imprisonment in the state prison for 16 months, 2 or 3 years (see P.C. § 18), or

- Both the above fine and the county jail or state prison imprisonment.

P.C. § 629.86: Civil Remedies for Unauthorized Interceptions:

Any person whose wire, electronic pager, or electronic cellular telephone communication is intercepted, disclosed, or used in violation of this Chapter shall have the following civil remedies:
• A civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use the communications.

• Be entitled to recover, in that action, all of the following:
  - Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars ($100.00) a day for each day of violation, or one thousand ($1,000.00), whichever is greater; and
  - Punitive damages; and
  - Reasonable attorney’s fees and other litigation costs reasonably incurred.

A good faith reliance on a court order is a complete defense to any civil or criminal action brought under this Chapter, or under Chapter 1.5 (P.C. §§ 630 et seq.; Eavesdropping), or any other law.

P.C. § 629.88: Effects of Other Statutes:

Nothing in P.C. §§ 631 (Wiretapping), 632.5 (Intercepting or Receiving Cellular Radio Telephone Communications), 632.6 (Intercepting or receiving Cordless Telephone Communications), or 632.7 (Recording Communications Via Cellular Radio, Cordless, or Landline Telephone Without Consent of All Parties) shall be construed as:

• Prohibiting any peace officer or federal law enforcement officer from intercepting of any wire, electronic digital pager, or electronic cellular telephone communication pursuant to an order issued in accordance with the provisions of this Chapter, or

• Rendering inadmissible in any criminal proceeding in any court or before any grand jury any evidence obtained by means of an order issued in accordance with the provisions of this Chapter.
Nothing in P.C. § 637 (Wrongful disclosure of Telegraphic or Telephonic Communication) shall be construed as prohibiting the disclosure of the contents of any wire, electronic pager, or electronic cellular telephone communication obtained by any means authorized by this Chapter.

Nothing in this Chapter shall apply to any conduct authorized by P.C. § 633 (Exceptions for Law Enforcement; Eavesdropping).

P.C. § 629.89: Covert Residential Entries Prohibited:

No order issued pursuant to this Chapter shall either directly or indirectly authorize entry into or upon the premises of a residential dwelling, hotel room, or motel room, for installation or removal of any interception device or for any other purpose.

Notwithstanding that this entry is otherwise prohibited by any other section or code, this Chapter expressly prohibits covert entry of a residential dwelling, hotel room, or motel room to facilitate an order to intercept a wire, electronic digital pager, or electronic communication.

P.C. § 629.90: Order for Cooperation of Public Utilities, Landlords, Custodians and Others:

An order authorizing the interception of wire, electronic pager, or electronic cellular telephone communication shall direct, upon request of the applicant, that:

- A public utility engaged in the business of providing communications services and facilities, or
- A landlord, or
- A custodian, or
- Any other person;

Furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services the person or entity is providing the person whose communications are to be intercepted.
Any such person or entity furnishing facilities or technical assistance shall be fully compensated by the applicant for the reasonable costs of furnishing the facilities and technical assistance.

**P.C. § 629.91: Civil or Criminal Liability; Reliance Upon Court Order:**

A good faith reliance on a court order issued in accordance with this Chapter by any public utility, landlord, custodian, or any other person furnishing information, facilities, and technical assistance as directed by the order;

Is a complete defense to any civil or criminal action brought under this Chapter, or Chapter 1.5 (P.C. §§ 630 et seq.), or any other law.

**P.C. § 629.92: Authority to Conform Proceedings and Order to Constitutional Requirements:**

Notwithstanding any other provision of law, *any court* to which an application is made in accordance with this Chapter *may* take any evidence, make any finding, or issue any order required to conform the proceedings or the issuance of any order of authorization or approval to the provisions of:

- The Constitution of the United States, or
- Any law of the United States, or
- This Chapter.

**P.C. § 629.94: Training and Certification of Law Enforcement Officers:**

The Commission on “Peace Officer Standards and Training” (“POST”), in consultation with the Attorney General, shall establish a course of training in the legal, practical, and technical aspects of the interception of private wire, electronic digital pager, or electronic communication and related investigative techniques.

The Attorney General *shall* set minimum standards for certification and periodic recertification* of the following persons as eligible to apply for orders authorizing the interception of private wire, electronic digital pagers, or electronic communication, to conduct the interceptions, and
to use the communications or evidence derived from them in official proceedings:

- Investigative or law enforcement officers; and

- Other persons, when necessary, to provide linguistic interpretation who are designated by the Attorney General, Chief Deputy Attorney General, or Chief Assistant Attorney General, Criminal Law Division, or the District Attorney, and are supervised by an investigative or law enforcement officer.

POST may charge a reasonable enrollment fee for those students who are employed by an agency not eligible for reimbursement by the Commission to offset the costs of the training.

The Attorney General may charge a reasonable fee to offset the costs of certification.

*Note: Recertification has been set for every five (5) years.

**P.C. § 629.96:** Severability:

If any provision of this Chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the Chapter, and the application of its provisions to other persons or circumstances, shall not be affected thereby.

**P.C. § 629.98:** Automatic Repeal:

This Chapter shall remain in effect only until January 1, 2015, and as of that date is repealed.

**P.C. § 632:** Eavesdropping, Compared:

Separate from, and in addition to, the restrictions on wiretapping, is the issue of “eavesdropping” on the “confidential communications” of others (effective 11/8/67).

See *People v. Ratekin* (1989) 212 Cal.App.3rd 1165: Although **P.C. §§ 631 and 632**, which prohibit wiretapping and eavesdropping, respectively, envision and describe the use of same or similar equipment to intercept
communications, the manner in which such equipment is used is clearly distinguished and mutually exclusive: “Wiretapping” is intercepting communications by an unauthorized connection to the transmission line whereas “eavesdropping” is interception of communications by the use of equipment which is not connected to any transmission line.

**Limitations on the Use of Search Warrants:**

*Newsroom Searches:*

P.C. § 1524(g) provides that; “No warrant shall issue for any item described in section 1070 of the Evidence Code.”

Evid. Code § 1070 is the so-called “newsman’s privilege” section and lists “unpublished information” such as “notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public” as privileged.

Therefore, such items may not be the subject of a search warrant.

This is not a federal constitutional requirement. Such searches are legal except as prohibited by state law. *(Zurcher v. The Stanford Daily (1978) 436 U.S. 547 [56 L.Ed.2nd 525].)*

This does not protect from search warrants other evidentiary items and contraband, as listed in P.C. § 1524(a)(1) through (8), where there is probable cause to believe the item sought is in a newsroom.

*Searches of, and on, Indian Tribal Property:*

Search Warrants:

The Ninth Circuit Court of Appeal initially ruled that use of a search warrant to seize “uniquely tribal property on tribal land” is a violation of Indian sovereignty, in a civil suit filed pursuant to 42 U.S.C. § 1983, and therefore illegal. *(Bishop Paiute Tribe v. County of Inyo (9th Cir. 2002) 275 F.3rd 893.)*

The Court reasoned that seizure of Indian casino employee records in a welfare fraud case was *not*
authorized by Public Law 280 (18 U.S.C. § 1162(a)), which gave selected states (including California) jurisdiction over criminal offenses committed by or against individual Indians.

However, the United States Supreme Court vacated the decision in this case finding that an Indian tribe is not a “person,” as required by 42 U.S.C. § 1983, and thus could not legally file a civil suit alleging a violation of their civil rights under authority of this section. The case was remanded it back for a determination whether there is some other legal basis for Indian tribes to challenge the execution of a search warrant on tribal property. (Inyo County v. Paiute-Shona Indians (2003) 538 U.S. 701 [155 L.Ed.2nd 933].)

Applicability of the Fourth Amendment:

As for Indian reservations outside of California (i.e., Arizona in this case), it has been held that the Fourth Amendment does not directly govern the conduct of tribal governments. Rather, the “Indian Civil Rights Act” (i.e., “ICRA”) applies instead. However, because the ICRA contains a provision regulating tribal law enforcement with language identical to that contained in the Fourth Amendment (see 25 U.S.C. § 1302(2)), the same legal reasoning as used in enforcing the Fourth Amendment applies to Indian tribes as well. (United States v. Becerra-Garcia (9th Cir. 2005) 397 F.3rd 1167.)

California Indian law, however, involves the so-called “Public Law 280,” which calls for different standards. Arguably, therefore, Fourth Amendment standards (in principle, if not in the letter of the law) are applicable. But, see below.

This same reasoning was used to find a search by California Indian tribal officers (Amador County) to be illegal and subject to an Exclusionary Rule. Although the Fourth Amendment did not apply to the Indian law enforcement officers, 25 U.S.C. § 1302(2) and the Fourteenth Amendment’s due process clause mandated the suppression of evidence which was the product of an unlawful search of a vehicle on an Indian reservation. (People v. Ramirez (2007) 148 Cal.App.4th 1464.)
Jurisdictional Issues:

The states have exclusive criminal jurisdiction over crimes committed on Indian land between non-Indians, as well as victimless crimes committed by non-Indians. (See United States v. McBratney (1882) 104 U.S. 621 [26 L.Ed. 869]; Oliphant v. Suquamish Indian Tribe (1978) 435 U.S. 191 [55 L.Ed.2nd 209]; see also People v. Ramirez, supra., at p. 1475, fn. 9.)

California has assumed exclusive jurisdiction over other crimes committed by or against Indians on Indian land. (People v. Ramirez, supra., at p. 1475, fn. 9; 18 U.S.C. § 1162.)

Search of Unauthorized Cell Phone Recovered at CDCR:

P.C. § 4576: CDCR (California Department of Corrections and Rehabilitation) shall not access data or communications that have been captured using available technology from the unauthorized use of a wireless communication device except after obtaining a search warrant.

Retention of the Documents: A sealed affidavit (per People v. Hobbs (1994) 7 Cal.4th 948.) may be retained by a law enforcement agency only upon a five-part showing:

1. The disclosure would impair further investigation of criminal conduct, or endanger the safety of a confidential informant or the informant’s family;

2. Security procedures at the court clerk’s office are inadequate to protect the affidavit against disclosure;

3. The security procedures at the law enforcement agency are sufficient to protect the affidavit against disclosure;

4. The law enforcement agency has procedures to ensure the affidavit is retained for 10 years (permanently in capital cases) after the final disposition of the case, pending further order of the court (see Gov’t. Code § 68152(j)); and

5. The magistrate has made a sufficient record of the documents reviewed, including the sealed materials, to permit identification of the original sealed affidavit or to permit reconstruction of the affidavit.
(People v. Galland (2008) 45 Cal.4th 354; also finding that the loss of the affidavit did not invalidate the warrant when “other evidence may be presented to establish the fact that an affidavit was presented, as well as its contents.”)

Mechanics of Preparation:

Use a Deputy District Attorney to at least review and approve the warrant and affidavit “for legal sufficiency,” if not to assist in the actual preparation. Aside from the benefits of having someone else proofread the warrant and affidavit, this also adds to the “good faith” argument should the warrant later be found to be lacking in probable cause. (See People v. Camarella (1991) 54 Cal.3rd 592, 602-607.)

Collect all reports, necessary physical descriptions of the place to be searched and the property to be seized, exhibits, etc., prior to beginning the preparation.

Make sure all exhibits are labeled and attached to the warrant affidavit, and are “incorporated by reference” in the affidavit.

Keep the warrant and affidavit separate.

The suspect(s) should later be allowed to read the warrant with a copy being left at the place searched, although this is not required by state law. The affidavit is not shown to the suspect(s) nor left at the scene. (People v. Calabrese (2002) 101 Cal.App.4th 79.)

Federal rules, as interpreted by the Ninth Circuit Court of Appeal, are to the contrary, mandating that a copy of the warrant be shown to, and left with, the subject whose property is being searched in all cases. (See Ramirez v. Butte Silver Bow County (9th Cir. 2002) 298 F.3rd 1022; and Federal Rules of Criminal Procedure, Rule 41(d)) (See “Leaving a Copy of the Warrant, Affidavit, and/or Receipt and Inventory,” below)

Leave a copy of the “Receipt and Inventory” at the scene. (P.C. § 1535)

The magistrate will ask the affiant(s) to swear to the truth of the affidavit.

The magistrate will sign the affidavit and the warrant.
Service and Return:

A search warrant is directed to “any peace officer” for service. (P.C. § 1529)

See “Who May Serve,” below.

Necessity to Serve: A search warrant is not an invitation that officers can choose to accept or reject. It is an order of the court based on probable cause which must be executed. (People v. Fisher (2002) 96 Cal.App.4th 1147; search warrant for marijuana executed despite defendant’s presentation of proof at the scene that he was legally entitled to possess marijuana pursuant to H&S § 11362.5, California’s “Compassionate Use Act;” Proposition 215.)

However, it is expected that officers will exercise some discretion in avoiding the taking of excessive, cumulative property, and unnecessary destructive behavior, in executing a search warrant. (San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose (9th Cir. 2005) 402 F.3rd 962.)

Night Service: Search warrants must be served between 7:00 a.m. and 10:00 p.m., absent an endorsement by the magistrate for night service. (P.C. § 1533)

“Night service” must be supported by “good cause,” i.e., some articulable reason why service cannot wait until morning. (See “Nighttime Searches,” above.)

Note: Although typically, night service becomes an issue when executing a search warrant at a residence, the statute does not limit the necessity for a night service endorsement to residences. When a search warrant specifies a person, vehicle or any other container to be searched, execution of such a warrant at night probably also must be justified in the affidavit and approved by the magistrate.

Executing a search warrant “at night” without authorization, at least if no one is home, will not result in the suppression of any evidence. (Tidwell v. Superior Court (1971) 17 Cal.App.3rd 780, 787.)

In-County Service: A judge can issue a warrant to be served anywhere in the county in which he or she is sitting. (People v. Smead (1985) 175 Cal.App.3rd 1101.)
Out-of-County Service: Search warrants may be issued for, and served, out-of-county so long as it relates to an offense that can be prosecuted in the issuing magistrate’s county. (*People v. Ruster* (1976) 16 Cal.3d 690; *People v. Fleming* (1981) 29 Cal.3d 698, 707; *People v. Easely* (1983) 34 Cal.3d 858, 869-870; *People v. Ruiz* (1990) 217 Cal.App.3d 574.)

The issuing magistrate must merely have *probable cause* to believe that the case is triable in his or her county. (*People v. Easely*, supra.)

P.C. § 1524(j) provides statutory authority for a magistrate to issue a search warrant to be executed in a different county where the alleged offense(s) include a violation of P.C. § 530.5 (Identify Theft), and the victim resides in the issuing magistrate’s county.

Even though the issuing magistrate is later determined to not have jurisdiction over a crime for which he issues a warrant (i.e., it is later discovered that the alleged crime is not triable in the magistrate’s county), “good faith” may save the improperly issued out-of-county warrant. (*People v. Ruiz*, supra; *People v. Galvan* (1992) 5 Cal.App.4th 866; *People v. Dantzler* (1988) 206 Cal.App.3d 289.)

Out-of-State Crimes: A California judge may issue a search warrant for a location within his or her county to search for evidence located within the county relevant to a crime committed in another state. (*People v. Kraft* (2000) 23 Cal.4th 978.)

It is not a legal requirement that law enforcement authorities in the foreign state have requested, or even be aware of, the search warrant. (*Ibid.*)

Who May Serve: Only a “peace officer” (with exceptions as noted below), as listed on the face of the warrant (i.e., “any peace officer”), may lawfully serve a search warrant, although the peace officer may be assisted by others. (P.C. §§ 1529, 1530)

While the affiant need not necessarily be a sworn peace officer (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1054-1055.), the person executing the warrant must be.

Exceptions: There are some exceptions to the general rule that the person serving a search warrant must be a peace officer:

P.C. § 830.13: Persons listed below who are not “peace officers” may exercise the power to serve warrants as
specified in P.C. §§ 1523 & 1530, and 830.11 during the course and within the scope of their employment, if they receive a course in the exercise of that power pursuant to P.C.§ 832.

Subd. (a)(1): Persons employed as investigators of an auditor-controller or director of finance of any county, or persons employed by a city and county who conduct investigations under the supervision of the controller of the city and county, who are regularly employed and paid in that capacity, provided that the primary duty of these persons shall be to engage in investigations related to the theft of funds or the misappropriation of funds or resources, or investigations related to the duties of the auditor-controller or finance director as set forth in Gov’t. Code §§ 26880 et seq., 26900 et seq., 26970 et seq., and 26980 et seq.

Subd. (a)(2): Persons employed by the Department of Justice as investigative auditors, provided that the primary duty of these persons shall be to investigate financial crimes. Investigative auditors shall only serve warrants for the production of documentary evidence held by financial institutions, Internet service providers, telecommunications companies, and third parties who are not reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence for which the warrant is requested.

V.C. § 21100.4(a)(1): A “designated local transportation officer,” for the purpose of seizing and causing the removal of a vehicle operated as a taxicab or other passenger vehicle for hire upon establishing in an affidavit reasonable cause to believe that said vehicle is being operated in violation of licensing requirements adopted by a local authority under V.C. § 21100(b).

A “designated local transportation officer” means any local public officer employed by a local authority to investigate and enforce local taxicab and vehicle for hire laws and regulations.

Federal criminal investigator and federal law enforcement officers are not California peace officers. (See P.C. 830.8(a))
It is permissible for a burglary victim to accompany the searching officers and point out items stolen from him. (*People v. Superior Court* [Meyers] (1979) 25 Cal.3d 67; *People v. Superior Court* [Moore] (1980) 104 Cal.App.3d 1001.)

It is also lawful to use a police dog trained to detect narcotics. (See *People v. Russell* (1987) 195 Cal.App.3d 186.)

However, members of the news media, or any other third party not necessary to the execution of the warrant, must not be allowed to enter a suspect’s private residence. To allow such persons to accompany the searching officers is a Fourth Amendment violation. (*Wilson v. Layne* (1999) 526 U.S. 603, 614 [143 L.Ed.2d 818, 830]; *Hanlon v. Berger* (1999) 526 U.S. 808 [143 L.Ed.2d 978].)

**Knock and Notice:**

*General Rule:* Any time a police officer makes entry into the residence of another to arrest (P.C. § 844), with or without an arrest warrant, or to serve a search warrant (P.C. § 1531), he must first:

- Knock.
- Identify himself as a police officer.
- State his purpose (e.g., serving an arrest warrant).
- Demand Entry.


*Note:* P.C. § 844 is not limited to law enforcement officers, imposing these requirements on a private person as well, “if the offense is a felony.”

Knock and notice requirements apply to entries for “investigative purposes” as well, although not coming within the provisions of P.C. §§ 844 or 1531. (*People v. Miller* (1999) 69 Cal.App.4th 190, 201.)

Knock and notice requirements also apply to entries made for purposes of conducting a Fourth Waiver search. (*People v. Constancio* (1974) 42 Cal.App.3d 533, 542; *People v. Lilienthal* (1978) 22 Cal.3d 891, 900; *People v.
The federal equivalent, most often referred to as “knock and announce,” is contained in 18 U.S.C. § 3109.

Purpose: The primary purpose of the rule is to avoid violent confrontations by giving the occupants the time and opportunity to peaceably open the door and admit the officers. (People v. Peterson (1973) 9 Cal.3rd 717, 723; Duke v. Superior Court (1969) 1 Cal.3rd 314, 321.) There are other purposes, as well:

“The purposes and policies underlying section 844 are fourfold: (1) the protection of the privacy of the individual in his home [citations]; (2) the protection of innocent persons who may also be present on the premises where an arrest is made [citation]; (3) the prevention of situations which are conducive to violent confrontations between the occupant and individuals who enter his home without proper notice [citations]; and (4) the protection of police who might be injured by a startled and fearful householder.” (People v. King (1971) 5 Cal.3rd 458, 464, fn. 3; People v. Murphy (2005) 37 Cal.4th 490, 496.)

When compliance does not serve to satisfy the purposes behind the knock and notice requirements, failing to comply with those requirements may not be a violation of the Constitution. (Martin v. City of Oceanside (9th Cir. 2004) 360 F.3rd 1078, 1083-1084; noting that: “The prophylactic purpose of the rule is not served where the occupants of the home know that it is the police knocking at the door and simply leave the area and choose not to answer.”)

Problem: Does this not also give the occupants an opportunity to destroy evidence, arm themselves, and/or escape? Yes! But, the Legislature and the courts, in balancing the interests, have determined that warning the occupants that it is law enforcement that is making entry, and allowing time for them to open the door peaceably, is the safer alternative in most cases. (Duke v. Superior Court, supra.)
Exceptions:

**Businesses:** The rule does not apply to the entry of a business that is open to the public. *(People v. Lovett* (1978) 82 Cal.App.3rd 527, 532.)

Inner doors of a business are also not protected, at least after the owners have been contacted and informed as to what the officers are doing. *(People v. Pompa* (1989) 212 Cal.App.3rd 1308, 1312.)

An exception might be someone’s locked inner office where a higher expectation of privacy is being exhibited. *(People v. Lee* (1986) 186 Cal.App.3rd 743, 750.)


But see *People v. Webb* (1973) 36 Cal.App.3rd 460, expressing the minority opinion that, so long as closed, the rule does apply to inner doors.

**Refusal:** If the occupants do not allow the officers to enter, the police may make a forcible entry.

**Implied Refusal:** “Refusal” need not necessarily be express. Waiting a reasonable time with no response will justify a forced entry. After a reasonable time, the officers may assume they are being denied entry and make a forcible entry. *(People v. Gallo* (1981) 127 Cal.App.3rd 828, 838.)

Note that a refused entry is not one of the listed statutory prerequisites under P.C. § 844. Therefore, a refusal is not an element necessary to prove compliance with a warrantless entry done for the purpose of affecting an arrest. *(People v. Schmel* (1975) 54 Cal.App.3rd 46, 50-51.)
How long constitutes a “reasonable time” to wait depends upon the circumstances, (People v. Trujillo (1990) 217 Cal.App.3rd 1219, 1226.), taking into consideration the size of the house, the time of day, any perceived exigencies, etc.

**Rule of Thumb:** For most homes, most courts are satisfied with approximately 30 seconds.

Five seconds is definitely *not* long enough. ([United States v. Granville](9th Cir. 2000) 222 Fd.3rd 1214.)

Fifteen to twenty seconds was not enough to satisfy the statute, under the circumstances of [People v. Hoag](2000) 83 Cal.App.4th 1198, but was not so aggravated as to be a constitutional violation. (See below)

But twenty to thirty seconds was found to be enough when entering a small apartment (800 square feet) in the early evening, knowing three persons were home and having some reason to fear that defendant might be dangerous. ([United States v. Chavez-Miranda](9th Cir. 2002) 306 F.3rd 973.)

Most recently, the U.S. Supreme Court upheld a 15 to 20 second wait, noting that the more important factor is the nature of the exigency, as opposed to the size of the residence. Where the officers are concerned with the destruction of a controlled substance, which can be accomplished in a matter of seconds, officers need not wait as long as they might have to under circumstances where physical property is the subject of the search, or the time it takes a person to come to the door is of more concern. ([United States v. Banks](2003) 540 U.S. 31 [157 L.Ed.2nd 343].)

The Court also held that the fact that property must be damaged (e.g., the door) to gain entry does not require a corresponding heightened exigency to justify a forced entry. ([Id.](at p. 37 [157 L.Ed.2nd at p. 355]; citing [United States v Ramirez](1998) 523 U.S. 65, 70-71 [140 L.Ed.2nd 191].)
Officers were found to have waited long enough when 25 to 35 seconds passed before entering the garage, and another 30 second passed before entering the house, in a narcotics-related case, even though the entry was at 7:00 a.m.  (*People v. Martinez* (2005) 132 Cal.App.4th 233, 243-245.)

**Exigent Circumstances:** If the officers hear noises or see movement from inside indicating that suspects are escaping, evidence is being destroyed, or the occupants are arming themselves, or any other circumstance which reasonably indicates to the officers that waiting for an occupant to open the door would be a futile act, will compromise the collection of evidence, or unnecessarily risk the safety of the officers or others, then an immediate forcible entry may be made.  (*People v. Maddox* (1956) 46 Cal.2nd 301, 306; hearing retreating footsteps inside.)

See also *People v. Tribble* (1971) 4 Cal.3rd 826, at p. 833: Failing to comply with the “knock and notice” rules is excused, “if the specific facts known to the officer before his entry are sufficient to support his good faith belief that compliance will increase his peril, frustrate the arrest, or permit the destruction of evidence.”

**Exigent circumstances** will be found under any one of three types of circumstances: When officers have a “reasonable suspicion” that knocking and announcing their presence, under the particular circumstances, it would:

- Be dangerous;
- Futile; or
- Inhibit the effective investigation of the crime, such as by allowing the destruction of evidence.


It need only be shown that the officer had an articulable “reasonable suspicion” justifying such an exigent circumstance to excuse compliance with knock and notice. (*Richards v. Wisconsin*, supra; *Hudson v. Michigan* (2006) 547 U.S. 586, 595-596 [165 L.Ed.2nd 56].)

this, where the officers knocked and announced their presence, and forcibly entered after a reasonable suspicion of exigency had ripened, their entry satisfied (18 U.S.C. § 3109) as well as the Fourth Amendment, even without refusal of admittance.” (Italics added)

California subscribes to the rule in Banks. (People v. Murphy (2005) 37 Cal.4th 490; Officers made entry without complying with knock and notice after “loudly” arresting someone outside, causing the officers to believe that the occupants would likely destroy narcotics known to be inside. See also People v. Flores (1982) 128 Cal.App.3rd 512, 521.)

For example:

Hearing retreating footsteps inside. (People v. Maddox (1956) 46 Cal.2nd 301.)

An occupant is heard screaming. (People v. Hall (1971) 3 Cal.3rd 922.)

An occupant opened the door before the officers were prepared to knock, noted the police uniforms, and slammed the door shut. (United States v. Peterson (9th Cir. 2003) 353 F.3rd 1045.)

Occupants see the officers approaching, after which one of the occupants is seen attempting to jump from a window and sounds of a toilet flushing were heard. (People v. Lopez (1969) 269 Cal.App.2nd 461, 469.)

Officers hear a door slamming and rapid footsteps inside. (People v. Watson (1979) 89 Cal.App.3rd 376, 380.)

An officer smelled ether and observed occupants running. (People v. Stegman (1985) 164 Cal.App.3rd 936, 946.)

Officers see one suspect attempting to dispose of narcotics and defendant slammed the door on the

When immediate entry is necessary to check the welfare of an occupant. (People v. Miller (1999) 69 Cal.App.4th 190.)

However, a “generalized fear” that occupants of a residence may be armed, that suspects may be fleeing, or that evidence is being destroyed, absent articulable reasons for so believing, is probably insufficient to justify a finding of “exigent circumstances.” At the very least, it is not sufficient cause to justify the issuance of a “no knock” warrant. (Richards v. Wisconsin, supra; see “No Knock Search Warrants,” below.)

Although prior knowledge of firearms being in the house, by itself, does not excuse the failure to comply with knock and notice (United States v. Marts (8th Cir. 1993) 986 F.2nd 1216.), “the presence of a firearm coupled with evidence that a suspect is willing and able to use the weapon will often justify non-compliance with the knock and announce requirement.” (United States v. Bynum (9th Cir. 2004) 362 F.3rd 574, 581-582; defendant known to answer the door with a pistol in hand, and acted strangely [in the nude] when he did so.)

Upon seeing an altercation taking place through the kitchen window, and being ignored when announcing their presence at the screen door, the uniformed officers were justified in making an immediate entry where a second announcement was made, quelling the disturbance. Brigham City v. Stuart (2006) 547 U.S. 398 [164 L.Ed.2nd 650]; it “serv(ing) no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.” (at p. 407.)

Doctrine of Substantial Compliance: The courts do not generally require law enforcement officers to perform an idle act. (CC § 3532; “Maxims of Jurisprudence”)

“Substantial compliance means ‘actual compliance in respect to the substance essential to every reasonable objective of the statute,’ as distinguished from ‘mere technical imperfections of form. [Citation.] The essential
inquiry is whether under the circumstances the polices underlying the knock-notice requirements were served. [Citation.]” (Italics in original; People v. Urziceanu (2005) 132 Cal.App.4th 747, 791; citing People v. Hoag (2000) 83 Cal.App.4th 1198, 1208.)

Therefore, it is not necessary to knock or identify one’s self if the occupant is standing right there staring at the police uniform. (People v. Uhler (1989) 208 Cal.App.3rd 766, 769-771.)

“Where a criminal offense has just taken place within a room, the occupants may reasonably be expected to know the purpose of a police visit and an express statement may not be necessary. (People v. Hall (1971) 3 Cal.3rd 992, 997; People v. Superior Court [Quinn] (1978) 83 Cal.App.3rd 609; People v. Lawrence (1972) 25 Cal.App.3rd 213; People v. Lee (1971) 20 Cal.App.3rd 982.)

It is not necessary to explain why admittance is sought when the officers’ intentions are reasonably apparent. (People v. Hill (1974) 12 Cal.3rd 731, 758.)

Knocking and announcing their presence at a door which was partially open, and then entering without demanding entry or stating their purpose, was found to be “substantial compliance” when entry is made to check the welfare of occupants who might need assistance. (People v. Miller (1999) 69 Cal.App.4th 190.)

“Substantial compliance is sometimes found even though officers have failed to state their purpose before entering. . . However, compliance does require, at the very least, that police officers identify themselves prior to entry.” (People v. Keogh (1975) 46 Cal. App. 3d 919, 927; identifying themselves while entering found to be insufficient.)

Failing to physically knock at the door was excused where announcement was made at the front of the house over a public address system for 30 seconds to a minute, and then repeated at the rear door, where entry was made, where a methamphetamine lab was suspected and there were indications that the occupants were in the process of cooking the meth at that time. (United States v. Combs (9th Cir. 2005) 412 F.3rd 1020.)
Upon seeing an altercation taking place through the kitchen window, and being ignored when announcing their presence at the screen door, the uniformed officers were justified in making an immediate entry where a second announcement was made, quelling the disturbance. *Brigham City v. Stuart* (2006) 547 U.S. 398 [164 L.Ed.2nd 650]; it “serv(ing) no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.” (at p. 407.)

“No-Knock” Search Warrants: Obtaining judicial authorization in the search warrant itself; justification for ignoring the knock and notice requirements being in the warrant affidavit.

California authority has yet to expressly recognize “No-Knock Search Warrants;” i.e., prior judicial authorization in the warrant allowing for an immediate entry without complying with the knock/notice requirements. (See *Parsley v. Superior Court* (1973) 9 Cal.3rd 934, 939-949; finding them in violation of the Fourth Amendment.)

However, the United States Supreme Court has since ruled that no-knock warrants are not unconstitutional, and that they may be authorized by a magistrate on a case-by-case basis. (*Richards v. Wisconsin* (1997) 520 U.S. 385 [137 L.Ed.2nd 615]; see also *United States v. Banks* (2003) 540 U.S. 31, 36 [157 L.Ed.2nd 343, 352.).

However, a blanket no-knock authorization, just because a search warrant is for a specific type of case (e.g., narcotics cases), is unconstitutional. (*Richards v. Wisconsin, supra.*)

Because *Parsley* based its decision on California’s interpretation of the Fourth Amendment, and because passage of Proposition 8 in 1982, California’s “Truth in Evidence” initiative, in effect negated California’s stricter search and seizure rules, *Richards* and *Banks* should be interpreted as overruling the rule of *Parsley*, even though neither case expressly refers to *Parsley*.

“No-knock” warrants are justified when police officers have a “reasonable suspicion” that knocking and announcing their presence before entering would “be dangerous or futile, or . . . inhibit the effective investigation
of the crime.”  (Richards v. Wisconsin, supra, at p. 394 [137 L.Ed.2nd at p. 624.]

The fact that property might be damaged or destroyed during the entry does not require a higher degree of exigency in order to justify the no-knock authorization.  (United States v. Ramirez (1998) 523 U.S. 65 [140 L.Ed.2nd 191; United States v. Banks, supra, at p. 37 [157 L.Ed.2nd at p. 355]; United States v. Bynum (9th Cir. 2004) 362 F.3rd 574, 580.)

Note: The Ninth Circuit Court of Appeal talks in terms of a “no-knock warrant” in a case where the officers had the door slammed in their face at the front porch.  (United States v. Peterson (9th Cir. 2003) 353 F.3rd 1045.)

Peterson, however, is more of an “exigent circumstance” situation, which developed at the front door, and did not involve an attempt to get a “no-knock” authorization from the magistrate prior to the actual execution of the warrant.

Entry by Ruse: One way to avoid the problems inherent in complying with the knock and notice statutes is to use a ruse to gain entry. As long as the officer has probable cause justifying an entry beforehand, the use of a ruse is lawful.  (People v. Reeves (1964) 61 Cal.2nd 268, 273.)

However, the entry must be supported by “probable cause” to be legal. Absent probable cause (and, absent exigent circumstances, a search warrant), it is illegal to use a ruse to make entry, or even to trick the suspect into opening his door, such a trick constituting a violation of the defendant’s right to privacy.  (People v. Hudson (1964) 225 Cal.App.2nd 554; People v. Miller (1967) 248 Cal.App.2nd 731; United States v. Bosse (9th Cir. 1990) 898 F.2nd 113.)

It is equally illegal to trick a suspect out of his home, unless such the ruse is supported by probable cause to believe the suspect is engaged in illegal activity.  (People v. Reyes (2000) 83 Cal.App.4th 7.)

Also, officers must remember that either a warrant, or probable cause and exigent circumstances, will likely be required under the rule of People v. Ramey (1976) 16
When armed with a search warrant, officers may use a ruse to induce the occupants to open the door. This is not a violation of the knock and notice requirements. (People v. Rudin (1978) 77 Cal.App.3d 139; People v. McCarter (1981) 117 Cal.App.3d 894, 906.)

Also, it is not illegal to use an undercover agent during a criminal investigation who makes entry upon the occupant’s invitation, despite the lack of probable cause. Such a situation does not involve a need to avoid a violent confrontation. (Hoffa v. United States (1966) 385 U.S. 293 [17 L.Ed.2d 374].)

Standing; An Absent Tenant: If the subject to be arrested, or the owner of a home which is to be searched, is not home at the time of the execution of the entry, whether or not he or she has “standing” to contest a failure to comply with the P.C. §§ 844 or 1531 knock and notice requirements is subject to a split of opinion. (See Hart v. Superior Court (1971) 21 Cal.App.3d 496, 500-504.)

In discussing the knock and notice requirements pursuant to P.C. § 1531 (serving a search warrant), it has been determined by at least one appellate court that the defendant did not need to be home to assert standing to challenge a knock and notice violation, in that defendant still had a privacy interest in his residence, and an interest in protecting his fiancée who was home at the time. (People v. Hoag (2000) 83 Cal.App.4th 1198.)

Hart v. Superior Court, supra, at pp. 500-504, and federal authority (United States v Silva (9th Cir. 2001) 247 F.3d 1051, 1058-1059.), are all to the contrary.

However, entering the house to arrest a subject without probable cause (or “reasonable grounds,” see below) to believe the suspect is even home is a Fourth Amendment violation in itself. (Hart v. Superior Court, supra, at p. 502; “Section 844 by its own terms provides that the entry can only be made if the person to be arrested is actually present or if the arrestor has reasonable grounds to believe he is present.” See also People v. Jacobs (1987) 43 Cal.3d 472, 478-479; and United States v. Gorman (2002) 314 F.3d 1105; interpreting “reasonable grounds” or “a reason
to believe” to be the equivalent of “probable cause.” But also see People v. Downey (2011) 198 Cal.App.4th 652, 657-662, finding that less than probable cause is required.

Sanctions for Violations: When executing an otherwise lawfully issued search warrant on a residence, a knock and notice violation, even if a violation of state and federal statutes and the Fourth Amendment, does not trigger the Exclusionary Rule. (Hudson v. Michigan (2006) 547 U.S. 586 [165 L.Ed.2nd 56].)

Per Hudson, the suppression of evidence is only necessary where the interests protected by the constitutional guarantee that has been violated would be served by suppressing the evidence thus obtained. The interests protected by the knock and notice rules include human life, because “an unannounced entry may provoke violence in supposed self-defense by the surprised resident.” Property rights are also protected by providing residents an opportunity to prevent a forcible entry. And, “privacy and dignity” are protected by giving the occupants an opportunity to collect themselves before answering the door. (Ibid.)

The Court also ruled in Hudson that because civil suits are more readily available than in 1914 with the exclusionary rule was first announced, and because law enforcement officers, being better educated, trained and supervised, can be subjected to departmental discipline, suppressing the product of a knock and notice violation is no longer a necessary remedy. (Ibid.)

The fact that a “no-knock” warrant could have been obtained does not require a different finding. Also, the use of a battering ram on the door, rubber bullets to knock out windows, and “flash bang” devices (one of which seriously injured defendant) to distract the occupants, even though possibly unreasonable under the circumstances, but where there is no “causal nexus” between the entry and the recovery of evidence in the home, does not require suppression of the evidence. (United States v. Ankeny (9th Cir. 2007) 502 F.3rd 829, 835-838; a one to 1½ second delay between knocking and entering.)

The rule as dictated by Hudson (a search warrant case) is applicable as well as in a warrantless, yet lawful, arrest
However, *Hudson* is not to be interpreted to mean that the Exclusionary Rule is to be scrapped. Intentionally unlawful law enforcement actions will still be subject to the Exclusionary Rule where necessary to discourage future illegal police activities. (*People v. Rodriguez* (2006) 143 Cal.App.4th 1137; case remanded for a determination whether police fabricated probable cause for a traffic stop, which led to the discovery of an outstanding arrest warrant, the search incident thereto resulting in recovery of controlled substances.)


Where the line is between a constitutional knock and notice violation and a simple statutory knock and notice violation has not yet been specifically determined by either any California or United States Supreme Court decisions, and must await future cases for clarification.

But it is helpful to look for circumstances relevant to the purposes of the knock and notice requirements, such as the lessening of the likelihood of a violent confrontation. For instance: “Here, the potential for violence and peril to the officers would have been *increased* had the officers announced their presence at the door. The officers could not see defendant's hands and whether he might have a weapon or syringe that could be used against them. Officer Norvall limited the potential for violence by entering to a place where he could put his hands on defendant before waking him.” (*People v. Zabelle, supra*, at p. 1287, where the officer’s unannounced entry was made upon seeing the defendant asleep.)

And note *People v. Hoag* (2000) 83 Cal.App.4th 1198, where it was held that a 15-to-20 second wait was not enough to satisfy the statute, but that it was only a “*technical violation,*” not implicating the Constitution or requiring the suppression of any evidence.
The federal statutory “knock and announce” requirements, pursuant to 18 U.S.C. § 3109, have been held to be judged by the same standards as is an alleged Fourth Amendment violation for entering without a proper announcement. (United States v Bynum (9th Cir. 2004) 362 F.3rd 574, 579.)

**Seizing Items not Listed in the Warrant:** Those items listed in the warrant may be seized, along with any other items reasonably identified as contraband or evidence of a crime, observed in plain sight during the search. (Skelton v. Superior Court (1969) 1 Cal.3rd 144, 157.)

“Where an officer has a valid warrant to search for one item but merely a suspicion, not amounting to probable cause, concerning a second item, that second item is not immunized from seizure if found during a lawful search for the first item.” (People v. Bradford (1997) 15 Cal.4th 1229, 1294; citing Horton v. California (1990) 496 U.S. 128, 138-139 [110 L.Ed.2nd 112, 124].), and noting that prior Supreme Court cases required “probable cause” to believe that the “second item” constitutes evidence of a crime. (People v. Bradford, supra, at p. 1290.)

Seizing the “second item” is based upon an application of the “plain view doctrine,” allowing for seizure of items observed in plain sight from a position the discovering officer has a legal right to be. However; “(t)he officers lawfully must be in a position from which they can view a particular area; it must be immediately apparent to them that the items they are observing may be evidence of a crime, contraband, or otherwise subject to lawful seizure, and the officers must have a lawful right of access to the object. (Citation)” (People v. Bradford, supra, at p. 1295.)

Items observed during the lawful execution of a search warrant which are identifiable as contraband or evidence of another crime are subject to seizure despite not being listed in the warrant itself. (People v. Gallegos (2002) 96 Cal.App.4th 612.)

“Items in plain view, but not described in the warrant, may be seized when their incriminating character is immediately apparent. [Citation.] The incriminating character of evidence in plain view is not immediately apparent if ‘some further search of the object’ is required.” (People v. Lenart (2004) 32 Cal.4th 1107, 119; citing Minnesota v. Dickerson (1993) 508 U.S. 366, 375 [124 L.Ed.2nd 334].)
The magistrate’s failure to initial that part of a search warrant listing the defendant’s residence, where she did initial those parts of the warrant describing defendant’s person and his vehicle, held to be a “minor technical error rather than evidence of a constitutional deficiency in the contents of the search warrant.” The search of the residence, based upon the search warrant, was upheld where all the circumstances (including the magistrate’s testimony at a suppression hearing) indicated that there was probable cause to search the residence and that the magistrate had intended to approve the search of the residence. (United States v. Hurd (9th Cir. 2007) 499 F.3rd 963.)

Note: When evidence of a different crime is discovered during a lawful warrant search, the better procedure is to fall back and obtain a second search warrant for the new offense, thus specifically allowing for the search for more evidence related to the newly discovered crime (see People v. Carrington (2009) 47 Cal.4th 145, 160, 164-168.) and eliminating some difficult legal issues later in the inevitable suppression hearings. (See People v. Albritton (1982) 138 Cal.App.3rd 79.)

In People v. Carrington, supra., officers from agency #2 accompanied officers from agency #1 who were executing a lawful search warrant in their own case. The officers from agency #2 were there for the purpose of making “plain sight” observations of evidence related to their agency’s own investigation. Upon making such observations, this information was used to obtain a second warrant directed specifically at agency #2’s investigation. This procedure was approved by the California Supreme Court.

“Even assuming the officers (from the agency #2) . . . hoped to find evidence of other offenses, their subjective state of mind would not render their conduct unlawful. . . . The existence of an ulterior motivation does not invalidate an officer’s legal justification to conduct a search.” (Id., at p. 168; citing Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89].)

This case, citing Whren v. United States for the proposition that an officer’s “subjective motivations” are irrelevant, looking only at whether the officers, from an “objective” standpoint, were lawfully acting, in effect overrules People v. Albritton, supra. Albritton stood for the theory that
it is illegal to use one warrant to look for evidence related to a different crime, even if such evidence is found in plain sight.

Searching a computer for drug related documents, and discovering child pornography, does not authorize the officer to begin searching for more child pornography without first obtaining a second search warrant for the pornography.  \((\text{United States v. Carey} \ (10^{\text{th}} \text{ Cir. 1999}) \ 172 F.3^{\text{rd}} \text{ 1268, 1273}; \ (\text{United States v. Giberson} \ (9^{\text{th}} \text{ Cir. 2008}) \ 527 F.3^{\text{rd}} \text{ 882, 890.})\)

As evidence of “\textit{dominion and control}” over a residence, the seizure of a computer not specifically listed in the warrant should be upheld. \((\text{People v. Varghese} \ (2008) \ 162 \text{ Cal.App.4th 1084, 1100-1103}; \text{People v. Balint} \ (2006) \ 138 \text{ Cal.App.4th 200.})\)

But see \textit{United States v. Payton} \((9^{\text{th}} \text{ Cir. 2009}) \ 573 F.3^{\text{rd}} \text{ 859, 861-864, where it was held that failure to include the magistrate’s authorization to search defendant’s computer, even though in the statement of probable cause the affiant indicated a desire to search any possible computers found in defendant’s house, was a fatal omission. Searching defendant’s computer, therefore, went beyond the scope of the warrant’s authorization.}\)

The fact that the issuing magistrate testified to an intent to allow for the search of defendant’s computers, and that the warrant included authorization to search for certain listed records which might be found in a computer, was held to be irrelevant. \((\text{Id.} \ \text{at pp. 862-863.})\)

The wholesale seizure of more records (a “few dozen boxes”) than was authorized by the search warrant, so long as not used, should not result in suppression of the records that were authorized by the warrant. \((\text{United States v. Tamura} \ (9^{\text{th}} \text{ Cir. 1982}) \ 694 F.2^{\text{nd}} \text{ 591.})\)

So how does the Ninth Circuit suggest that such a situation be handled? At pp. 595-596, and fn. 3: “In the comparatively rare instances where documents are so intermingled that they cannot feasibly be sorted on site, we suggest that the Government and law enforcement officials generally can avoid violating \textbf{fourth amendment} rights by sealing and holding the documents pending approval by a magistrate of a further search, in accordance with the
procedures set forth in the American Law Institute's Model Code of Pre-Arraignment Procedure (Section SS 220.5). If the need for transporting the documents is known to the officers prior to the search, they may apply for specific authorization for large-scale removal of material, which should be granted by the magistrate issuing the warrant only where on-site sorting is infeasible and no other practical alternative exists. (Citation) The essential safeguard required is that wholesale removal must be monitored by the judgment of a neutral, detached magistrate (fn. omitted).”

Seizure of massive amounts of confidential computerized medical information where it is impossible to tell what is included in the warrant (for which probable cause has already been found by a magistrate), such as when the information is commingled in other computer records, creates a difficult situation. Five justices of an en banc panel of the Ninth Circuit Court of Appeal makes the following non-binding suggestions for insuring that the privacy rights of others for whom there is no probable cause is not compromised:

1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.

2. Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.

3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.

4. The government’s search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.

5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the
issuing magistrate informed about when it has done so and what it has kept.

(United States v. Comprehensive Drug Testing, Inc. (9th Cir. 2010) 621 F.3rd 1162, 1178-1180; incorporating the facts as described at 513 F.3rd 1085.)

The Court in Comprehensive Drug Testing, Inc. also noted the availability of Federal Rule of Criminal Procedure 41(g), as opposed to a “motion to suppress,” where an uncharged third party is seeking the return of items seized from him unlawfully. (Id. at pp. 1172-1174.)

Lastly, the Court disapproved of the Government’s use of a subpoena to seek documents already obtained unlawfully, upholding the trial judge’s “quashal” of the Government’s subpoena under authority of Federal Rule of Criminal Procedure 17(c). (Id. at pp. 1174-1175.)

Answering the Telephone: In some cases (e.g., bookmaking, narcotics, etc.), answering the suspect’s telephone during service of the warrant may lead to valuable corroborative evidence. (People v. Warner (1969) 270 Cal.App.2nd 900, 907; People v. Sandoval (1966) 65 Cal.2nd 303, 308; People v. Nealy (1991) 228 Cal.App.3rd 447, 452.)

A standard paragraph in the affidavit justifying the expectation of receiving incriminating evidence from callers, and inclusion in the warrant authorization to answer the phone, is advisable, although failure to do so should not preclude answering the phone. (See People v. Vanvalkenburgh (1983) 145 Cal.App.3rd 163, 167.)

Note: Justification for answering the telephone during execution of a warrant may also be premised upon the need to corroborate the occupant’s possessory interest over the place being searched, as a form of oral “dominion and control” evidence.

The contents of a telephone call to a narcotics dealer’s home asking to buy narcotics, answered by the police executing a search warrant, are admissible as a judicially created exception to the Hearsay Rule. (People v. Morgan et al. (2005) 125 Cal.App.4th 935.)
Other courts have held that the contents of a telephone call are admissible as non-hearsay circumstantial evidence of the defendants’ dope dealing. (*People v. Nealy*, *supra*; and *People v. Ventura* (1991) 1 Cal.App.4th 1515.)

The *Morgan* Court further determined that the telephone call was “non-testimonial,” as described in *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2nd 177], and thus admissible over a *Sixth Amendment*, “right to confrontation” objection. (*People v. Morgan*, *supra*, at pp. 946-947.)

Searching pursuant to the suspect’s consent, unless specifically included in the consent, does not give the searching officers the right to answer the telephone. (*People v. Harwood* (1977) 74 Cal.App.3rd 460, 465.)

But, with probable cause to believe that a robbery suspect might be calling, and the exigent circumstance of not being able to obtain a search warrant without losing the opportunity to receive the expected call from the suspect, thus compromising the officers’ ability to quickly locate and apprehend him, answering the telephone without permission is lawful. (*People v. Ledesma* (2006) 39 Cal.4th 641, 704.)

*Time Limitations:* The warrant must be served and returned within ten (10) calendar days of issuance or it is deemed to be “void.” A warrant which is executed within the ten-day period shall be deemed to have been timely executed and no further showing of timeliness need be made. (P.C. § 1534(a))

However, at least where the execution of the warrant is begun within the statutory time period, and absent any showing of bad faith, failure to complete the execution of the warrant within the 10-day period is not a constitutional violation and will not result in the suppression of any evidence. (*People v. Superior Court [Nasmeh]* (2007) 151 Cal.App.4th 85, 98-100; citing *United States v. Gerber* (11th Cir.1993) 994 F.2d 1556, 1560.)

However, the Court in *Nasmeh* specifically declined to discuss the implications of violating P.C. § 1534 in that defendant had failed to raise the issue at the trial court level. (fn. 5.)

The day the warrant is signed by the magistrate is “day zero,” with “day one” being the next day. Saturday, Sunday and holidays are

After service of the warrant, the officer “must forthwith” return the executed warrant to the magistrate with the “receipt and inventory” (referred to as the “return” by some jurisdictions). (P.C. § 1537)

Even if P.C. § 1537 is violated by a return after the 10-day period, this defect does not require suppression of the evidence unless the defendant can show that he was prejudiced by the delay. (People v. Couch (1979) 97 Cal.App.3rd 377; People v. Kirk (1979) 99 Cal.App.3rd 89, 94; People v. Head (1994) 30 Cal.App.4th 954; delay of one year!)

The “return package” consists of the following:

- The original warrant.
- The original affidavit.
- An inventory (or “return” form) of all the items seized, upon which the officer who executed the warrant swears that the inventory is a true list of everything seized during the execution of the warrant, including items seized but which were not listed in the warrant.

The physical evidence seized is to be retained (i.e., “impounded”) by the officer pending use of the evidence in court or other court ordered disposition. (P.C. § 1536)

One Continuous Search: If officers complete the execution of a warrant, and leave the scene, a second search warrant must be obtained in order to return and renew the search. However, so long as at least one officer remains on the scene, reasonable breaks to accomplish other police activity (e.g., transporting the suspect to jail), do not necessarily mean that a renewed search requires a new warrant. (People v. James (1990) 219 Cal.App.3rd 414.)

However, the Courts tend to be a bit flexible on this rule. In United States v. Kaplan (9th Cir. 1990) 895 F.2nd 618, after defendant’s arrest, his office was searched by FBI agents with a search warrant authorizing the seizure of certain files. Leaving the scene with the files thus obtained, the agents later discovered that they had not received all the files that were authorized by the warrant. Two hours and ten minutes after the initial execution of the warrant, agents returned and seized the remaining files. The
Court noted that the issue was whether the second search was really no more than a continuation of the first. The Court decided that it was, citing the fact that the files seized on the second trip were listed in the warrant.

*Leaving a Copy of the Warrant, Affidavit and/or Receipt and Inventory:* There is no state statutory nor constitutional rule requiring that searching officers show the suspects the warrant, the affidavit to the warrant, or a copy of either, or that a copy of either be left at the scene after the search. (*People v. Calabrese* (2002) 101 Cal.App.4th 79.)

Only a copy of the “receipt and inventory” (or “return”) must be left with the occupants or at the scene. (*P.C. § 1535*)

**Note:** *Fed. Rules of Criminal Procedure, Rule 41(d),* applying only to the execution of a federal search warrant, requires that the occupant be given a copy of the warrant and a receipt for property taken in the search, or that these documents be left at the scene.

The Ninth Circuit’s Opinion: The Ninth Circuit Court of Appeal is of the belief that failure to provide to an occupant a copy of a warrant, properly describing the place to be searched and the property to be seized, may be a *Fourth Amendment* violation (See *Ramirez v. Butte Silver Bow County* (9th Cir. 2002) 298 F.3rd 1022.), thus creating some potential federal civil liability for state officers who choose to follow the state rule.

However, the Ninth Circuit has also noted that only a “fundamental” violation of *Rule 41(d)* will mandate suppression of evidence. Where the agent was not aware of this rule, and otherwise insured that defendant was aware of why they were in his home and what they were looking for, suppression of evidence was not a proper remedy. (*United States v. Williamson* (9th Cir. 2006) 439 F.3rd 1125; discussing the difference between “intentionally,” but not “deliberately,” failing to provide defendant with a copy of the warrant prior to searching his house.)

**Note:** Therefore, despite not being required by state law, it is probably *good practice* for a state law enforcement officer to show the occupants a copy of the search warrant (but not the affidavit), or, if no one is home, leave a copy of the search warrant at the scene. There is no harm in doing this, and brings the state execution of a search warrant in compliance with the federal rules.
And see United States v. Celestine (9th Cir. 2003) 324 F.3rd 1095, 1105-1108, describing “the policies that underlie the warrant requirement: providing the property owner assurance of the lawful authority of the executing officer, his need to search, and the limits of his power to search.”

However, where the occupant tells the searching officers that he does not understand English, and the officers take immediate steps to find a Spanish-speaking interpreter, the Fourth Amendment is not violated when the officers commence the search before the occupant can be read, in his own language, the contents of the warrant. (United States v. Martinez-Garcia (9th Cir. 2005) 397 F.3rd 1205.)

See United States v. Vesikuru (9th Cir. 2002) 314 F.3rd 1116, 1123-1124.), requiring that the warrant describe the place to be searched and property to be seized with “particularity,” thus serving two important purposes. It:

- Limits the discretion of the officers executing the warrant; and
- By showing it to the property owner or resident, it gives notice of the proper scope of the search.

In order to accomplish these purposes, the warrant must therefore be brought to the scene of the search and shown to the occupants. (Ibid.)

The United States Supreme Court has recently ruled that the Ninth Circuit’s belief that a copy of the search warrant must be given to the occupants of the place being searched at the initiation of the search (see United States v. Williamson (9th Cir. 2006) 439 F.3rd 1125, above), is simply wrong. (United States v. Grubbs (2006) 547 U.S. 90, 98-99 [164 L.Ed.2nd 195].)

But see the concurring opinion in Grubbs (p. 101), noting that it has yet to be decided whether there is a constitutional requirement to show the property owner a copy of the warrant if he demands to see it.

In United States v. Hector (9th Cir. 2007) 474 F.3rd 1150, 1154, the Ninth Circuit noted that it is not clear whether Grubbs overrules their cases to the contrary, but found that under authority of Hudson v. Michigan (2006) 547 U.S. 394.
395

586 [165 L.Ed.2nd 56] (ruling that suppression of evidence is not an appropriate remedy for a constitutional violation that was not the “unattenuated but-for cause” of obtaining the disputed evidence), suppressing evidence is not required where law enforcement’s mistake was nothing more than a failure to present a person with a copy of the search warrant.

But then in United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3rd 684, 701, the Ninth Circuit finally conceded that Grubbs overrules any prior cases that might have previously held that the occupant must be given a copy of the warrant affidavit.

Destruction of Property: Officers are expected to use some discretion in the execution of a warrant to avoid the taking of unnecessarily excessive (i.e., “cumulative”) property and engaging in unnecessarily destructive behavior. (San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose (9th Cir. 2005) 402 F.3rd 962; damaging property in the taking of “truckloads” of “indicia of affiliation” property, plus the shooting of several dogs without having considered alternative methods of controlling the dogs.)

However, the fact that property might be damaged or destroyed during the entry does not require a higher degree of exigency in order to justify the no-knock authorization when applying for a search warrant. (United States v. Ramirez (1998) 523 U.S. 65 [140 L.Ed.2nd 191; United States v. Banks, supra, at p. 37 [157 L.Ed.2nd at p. 355]; United States v. Bynum (9th Cir. 2004) 362 F.3rd 574, 580.)

Sealing the Warrant Affidavit: i.e., the “Hobbs Warrant;” All or part of the warrant affidavit may be ordered sealed by the court if necessary to protect the identity of the informant. (People v. Hobbs (1994) 7 Cal.4th 948; see also People v. Sanchez (1972) 24 Cal.App.3rd 664, 678; (People v. Galland (2008) 45 Cal.4th 354, 363-365.)

How Accomplished: This is done by obtaining the signature of a judge on a separate affidavit (describing the need for sealing) and order, requesting the sealing of a search warrant affidavit.

The warrant itself must contain a corresponding order by the court sealing the warrant affidavit, or a portion thereof: E.g.:

© 2012 Robert C. Phillips. All rights reserved
“GOOD CAUSE appearing therefore, IT IS HEREBY ORDERED that the attached affidavit (and attachments thereto) be sealed pending further order of the court. IT IS SO ORDERED.” (Dated and signed by the magistrate)

When Warrants May be Sealed: Search warrant affidavits are commonly sealed when necessary to protect the identity of a confidential informant either because his or her safety could be jeopardized, and/or because he or she is being used in other investigations that might be compromised if it is known who he or she is. (*United States v. Napier* (9th Cir. 2006) 436 F.3rd 1133.)

However, despite the lack of any case authority, there is no reason why sealing an affidavit must necessarily be restricted to protecting confidential informants. While this procedure should not be used unless actually necessary, there may be other legitimate reasons for requiring an affidavit to be sealed. (e.g.; to avoid news media publicity compromising an investigation-in-progress.)

There is as of yet no case authority on the issue as to whether this, or any other purpose other than to protect informant confidentiality, justifies the sealing of a warrant affidavit.

The justification behind the *Hobbs* decision had a lot to do with the importance of encouraging the use of, and protecting the confidentiality of the identities of, informants. (*People v. Hobbs, supra*, at p. 958, citing *McCray v. Illinois* (1967) 386 U.S. 300, 308-309 [18 L.Ed.2nd 62, 69].)

“We therefore conclude that, taken together, the informant’s privilege (*E.C. § 1041*), the long-standing rule extending coverage of that privilege to *information* furnished by the informant which, if disclosed, might reveal his or her identity, and the codified rule that disclosure of an informant’s identity is not required to establish the legality of a search pursuant to a warrant is valid on its face (*E.C. § 1042(b)*)) compel a conclusion that all or any part of a search warrant affidavit may be sealed if necessary to implement the privilege and protect the identity of a confidential informant.” (*People v. Hobbs, supra*, at p. 971.)
While a criminal defendant’s due process rights (to be treated fairly) at trial are substantial, they “are less elaborate and demanding” in a motion to suppress. The purpose of a trial is to find the truth. The purpose of a suppression motion is “to avoid the truth.” “The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, . . . .” (United States v. Napier, supra, at p. 1137; quoting McCray v. Illinois, supra., at p. 307.)

**Criticism of Procedure:** The practice of sealing warrant affidavits is not without its critics, in that a defendant’s Sixth Amendment right to confront his accusers is arguably compromised.

The Hobbs sealing was upheld in People v. Theilen (1998) 64 Cal.App.4th 326, but criticized by the author of the opinion who felt that federal authority (Waller v. Georgia (1984) 467 U.S. 39 [81 L.Ed.2nd 31,]) required the prosecution to demonstrate an “overriding interest” likely to be prejudiced before allowing the sealing of an affidavit.

**Court Procedures:** When testing the validity of a sealed warrant affidavit, the following court procedures should be followed (See People v. Martinez (2005) 132 Cal.App.4th 233.):

- The defense must file a properly noticed motion seeking to quash and/or traverse the search warrant.

- The trial court should conduct an in camera hearing pursuant to E.C. § 915(b) and People v. Luttenberger (1990) 50 Cal.3rd 1, 20-21.

The prosecution and police officer may be present.

Defendant and his/her counsel will be excluded, although defense counsel should be allowed to submit questions for the magistrate to ask any witnesses present at the in camera hearing.

Failure to conduct an in camera hearing, reviewing the sealed portions of the affidavit to determine whether there are any litigable issues, is an abuse of discretion. (See People v. Galland (2008) 45
• The trial court should determine whether sufficient grounds exist for maintaining the confidentiality of the informant’s identity.

• The trial court then determines whether the entirety of the affidavit or any portion thereof is properly sealed; i.e., whether the extent of the sealing is necessary to avoid revealing the informant’s identity.

• In a traversal motion:

  The trial court must scrutinize the affidavit and other materials the magistrate determines are necessary for a fair determination of the issue, such as police reports and information regarding the informant.

  The trial court should consider examining the affiant, the informant, or any other witness whose testimony it deems necessary.

  If the affidavit is found to have been properly sealed, the court must then determine, based upon the general allegations made by defendant in his/her motion, and in considering the public and sealed portions of the affidavit, whether there are any intentional or reckless misstatements or omissions in the affidavit, as with any such motion. (See Franks v. Delaware (1978) 438 US 154, 155-156 [57 L.Ed.2nd 667, 672].)

  If it is determined that defendant’s allegations are not supported by the information before the court, defendant’s motion should be denied.

  If it is determined that there is a “reasonable probability” that defendant would prevail on the motion to traverse, the District Attorney must be afforded the option of:

    Consenting to disclosure of the sealed materials and proceeding with the motion to
traverse after full disclosure to the defense; 

or

Suffering the granting of defendant’s motion to traverse.

Examples:

The affiant’s failure to disclose that the plaintiff’s son was in jail at the time of the issuance of the warrant, and for over six months prior, and therefore not only was not present in the home, but moreover could not have been involved in a described shooting or the storage of weapons used in it. Plaintiffs presented sufficient evidence to establish a genuine issue as to whether a detective’s omission of this material fact was intentional or reckless, as opposed to merely negligent. Had the omitted facts of the son’s two-year sentence and custody status been included, it was extremely doubtful that an issuing judge would simply have issued the warrant or authorized nighttime service without more information. (Bravo v. City of Santa Maria (9th Cir. Dec. 9, 2011) __ F.3d __ [2011 U.S. App. LEXIS 24383].)

- In a motion to quash:

If the affidavit is found to have been properly sealed, the trial court should:

Determine whether the affidavit (public and sealed portions) establishes probable cause (i.e., whether there was a “fair probability”) that contraband or evidence would be found in the place searched pursuant to the warrant:

If yes, defendant’s motion should be denied.
If the court determines, considering the public and sealed portions, that there is a "reasonable probability" the defendant would prevail, then again, the District Attorney must be given the option of:

Consenting to disclosure of the sealed materials and proceeding with the motion to quash after full disclosure to the defense; or

Suffering a granting of defendant’s motion to quash. *(People v. Hobbs, *supra, at pp. 971-975.)*

**Retention of the Documents:** A sealed affidavit should generally be retained by the court, but may be retained by a law enforcement agency upon a five-part showing:

1. The disclosure would impair further investigation of criminal conduct, or endanger the safety of a confidential informant or the informant’s family;

2. Security procedures at the court clerk’s office are inadequate to protect the affidavit against disclosure;

3. The security procedures at the law enforcement agency are sufficient to protect the affidavit against disclosure;

4. The law enforcement agency has procedures to ensure the affidavit is retained for 10 years (permanently in capital cases) after the final disposition of the case, pending further order of the court (see *Gov’t. Code § 68152(j)(18))*; and

5. The magistrate has made a sufficient record of the documents reviewed, including the sealed materials, to permit identification of the original sealed affidavit or to permit reconstruction of the affidavit.
Post-Investigation Disposition of Warrant Application and Supporting Affidavits:

The public has a qualified common law right of access to warrant materials after an investigation has been terminated. The concerns about suspects destroying evidence, coordinating their stories before testifying, or fleeing the jurisdiction are no longer present once an investigation has been terminated. Absent a compelling reason or factual basis for limiting and restricting the use of such documents, a court may not do so. (United States v. The Business of the Custer Battlefield Museum (9th Cir. 2011) 658 F.3rd 1188.)

Return of Property:

Property seized by search warrant may only be released by court order:

P.C. § 1536: All property taken by warrant is to be retained by the officer “subject to the order of the court.”

P.C. § 1540: The magistrate has the authority to release property seized by warrant.

Stolen or embezzled property in cases where a complaint has been filed should be released by a magistrate after notice to anyone claiming an interest in the property. (P.C. §§ 1408, 1410, 1413(c))

Otherwise, property may be returned to the lawful owner by the seizing law enforcement officer, but only after notice is given to the person from whom the property was seized. (P.C. § 1413(b))

If, after termination of any related prosecution, or if no case has been filed, and the owner fails to claim the property and no one else has claimed it, it “may” be delivered to the county for disposal pursuant to the procedures set out in P.C. § 1411.

Note: Special provisions for the disposition of firearms (P.C. § 12028) and money (P.C. §§ 1420 et seq.)

It is not legally necessary for officers executing a search warrant to give a person from whom property has been seized any notice of the applicable
statutes or the means by which that person may seek the return of his or her property. (*City of West Covina vs. Perkins* (1999) 525 U.S. 234 [142 L.Ed.2nd 636]; reversing a Ninth Circuit Court of Appeal opinion to the contrary.)

*Burden of Proof when the Return of Property is Contested:*

“‘When a motion for return of property is made before an indictment is filed (but a criminal investigation is pending), the movant bears the burden of proving both that the seizure was illegal and that he or she is entitled to lawful possession of the property.’ *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir.1987) (citations omitted). ‘However, when the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or . . . the government has abandoned its investigation, the burden of proof changes. The person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate reason to retain the property.’ Id. (footnotes and citations omitted). The ‘government must justify its continued possession of the property by demonstrating that it is contraband or subject to forfeiture.’ Id.” (*United States v. Harrell* (9th Cir. 2008) 530 F.3rd 1051, 1057.)

*Extensions:*

Search warrants must be served within ten (10) calendar days of issuance. *(P.C. § 1534)*

The sole exception provided for by statute is for bank records. If a bank cannot reasonably retrieve the requested records within ten days, the affiant may request for some time period longer than ten days. *(Gov’t. Code § 7475)*

So long as served within the 10-day limit, no further evidence of timeliness need be shown. *(Cave v. Superior Court)* (1968) 267 Cal.App.2nd 517.)

If, during the 10-day period, it becomes apparent that the warrant cannot, or will not, be served, the officer may do either of the following:

- Submit a new warrant and affidavit, with an added explanation in the affidavit for why the warrant was not executed on time and listing any facts relevant to a possible change in probable cause or why it is believed the property to be seized will still be in the placed to be searched; or
• Take the original warrant, with a supplemental affidavit incorporating by reference the entire original affidavit, back to the issuing magistrate to “revalidate and reissue” the same warrant *(People v. Sanchez* (1972) 24 Cal.App.4th 664.) upon a showing that the probable cause has not become stale. *(People v. Brocard* (1985) 170 Cal.App.3rd 239-242.)

**Special Masters:**

*Rule:* Per P.C. § 1524(c), search warrants for documentary evidence in the possession of, or under the control of, a . . .

- Lawyer,
- Doctor,
- Psychotherapist, or
- Clergyman,

. . . who is not him or herself reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence for which a warrant is requested, are invalid unless certain statutory requirements relating to obtaining the assistance of a “special master” are first met. *(See Deukmejian v. Superior Court* (1980) 103 Cal.App.3rd 253.)

*When not applicable:*

This special master system is specifically *not* available for evidence coming within the so-called “newsman’s privilege,” as described in E.C. § 1070. *(P.C. § 1524(g)) *

A special master is not necessary if the attorney, etc., is him or herself reasonably suspected of the criminal activity about which the documentary evidence is sought. *(People v. Blasquez* (1985) 165 Cal.App.3rd 408.)

However, this does not preclude an attorney, etc., from obtaining an order from the court sealing the seized files pending an in camera determination of the applicability of any privilege. *(People v. Superior Court [Bauman & Rose]* (1995) 37 Cal.App.4th 1757.)

The search of a Deputy District Attorney’s (DDA) home, when the DDA was the target of the criminal investigation, did not require a special master, while the search of the
DDA’s office, where there might be confidential material belonging to the District Attorney (as opposed to the DDA himself) did require the services of a special master. *(People ex rel. Lockyer v. Superior Court (2000) 83 Cal.App.4th 387.)*

A “*special master*” must first be appointed by the court, who must then accompany the officers serving the warrant. A “*special master*” is an attorney licensed to practice law, in good standing, in California, to be selected from a list of qualified attorneys maintained by the State Bar for the purpose of conducting such searches. *(P.C. § 1524(d))*

“*Documentary evidence*” includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, x-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films or papers of any type or description. *(P.C. § 1524(f))*

**Procedure:**

The special master must inform the person in possession of the specific items being sought and allow the party in possession of the documents to voluntarily provide the items requested.

If, in the judgment of the special master, the party fails to provide the items requested, the special master shall conduct the search for the items in the areas designated in the search warrant.

Potentially privileged documents must be sealed.

The documents sealed by the special master cannot be:

Unsealed and/or turned over to the investigating agency (or to the prosecutor) without notice being given to the person from whom they were seized (i.e., the attorney, physician, psychotherapist, or clergyman); nor

Returned to the person from whom they were seized without notice to the person executing the warrant (or, alternatively, to the investigating agency or the prosecutor). *(Gordon v. Superior Court (1997) 55 Cal.App.4th 1546.)*

*The Court Hearing:* If the party indicates that the items seized should not be disclosed (e.g., due to “*privilege*” issues), the special master must seal them and deliver them to the court for a hearing on the issue.
The court will review the material in camera if a privilege (e.g., attorney-client, or work product, etc., privilege) is claimed. (PSC Geothermal Services Co. v. Superior Court (1994) 25 Cal.App.4th 1697, 1711-1712; Geilim v. Superior Court (1991) 234 Cal.App.3rd 166, 171.)

The Court has a duty to hear and determine the applicability of a claim of privilege, but lacks the statutory or inherent power to require the parties to bear the cost of a special master’s services. (People v. Superior Court [Laff] (2001) 25 Cal.4th 703.)

A special master may not release even an inventory of the items seized to a police officer after a privilege is invoked. (Magill v. Superior Court (2001) 86 Cal.App.4th 61.)

The hearing will resolve issues related to:

- Suppression issues pursuant to P.C. § 1538.5 (i.e., a “motion to suppress evidence.”)
- Claims of “privilege,” pursuant to E.C. §§ 900 et seq.

The hearing must be held in Superior Court within three (3) days of the service of the warrant, or as soon as possible if three days is impracticable.

Although the statute is silent on the issue, it has been held that the special master should determine whether a hearing is required and give notice to the parties concerning when and where such hearing is to be held. (Gordon v. Superior Court, (1997) 55 Cal.App.4th 1546.)

Other Service Conditions:

Execution of the search warrant must be done during business hours if possible. (P.C. § 1524(c)(3))

The search warrant must be served on the person who appears to have possession or control of the documents sought. If no such person can be found, the special master is responsible for sealing and returning to the court any items that appear to be privileged. (P.C. § 1524(c)(3))

Police officers may accompany the special master during the search, but shall not participate in the search nor shall they examine any of the items being seized except upon agreement of
the party upon whom the warrant has been served. (P.C. § 1524(e))

Other Warrants:

Inspection Warrants: Enforcement of some codes, such as building, fire, health, safety, health, plumbing, electrical, labor or zoning codes, require
the periodic inspections of some buildings. (See Dawson v. City of Seattle
(9th Cir. 2006) 435 F.3rd 1054.)

California has enacted a regulatory scheme for what are referred to
as “inspection warrants,” for obtaining search warrants for
regulatory inspections “required or authorized by state or local or
regulation relating to building, fire (etc.),” code compliance.
(CCP §§ 1822.50 et seq.)

Consent to search is to be requested first. (CCP § 1822.51)

If consent is refused, a warrant is needed, but may be obtained on
less than the traditional probable cause. (See Salwasser
Manufacturing Co. v. Occupational Safety & Heath Appeals

A warrant may be obtained upon a showing that the area is
blighted, non-discriminatory searches are conducted on a
regular basis, and/or areas are picked at random for
inspection.

“Cause” needed to obtain a warrant, when consent is
refused, is “deemed to exist if either reasonable legislative
or administrative standards for conducting a routine or area
inspection are satisfied with respect to the particular place,
dwelling, structure, premises, or vehicle, or there is reason
to believe that a condition of nonconformity exists with
respect to the particular place, dwelling, structure,
premises, or vehicle.” (CCP § 1822.52)

Examples:

Residences. (Camara v. City and County of San
Francisco (1967) 387 U.S. 523 [18 L.Ed.2nd 930].)

Commercial Areas. (See v. City of Seattle (1967)
387 U.S. 541 [18 L.Ed.2nd 943].)
Reasonable force may be used to insure everyone’s safety, including the temporary detention of a resident’s occupants if necessary under the circumstances. (*Dawson v. City of Seattle* (9th Cir. 2006) 435 F.3rd 1054, 1065-1070.)

**Rendition (or Extradition):**

**Article IV, § 2, Clause 2 of the United States Constitution** states that: “A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.”

The term “rendition,” literally translated as “to surrender,” refers to what is more commonly known as “extradition.”

*The implementing statute, 18 U.S.C. § 3182,* provides in substance that, on a proper demand of the executive of one state upon the executive of another, it is the duty of the latter to have the fugitive arrested and delivered to the agent of the demanding state.

The federal statute and constitutional provisions provide the basis for the interstate extradition of fugitives.

The “asylum” state has a duty to release to the “demanding” state one who has allegedly violated the laws of the later. It is for the demanding state alone, and not the asylum state, to determine the offending party’s innocence or guilt. (*In re Golden* (1977) 65 Cal.app.3rd 789, 796.)

Upon receipt of the defendant in the “demanding state,” his return to the “asylum state” prior to a determination of guilt will result in dismissal of the charges in the demanding state, under the terms of the *Interstate Agreement on Detainers*. (*Alabama v Bozeman* (2001) 533 U.S. 146 [150 L.Ed.2nd 188].)

*International extraditions* are the subject of treaties between the United States and other individual countries.

*Extradition:* All fifty states have supplemented the federal provisions through the adoption of the “*Uniform Criminal Extradition Act.*”
California adopted the Act in 1937. (See P.C. §§ 1548 et seq.)

P.C. § 1548.1; the Governor’s Duty: “Subject to the provisions of this chapter, the Constitution of the United States, and the laws of the United States, it is the duty of the Governor of this State to have arrested and delivered up to the executive authority of any other State any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in this State.”

Under the Uniform Act for Out-of-State Probationer or Parolee Supervision (P.C. §§ 11175 et seq.), a paroled prisoner or probationer may be arrested and brought back from another state, on revocation of his parole or probation, without invoking the more difficult extradition procedure.

If the defendant has a case pending in this state, he may be held here until he is tried and discharged or convicted and has served his sentence. (P.C. § 1551.1).

Procedure:

P.C. § 1548.2: The demand must be in writing and accompanied by:

A copy, certified as authentic by the executive, of an indictment, information, or affidavit before a magistrate in the demanding state, charging the commission of a crime under the laws of that state; and

A copy of any warrant issued thereon; or

A copy of a judgment of conviction or sentence imposed, with a statement that the person claimed has escaped or violated his bail, probation or parole.

P.C. § 1548.3: The governor of the asylum state may then call upon the Attorney General or any District Attorney to investigate the demand and report on whether the person should be surrendered.
It is not supposed to be an issue in the asylum state whether or not the defendant is guilty. The only issue to be resolved by the asylum state is whether the defendant in custody is the same person demanded by the other state. (P.C. §§ 1550.1, 1553.2)

However, despite the fact that the Uniform Act is worded in mandatory terms, it has been held that while a court may force the governor to make a decision, courts do not have the power to make a governor make a specific decision; i.e., the governor cannot be forced to honor another state’s request for extradition. (South Dakota v. Brown (1978) 20 Cal.3rd 765.)

A 30-year delay in extraditing a California resident, nor the defendant’s ill health, do not justify an exception to the extradition requirements. (In re Walton (2002) 99 Cal.App.4th 934.)

P.C. §§ 1547 et seq.: When the decision is made to surrender the defendant, a “Governor’s Warrant of Extradition” is issued which authorizes the arrest and delivery of an accused to the agent of the demanding state.

P.C. § 1555.2: A person may be required to give a prior waiver of extradition as a condition of his or her release from custody, or as a part of a plea bargain, on the original charge which later becomes the subject of the extradition from the asylum state. (Overruling a prior court decision to the contrary, In re Klock (1982) 133 Cal.App.3rd 726.)

A probationer who flees California may be ordered to pay the costs of his extradition back to California. (People v. Washington (2002) 100 Cal.App.4th 590.)

Ignoring Extradition Treaties: Prosecution of a defendant is not precluded merely because a defendant is abducted abroad for the purpose of prosecution, even if done in violation of an extradition treaty.
treaty, such as when U.S. law enforcement agents forcibly abduct a foreign national in Mexico and bring him to the United States for prosecution. (*Alvarez-Machain* (1992) 504 U.S. 655 [119 L.Ed.2nd 441]; see also *Ker v. Illinois* (1886) 119 U.S. 436 [30 L.Ed. 421]; *People v. Salcido* (2008) 44 Cal.4th 93, 119-126.)

**Unlawful Flight to Avoid Prosecution ("UFAP"): 18 U.S.C. § 1073; The Fugitive Felon Act:**

**Scope:** This federal statute provides criminal penalties for unlawful flight to avoid prosecution, confinement, giving of testimony, or to avoid service of process. ($5,000 fine and/or 5 years in prison.)

*The primary purpose* of the statute is to give the federal government the jurisdiction to assist in the location and apprehension of fugitives from state justice, through the use of a "*UFAP Warrant.*"

**Procedure:**

- A federal complaint for unlawful flight to avoid prosecution is appropriate where there is probable cause to believe that the fugitive has fled and that his flight was for the purpose of avoiding prosecution and that he has moved or traveled in interstate or foreign commerce.

  The mere absence from the state without evidence of an intent to avoid prosecution is *not* sufficient. (*In re King* (1970) 3 Cal.3rd 226, 236, fn. 8.)

- Although not legally required, state prosecution should have been commenced by complaint, warrant, indictment, or information, prior to issuance of the federal complaint.

  However, it is not necessary that the flight itself occur prior to the initiation of the prosecution. (*Lupino v. United States* (8th Cir. 1959) 268 F.2nd 799.)

- Certified copies of the charging documents should be delivered to the Unites States Attorney’s Office.

*UFAP* specifically applies as well to *parental kidnapping* and interstate or international flight to avoid prosecution for that crime.
The Department of Justice has established guidelines for issuing warrants in these cases which require independent and credible information that the kidnapped child is in a condition of abuse or neglect.

UFAP also covers flight for the purpose of avoiding custody or confinement.

Applies to inmates of jails and prisons as well as those on conditional liberty; i.e., probation or parole.

Evidence should be available indicating that a probationer or parolee knew or believed that his conditional liberty was about to be revoked or was at least in jeopardy.

A complaint may also be authorized where a witness has fled the state to avoid giving testimony in a criminal proceeding which involves a felony.

The criminal proceedings must actually have been initiated in state court. (Durbin v. United States (D.C. Cir. 1954) 221 F.2nd 520.)

There should be substantial evidence to indicate that the intent was to flee in order to avoid the giving of testimony.

UFAP prohibits interstate flight “to avoid service of, or contempt proceedings for alleged disobedience of, lawful process, requiring attendance and the giving of testimony or the production of documentary evidence before an agency of a state empowered by the law of such state to conduct investigations of alleged criminal activities.”

UFAP does not supersede, nor is it intended to provide an alternative for, state extradition proceedings.

Note: The federal complaint charging unlawful flight will generally be dismissed once a fugitive has been apprehended and turned over to state authorities to await interstate extradition.
Chapter 7

Warrantless Searches:

General Rule:

Although the use of a search warrant when conducting any search is the general rule (see below), under the terms of the Fourth Amendment, the search of a person, vehicle and (possibly) container without a warrant may often be justified under one or more of three legal theories:

- Incident to Arrest
- With Probable Cause plus Exigent Circumstances
- With Consent

Each of these theories is separately discussed in the following chapters.

Searches of a house (or residence) pose different problems relating to the necessity of a warrant. (See “Searches of Residences,” below)

Exceptions to the Search Warrant Requirement:

Aside from the three legal theories noted above, there are at least seven other justifications for the search and/or seizure of evidence without the need for a search warrant, as discussed below:

- Plain Sight Observations
- Plain Hearing
- Plain Smell
- Special Needs Searches
- Exigent Circumstances
- Closely Regulated Businesses or Activities
- School Searches
- Airport Searches

Plain Sight Observations: A “plain sight” observation (or “plain smell” or “plain hearing”) is not a search, and thus does not implicate the Fourth Amendment.

Rule: A plain sight observation of contraband or other evidence made while the officer is in a place or a position he or she has a lawful right to be does not involve any constitutional issues. (People v. Block (1971) 6 Cal.3rd 239, 243; North v. Superior Court (1972) 8 Cal.3rd 301, 306.)
No Search: There is no search when an officer “observe(s) criminal activity with the naked eye from a vantage point accessible to the general public.” (United States v. Garcia (9th Cir. 1993) 997 F.2nd 1273, 1279; People v. Ortiz (1994) 32 Cal.App.4th 286, 291.)

Use of night vision goggles to observe areas within the curtilage of defendants’ residence was irrelevant. (People v. Lieng (2010) 190 Cal.App.4th 1213, 1227-1228.)

Justification for Seizure: When a peace officer lawfully discovers an item he reasonably believes is potential evidence of a particular crime, observed in “plain sight,” and its seizure appears necessary for its preservation, he may seize the item without a warrant. (People v. Curley (1970) 12 Cal.App.3rd 732.) Five requirements are listed by the court:

1. The officer must have reasonable cause to believe a particular crime has been committed. This requirement is compelled by the Constitution in order to avoid the danger of exploratory searches and seizures.
2. The evidence must not have been discovered as the result of any invasion, intrusion, or illegal entry other than purely formal trespass.
3. The evidence must be in plain sight or readily accessible to routine inspection without rummage or pry. If the evidence is discoverable only as a result of inquisitive or exploratory action then what is involved is a search, and the rules for search apply.
4. The officer must have reasonable cause to believe the evidence tends to show the commission of the crime or tends to show that a particular person committed the crime.
5. The seizure must be necessary to preserve potential evidence, and the degree of invasion of other interests affected by the seizure must be in proportion to the seriousness of the crime.

No Expectation of Privacy: There is no expectation of privacy in anything voluntarily exposed to public view. (People v. Benedict (1969) 2 Cal.App.4th 400.)

“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” (Katz v. United States (1967) 389 U.S. 347, 351 [19 L.Ed.2nd 576, 582.]
“Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited. . . . (C)onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.” (Id., at p. 361 [19 L.Ed.2nd at p. 588]; concurring opinion.)

Examples:

An officer standing in the common areas of an apartment complex, observing contraband though a person’s uncovered windows, is not illegal. (People v. Superior Court [Reilly] (1975) 53 Cal.App.3rd 40, 50.)

But, trespassing at the side of a house where the public is not impliedly invited, at least when investigating a minor offense (i.e., loud music) and no attempt is first made to contact the resident by knocking at the front door, makes the officers’ observations into the defendant’s uncovered windows illegal. (People v. Camacho (2000) 23 Cal.4th 824.)

But see the dissent in Camacho, at pp. 843-844, listing a considerable number of federal circuit court decisions [not binding upon the state courts] which have ruled to the contrary in similar circumstances.

Walking around to the back of the defendant’s house to knock, while looking for an armed parolee-at-large, was held to be lawful, differentiating the rule of Camacho on the facts and the relative seriousness of the crimes involved. The fact that the officer was “trespassing” held not to be significant when considering the “reasonableness” of the officer’s actions. (People v. Manderscheid (2002) 99 Cal.App.4th 355.)

Walking all the way around a house in an attempt to locate an occupant was lawful, and the plain sight observations made while doing so were therefore admissible. (United States v. Hammett (9th Cir. 2001) 236 F.3rd 1054.)
Observing defendant retrieving contraband from a hole in the ground behind an apartment complex, this observation being made from another person’s private property with that person’s permission, is a lawful plain sight observation. (*People v. Shaw* (2002) 97 Cal.App.4th 833.)

The use of binoculars to enhance what the officer can already see, depending upon the degree of expectation of privacy involved under the circumstances, is normally lawful. (*People v. Arno* (1979) 90 Cal.App.3rd 505.)

The use of a flashlight to look into a structure, when the officers are in a place they have a lawful right to be, is not a search. (*United States v. Dunn* (1987) 480 U.S. 294, 298, 304 [94 L.Ed.2d 326, 333, 336-337]; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1501; *United States v. Barajas-Avalos* (9th Cir. 2004) 359 F.3d 1204, 1214, but see dissenting opinion, at pp. 1220-1221.)

Use of night vision goggles to observe areas within plain sight and the curtilage of defendants’ residence is lawful. (*People v. Lieng* (2010) 190 Cal.App.4th 1213, 1227-1228.)

Similarly, observation of a marijuana patch while flying at an altitude of some 1,500 to 2,000 feet, visible to the naked eye (and then enhanced through the use of binoculars), did not violate the defendant’s privacy rights. (*Burkholder v. Superior Court* (1979) 96 Cal.App.3rd 421; see also *People v. St Amour* (1980) 104 Cal.App.3rd 886, observations made from 1,000 to 1,500 feet, again enhanced through the use of binoculars, held to be lawful.)

Ordering a person to lift his sunglasses exposing his eyes is not a search. (*People v. Weekly* (1995) 37 Cal.App.4th 1264; dilated pupils observed.)

The surveillance and photographing of defendant in public was not a Fourth Amendment violation despite the fact that defendant’s identity and location where he was expected to appear were determined through the use of a witness telephone hotline program which guaranteed anonymity to its callers. (*People v. Maury* (2003) 30 Cal.4th 342, 382-403.)

Observation of child pornography on the defendant’s computer, being lawfully searched as authorized by a homicide warrant, was in “plain sight,” and admissible in a later pornography prosecution. (*United States v. Wong* (9th Cir. 2003) 334 F.3d 831.)
The “Plain Sight Observation” vs. the Right To Enter a Residence: When observing contraband within a residence from the outside, a warrantless entry into those premises to seize the contraband would *not* be justified absent exigent circumstances. (*Horton v. California* (1990 496 U.S. 128, 137, fn. 7 [110 L.Ed.2nd 112, 123]; *United States v. Murphy* (9th Cir. 2008) 516 F.3rd 1117, 1121.) A search warrant authorizing the entry of the residence must first be obtained.

However, exigent circumstances would be present if the officer reasonably believes that the occupants of the residence have discovered that the police are aware of contraband in the residence. (*Horton v. California*, supra.)

Plain View in Computerized Information Search Warrant Cases:

Troubled by the wholesale seizure of computerized information of a private business keeping medical information, where the government case agent perused the seized computer files and found incriminating information related to many other individuals for whom there was no probable cause, the Ninth Circuit Court of appeal has proposed waiving the “plain view” doctrine in such cases as a condition of issuing such a search warrant. (*United States v. Comprehensive Drug Testing, Inc.* (9th Cir. 2010) 621 F.3rd 1162, incorporating the facts as described at 513 F.3rd 1085.)

“Plain Hearing.” It has also been held that an offense occurring within a police officer’s *sense of hearing* is within his presence, and can supply probable cause. (*People v. Bradley* (1957) 152 Cal.App.2nd 527.) The crime of making annoying or harassing telephone calls, per *P.C. § 653x*, is done in the listener’s presence. (*People v. Bloom* (2010) 185 Cal.App.4th 1496; harassing phone calls to a police dispatcher.)

“Plain Smell.” It has been argued that there should be no logical distinction between something apparent to the *senses of sight and hearing* and the same thing apparent to the *sense of smell*. (*People v. Bock Leung Chew* (1956) 142 Cal.App.2nd 400.)

*Rule:* “If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed, it might very well be found to be evidence of most persuasive character.” (*Johnson v. United States* (1948) 333 U.S. 10, 13 [92 L.Ed. 436, 440].)
This, however, does not relieve the officer of the necessity of obtaining a search warrant before looking for, and seizing, the source of the odor, absent exigent circumstances excusing the lack of a warrant. (Id. at p. 14 [92 L.Ed. at pp. 440-441].)

Also, while seizure of a package from which the odor of marijuana is emanating may be lawful, a warrantless search of that package absent exigent circumstances is not lawful. (Robey v. Superior Court [Superior Court] (2011) 200 Cal.App.4th 1.)

Examples:

The odor of opium coming from an apartment supplied sufficient probable cause to justify an entry, arrest and search of the apartment. (People v. Bock Leung Chew, supra.)

Odor of marijuana smoke during a traffic stop justified the search of a vehicle. (People v. Lovejoy (1970) 12 Cal.App.3rd 883, 887.)

The “strong odor of fresh marijuana” on defendant’s person was held to be probable cause to believe defendant was in possession of the marijuana. (People v. Gale (1973) 9 Cal.3rd 788, 793, fn. 4.)

The odor of marijuana emanating from two trucks at a private airstrip, under circumstances consistent with smuggling operations, was found to constitute probable cause to believe the trucks contained marijuana. (United States v. Johns (1985) 469 U.S. 478 [83 L.Ed.2nd 890].)

The odor of beer noted during a traffic stop supplied probable cause to search the car for alcohol. (People v. Molina (1994) 25 Cal.App.4th 1038.)

Exceptions:

The courts in some jurisdictions feel that the odor alone, without other suspicious circumstances, may not be sufficient to establish probable cause. (See People v. Taylor (Mich. 1997) 564 N.W.2nd 24; odor of marijuana did not justify the warrantless search of a vehicle.)

And Note: The courts uniformly have held that the odor of ether (a byproduct of the manufacturing process for some dangerous drugs), emanating from a particular location (e.g., a house or garage), is not probable cause to search for drugs.
However, it is an exigent circumstance, given the potential volatility of ether, to justify an immediate warrantless entry to “neutralize” the dangerous situation. (*People v. Messina* (1985) 165 Cal.App.3d 931; *People v. Osuna* (1987) 187 Cal.App.3d 845.)

So long as (1) the police have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, (2) their assistance is not primarily motivated by the intent to arrest a person or seize evidence, and (3) there is some reasonable basis, “approximating probable cause,” to associate the emergency with the area or place to be entered, then the “emergency doctrine” will allow for a warrantless entry to neutralize the emergency. (*United States v. Cervantes* (9th Cir. 2000) 219 F.3d 882.)

And then, any plain sight observations made while lawfully in the house neutralizing the danger can provide the necessary probable cause to secure the house, arrest the occupants, and obtain a search warrant for the rest of the house. (*People v. Hill* (1974) 12 Cal.3d 731.)


**Exigent Circumstances:** The presence of exigent circumstances will excuse the lack of a warrant. “Exigent Circumstances” are present, as a general rule, whenever there is no reasonable opportunity for the police officers to stop and take the time to get a search warrant. (See *United States v. Ventresca* (1965) 380 U.S. 102, 107 [13 L.Ed.2d 684, 688].)

*Rule:* “[E]xigent circumstances are present when a reasonable person [would] believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” (*United States v. Alaimalo* (9th Cir, 2002) 313 F.3rd 1188, 1192-1193, quoting *Bailey v. Newland* (9th Cir. 2001) 263 F.3rd 1022, 1033; *United States v. Brooks* (9th Cir. 2004) 367 F.3rd 1128, 1133, fn. 5, & 1135.)
Per the California Supreme Court: “We have defined ‘exigent circumstances’ to include ‘an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property . . . ’ (People v. Ramey (1976) 16 Cal.3d 263, 276 . . . ) The action must be ‘prompted by the motive of preserving life or property and [must] reasonably appear to the actor to be necessary for that purpose.’ (People v. Roberts (1956) 47 Cal.2nd 374, 377 . . . )” (People v. Duncan (1986) 42 Cal.3rd 91, 97.) “[E]xigent circumstances’ means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.” (People v. Panah (2005) 35 Cal.4th 395, 465.)

Examples:


  The warrantless entry and temporary seizure of a home while police obtain a search warrant is reasonable where there exists; (a) probable cause to believe the home contains evidence, (b) good cause to believe the occupants unless restrained will destroy the evidence, (c) the method used is less restrictive to the occupants than detaining them, and (d) a reasonable period of time is used to obtain a warrant. (In re Elizabeth G. (2001) 88 Cal.App.4th 496.)

  With “probable cause” to believe that contraband is contained in a particular residence, and a “reasonable belief” that if the house is not immediately secured the evidence will be destroyed, officers may enter to secure the house pending the obtaining of a search warrant or a consent to do a complete search. (United States v. Alaimalo (9th Cir, 2002) 313 F.3rd 1188.)

  See “Securing the Premises Pending the Obtaining of a Search Warrant,” below.

- To check for other suspects, for the officers’ safety. (United States v. Ojeda, supra.)

  See “Protective Sweeps,” below.

© 2012 Robert C. Phillips. All rights reserved

• *Search for additional suspects.* (*People v. Block* (1971) 6 Cal.3rd 239.)


A reasonable belief in the existence of an *imminent threat to life* or the *welfare of a person* within the home, probable cause to believe a *person reported missing is therein*, or a reasonable belief a person within is in *need of aid*, are all well recognized as exigent circumstances which justify an immediate, warrantless entry. (*People v. Coddington* (2000) 23 Cal.4th 529; *Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [80 L.Ed.2nd 732, 743].)

The presence of a drug lab, as evidence by the odor of ether, given the explosive nature of the chemicals used, justifies an immediate warrantless entry to neutralize the danger. (*People v. Duncan* (1986) 42 Ca.3rd 91; *People v. Stegman* (1985) 164 Cal.App.3rd 936, 943; *People v. Messina* (1985) 165 Cal.App.3rd 937.)

See “*Plain Smell,*” above.

*Note:* The Ninth Circuit Court of Appeal considers the warrantless entry of a residence in such drug lab cases as justified by the so-called “*emergency doctrine,***” which, per the court, is something different than “*exigent circumstances.*” (*United States v. Cervantes* (9th Cir. 2000) 219 F.3rd 882.)

Based upon probable cause to believe a domestic violence incident had occurred and that the female victim, known to be in a hotel room, might need the officer’s assistance; a warrantless entry was upheld. (*United States v. Brooks* (9th Cir. 2004) 367 F.3rd 1128.)

A warrantless entry into a residence when necessary to “*preserve the peace*” in the execution of a restraining order, allowing the defendant’s daughter to retrieve certain property, was held to be lawful. Reasonable force was also
properly used when necessary to effectively preserve the peace. (*Henderson v. City of Simi Valley* (9th Cir. 2002) 305 F.3rd 1052.)

To check on the welfare of persons reasonably believed to need law enforcement’s assistance. (*Martin v. City of Oceanside* (9th Cir. 2004) 360 F.3rd 1078.)

To check for a missing eight-year-old girl where there was cause to believe that a male resident in the apartment searched had had contact with her earlier in the day and was now hiding, refusing to open the door. (*People v. Panah* (2005) 35 Cal.4th 395, 464-466. The fact that later evidence indicated that the victim might no longer be alive did not negate the exigency justifying a second warrantless entry upon discovery of evidence implicating defendant and indicating that the victim, who might still be alive despite defendant’s statements to the contrary, had been in his apartment. (*Id.*, at pp. 467-468)

- To prevent the *escape of suspects*, or when *suspects arm themselves*. (See *People v. Miller* (1999) 69 Cal.App.4th 190, 200.)

E.g.: A possible trafficker in narcotics, ducking back into his residence upon the approach of peace officers, while attempting to shut the door and close the blinds, is an exigent circumstance justifying an immediate, warrantless entry. *United States v. Arellano-Ochoa* (9th Cir. 2006) 461 F.3rd 1142; gun found on the floor next to the front door, after the fact.)

**Special Needs Searches:** An exception to the search warrant requirement, as well as the need to even show any “individualized suspicion,” is when a search is found to serve “special needs” beyond the need for normal law enforcement.

**Test:** The legality of a warrantless search under the “special needs” exception is determined by balancing (1) the need to search against (2) the constitutional intrusiveness of the search. (*Henderson v. City of Semi Valley* (9th Cir. 2002) 305 F.3rd 1052, 1059; citing *Ferguson v. City of Charleston* (2001) 532 U.S. 67, 78 [149 L.Ed.2nd 205].)

Suspicionless searches may be upheld if they are conducted for important “non-law enforcement purposes” in contexts where adherence to the warrant and probable cause requirement would be impracticable. (*Friedman v. Boucher* (9th Cir. 2009) 580 F.3rd 421
847, 853; finding that a forced extraction of a DNA sample from defendant’s mouth by means of a buccal swab for inclusion in Nevada’s cold case data bank was not justified by the Special Needs exception to the search warrant requirement.)

See People v. Maikhio (2011) 51 Cal.4th 1074, where the California Supreme Court, in reversing the lower court, held that a game warden, under authority of Fish & Game § 1006, who reasonably believes that a person has recently been fishing or hunting, but lacks reasonable suspicion that the person has violated an applicable fish or game statute or regulation, may stop a vehicle in which the person is riding to demand the person display all fish or game the person has caught or taken. As an administrative, special needs search, the standard Fourth Amendment probable cause requirements are irrelevant.

Examples:


- **Suspicionless drug testing of teachers and administrators** because of the unique role that teachers play in the lives of school children, the in loco parentis obligations imposed upon them, and the fact that by statute (in Tennessee), teachers were charged with securing order such that they were “on the ‘frontline’ of school security, including drug interdiction.” (Knox County Educ. Ass’n v. Knox County Bd. Of Educ. (6th Cir. 1998) 158 F.3rd 361, 375.)


- **Search of a student’s computer** based upon information that the graduate student was “hacking into” the school’s e-mail server and had the capability of “threaten(ing) the integrity of campus computer or communication systems.” (United States v. Heckenkamp (9th Cir. 2007) 482 F.3rd 1142.)

- **Drug testing** for United States Customs Service employees, in certain positions. (Treasury Employees v. Von Raab (1989) 489 US. 656 [103 L.Ed.2nd 685].)
• Searches of employee backpacks to prevent inventory loss.  
  *(United States v. Gonzalez* (9th Cir. 2002) 300 F.3rd 1048.)

• Pre-departure airport screening procedures, including the use of a magnetometer, at airports, as an “administrative search” to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board.  *(People v. Hyde* (1974) 12 Cal.3rd 158; *United States v. Aukai* (9th Cir. 2007) 497 F.3rd 955.)


• Administrative inspection of fire-damaged premises to determine the cause of a fire.  *(Michigan v. Tyler* (1978) 436 U.S. 499 [56 L.Ed.2nd 486].)

• Administrative inspections to ensure compliance with city housing code.  *(Camara v. Municipal Court of City and County of San Francisco* (1967) 387 U.S. 523 [18 L.Ed.2nd 930].)

• Border Patrol Checkpoints.  *(United States v. Martinez-Fuerte* (1976) 428 U.S. 543 [49 L.Ed.2nd 1116].)

• Sobriety Checkpoints.  *(Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444 [110 L.Ed.2nd 412].)

• Entry into a residence when necessary to enforce a court order, such as a temporary restraining order related to domestic violence.  *(Henderson v. City of Simi Valley* (9th Cir. 2002) 305 F.3rd 1052.)


• A search warrant issued pursuant to *P.C. § 1524.1*, for HIV testing in specified circumstances, authorized for purposes of public safety, has been referred to as a “special needs”—type search, and
therefore subject to less stringent requirements than normally applicable. (*Humphrey v. Appellate Division of the Superior Court* (2002) 29 Cal.4th 569, 574-575.)

- The taking of biological samples from prison inmates, parolees and probationers for the purpose of completing a federal DNA database, might qualify as a “special needs” search. (*United States v. Kincade* (9th Cir. 2004) 379 F.3rd 813, 823-832.)

- **Search of Luggage in a Subway Facility:** Implemented in response to terrorist attacks on subways in other cities, a program was designed to deter terrorists from carrying concealed explosives onto the New York’s subway. The city program established daily inspection checkpoints at selected subway facilities where officers searched bags that met size criteria for containing explosives. Subway riders wishing to avoid a search were required to leave the station. In a bench trial, the district court found that the program comported with the **Fourth Amendment** under the “special needs doctrine.” On appeal, the court affirmed, finding that the program was reasonable and therefore constitutional. In particular, the court found that preventing a terrorist attack on the subway was a special need, which was weighty in light of recent terrorist attacks on subway systems in other cities. In addition, the court found that the disputed program was a reasonably effective deterrent. Although the searches intruded on a full privacy interest, the court further found that such intrusion was minimal, particularly as inspections involved only certain size containers and riders could decline inspection by leaving the station. (*MacWade v. Kelly* (2nd Cir. 2006) 460 F.3rd 260.)

- **The search of a high school student’s pockets** based upon a standard policy that all students who leave and return to the campus during the school day are subject to search, done to prevent the introduction of drugs and weapons onto the campus, at least where the search is very non-intrusive (i.e., the student is not touched). (*In re Sean A.* (2010) 191 Cal.App.4th 182.)

- **Fish and Game Regulations:** A game warden, under authority of Fish & Game § 1006, who reasonably believes that a person has recently been fishing or hunting, but lacks reasonable suspicion that the person has violated an applicable fish or game statute or regulation, may stop a vehicle in which the person is riding to demand the person display all fish or game the person has caught or taken. As an administrative, special needs search, the standard
Fourth Amendment probable cause requirements are irrelevant.  
(People v. Maikhio (2011) 51 Cal.4th 1074.)

Exceptions to the Exceptions; i.e., where law enforcement is primarily pursuing its general crime control purposes:

- A highway checkpoint program set up for purposes of drug interdiction.  (City of Indianapolis v. Edmond (2000) [148 L.Ed.2nd 333].)

  See “DUI (and other regulatory “special needs”) Checkpoints,” under “Detentions,” above.

- A state hospital program to test pregnant women for drug use when the results are made available to law enforcement.  (Ferguson v. City of Charleston (2001) 532 U.S. 67 [149 L.Ed.2nd 205].)

  The “special needs” doctrine is inapplicable where the arrest and search at issue in a case were clearly for law enforcement purposes.  (Ferguson v. City of Charleston, supra, at p. 83, fn. 20 [149 L.Ed.2nd 205]; “In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes;” and City of Indianapolis v. Edmond, supra, at p. 121 [148 L.Ed.2nd 333]; observing that the “special needs” doctrine has never been applied where the purpose of the search was “to detect evidence of ordinary criminal wrongdoing.”).

Examples where the “Special Need” fails to outweigh a person’s right to privacy:

The preemployment drug and alcohol screening requirement for a part time “page” who would be responsible for putting books back on library shelves and, on occasion, staff the desk in the youth services area.  (Lanier v. City of Woodburn (9th Cir. 2008) 518 F.3rd 1147.)

A urinalysis drug test requirement for candidates for public office was held to violate the Fourth Amendment.  (Chandler v. Miller (1997) 520 U.S. 305 [137 L.Ed.2nd 513].)

Drug testing as a condition of placement or employment for Customs employees who were required to handle classified material only was rejected as being too broad   (National Treasury Employees Union v. Von Raab (1989) 489 U.S. 656 [103 L.Ed.2nd 685].)
A state hospital’s drug testing policy, developed in conjunction with the police, for testing unwed mothers for drug abuse, found to be unconstitutional, at least without informing the mothers of the purposes for the test. (Ferguson v. Charleston (2001) 532 U.S. 67 [149 L.Ed.2nd 205].)

A forced, warrantless extraction of a DNA sample from defendant’s mouth by means of a buccal swab for inclusion in Nevada’s cold case data bank was not justified by the “special needs” exception to the search warrant requirement. (Friedman v. Boucher (9th Cir. 2009) 580 F.3rd 847, 853.)

A city did not violate an employee’s (a police officer) Fourth Amendment rights and right to privacy under the Federal Stored Communications Act (18 U.S.C. §§ 2701 et seq.) by obtaining and reviewing transcripts of the employee’s text messages sent via a city pager where there were reasonable grounds for suspecting that the search was necessary for a non-investigatory work-related purpose because the search was done in order to determine whether the character limit on the city’s contract was sufficient to meet the city’s needs. Also, the city and a police department had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand, that the city was not paying for extensive personal communications. The search was permissible in its scope because reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether the employee’s overages were the result of work-related messaging or personal use. (Ontario v. Quan (June 17, 2010) 560 U.S. __ [130 S.Ct. 2619; 177 L.Ed.2nd 216].)

Declining to rule on the application of an employee’s privacy rights in the workplace, as they relate to the use of high-tech devices, the Court assumed for the sake of argument, without deciding, that the plaintiff/respondent had a right to privacy in the contents of text messages made via an employer-issued pager. However, the “special needs” of the workplace allow for this intrusion into plaintiff/respondent’s privacy rights when conducted for a “noninvestigatory, work-related purpose.” (Id., at p. __ [130 S.Ct. at pp. 2629-2630]; i.e., to determine whether the allotted number of messages was insufficient, requiring employees to pay for office-related messages, or whether employees were using the pagers for non-work related purposes.)

© 2012 Robert C. Phillips. All rights reserved
Note that *Greene v. Camreta* (9th Cir. 2009) 588 F.3rd 1011; where the Ninth Circuit Court of Appeal ruled that interviewing a child victim on a school campus without the parents’ consent required a search warrant or other court order, or exigent circumstances, as a *Fourth Amendment* seizure, and did not meet the requirements of a “special needs” seizure, was overruled by the United States Supreme Court in *Camreta v. Greene* (May 26, 2011) __ U.S. __ [131 S.Ct. 2020; 179 L.Ed.2nd 1118]. The Ninth Circuit's decision, however, was merely vacated, leaving the issue undecided. See P.C. § 11174.3(a), setting out a statutory procedures police officers are to use in interviewing child victims while at school.

*Closely Regulated Businesses or Activities:*

“Pervasively” or “Closely Regulated Businesses:” The courts have indicated that a warrant is *not* necessary in those cases where the place to be searched is commercial property, and the industry involved is one that is so “pervasively regulated” or “closely regulated” that warrantless inspections are necessary to insure proper, or legal, business practices. (Donovan v. Dewey (1981) 452 US. 594, 598-599 [69 L.Ed.2nd 262, 268-169]; New York v. Burger (1987) 482 U.S. 691, 700 [96 L.Ed.2nd 601, 612-613]; People v. Paulson (1990) 216 Cal.App.3rd 1480, 1483-1484.)

To qualify as a closely or pervasively regulated business which may be subject to warrantless, administrative searches, three criteria must be met:

- There must be a substantial governmental interest underlying the regulatory scheme authorizing the inspection.

- The warrantless inspections must be necessary to further the regulatory scheme.

- The statute’s inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant; i.e.:

  It must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope; *and*
It must limit the discretion of the inspecting officers.

(New York v. Burger, supra, at pp. 702-702 [96 L.Ed.2nd at pp. 613-615; People v. Paulson, supra, at p. 1485.)

“Closely regulated” businesses (Colonade Catering Corp. v. United States (1970) 397 U.S. 72, 77 [25 L.Ed.2nd 60, 63-65].); or


Example:

Commercial trucking is a pervasively regulated industry, allowing for warrantless searches. (United States v. Delgado (9th Cir. 2008) 545 F.3rd 1195, 1200-1204; based upon Missouri statutes allowing for such searches.)

Also, for a “commercial vehicle officer,” who had limited law enforcement powers, to contact a regular state Highway Patrol officer to conduct a search, did not require any reasonable suspicion and did not prevent the regular officer from questioning defendant about issues unrelated to commercial vehicle regulations. (Id., at pp. 1204-1205.)

A county jail, including lockers located outside the visitor center but maintained by the jail personnel, particularly with signs warning visitors that they were subject to search, is the equivalent to a closely regulated business allowing for a warrantless administrative search of a visitor and the property he deposits in the lockers. (People v. Boulter (2011) 199 Cal.App.4th 761.)

In some instances, licenses to do business include a consent to search (26 U.S.C. § 7342), and may impose sanctions for refusing to give such consent, but do not, by its terms, permit a forcible entry. (Colonnade Catering Corp. v. United States, supra: Inspections under the federal retail liquor occupational tax stamp act.)

See also United States v. Biswell (1972) 406 U.S. 311 [32 L.Ed.2nd 87]; warrantless search of a gun dealer’s place of

*People v. Lee* (1986) 186 Cal.App.3rd 743, 749, finding a warrantless entry into the private areas of a business (for the purpose of an arrest, in this case), does *not* affect the applicability of a regulatory scheme authorizing warrantless inspections of the private areas of some regulated businesses, unless the search is being conducted for the purpose of seeking contraband or evidence of crime under the guise of an administrative warrant. *(Donovan v. Dewey* (1981) 452 U.S. 594, 598, fn. 6 [69 L.Ed.2nd 262, 268].)

Use of an administrative, or “*inspection*” warrant, issued by a court for the purpose of regulating building, fire, safety, plumbing, electrical, health, labor or zoning codes, does not justify an entry by police to make an arrest given the lesser proof standards needed to obtain an administrative warrant. If an entry is effected for the purpose of arresting the occupant, an arrest warrant will have to be obtained. *(Alexander v. City and County of San Francisco* (1994) 29 F.3rd 1355.)

**Other California or United States Regulatory/Administrative Searches:**

**Vehicle Code:**


V.C. § 320(b): Auto dismantlers.


See “*Searches of Vehicles,*” below.

**Penal Code:**

P.C. § 171: Inspection of a firearm to determine whether it is loaded for purposes of P.C. §§ 171c & 171d (Firearms in state buildings and governmental residences.)
P.C. § 12031(a): Inspection of a firearm in a public place.

P.C. § 12028.5: Seizure of firearms and other deadly weapons at domestic violence scenes.

**Fish and Game Code:** There is case law that refers to the regulation of hunting and fishing as having relaxed search and seizure standards due to the fact that they are “highly regulated” activities, and that requiring warrants would make it impossible to effectively implement hunting and fishing laws. But the case law is very sparse:

*People v. Harbor Hut Restaurant*(1983) 147 Cal.App.3rd 1151; upholding the warrantless inspection of a restaurant under the theory that “fishing” is a “highly regulated business.”

*Betchard v. Dept. of Fish and Game*(1984) 158 Cal.App.3rd 1104, upheld the routine and warrantless inspections of plaintiff's agricultural rangeland upon which deer hunting was often done. But the court noted that the relaxed standards were due to the fact that the areas entered were “open fields” and the intrusion into the plaintiff's privacy rights was minimal.

The court also noted that a hunter has given up a certain amount of his or her privacy rights: “Hunters are required to be licensed. By choosing to engage in this highly regulated activity, there is a fundamental premise that there is an implied consent to effective supervision and inspection as directed by statute.” (p. 1110.)


See also **F&G § 8011:** Allowing the warrantless inspection of the records of a wholesale fish dealer licensed under **F&G § 8040(a).**

**Financial Code:**

**Fin. Code § 21206:** Inspection of pawned property. (See *Sanders v. City of San Diego* (1996) 93 F.3rd 1423, 1427; *G&G Jewelry Inc. v. City of Oakland* (9th Cir. 1993) 989 F.2nd 1093, 1099-1101, and fn. 4.)
United States Code:

14 U.S.C. § 89(a): The Coast Guard has statutory authority to search vessels, giving them plenary authority to stop vessels for document and safety inspections. (People v. Eng (2002) 94 Cal.App.4th 1184; drugs discovered; see “Border Searches,” below.)

49 U.S.C. § 44901: Transportation Security Administration (TSA) screening of luggage bound for airline flights. (See (United States v. McCarty (9th Cir. Sep. 9, 2011) __ F.3rd __ [2011 U.S. App. LEXIS 18874]; child pornography observed during a lawful TSA administrative search may lawfully be used to establish probable cause to arrest.)

School Searches:


Airport Searches:

Airport screenings of passengers and their baggage constitute administrative searches and are subject to the limitations of the Fourth Amendment. (United States v. Davis (9th Cir. 1973) 482 F.2nd 893, 895 908.)

Airport screenings must be reasonable to be lawful. (United States v. Marquez (9th Cir. 2005) 410 F.3rd 612.)

“Reasonableness” is determined by balancing the right to be free of intrusion with society’s interest in safe air travel. (United States v. Pulido-Baquerizo (9th Cir. 1986) 800 F.2nd 899, 901.)

Airport searches are reasonable when:

- They are no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives;
- They are confined in good faith to that purpose; and
- Passengers are given the opportunity to avoid the search by electing not to fly.
A second, more intense, yet random screening of passengers as a part of airline boarding security procedures, is constitutional.  (*United States v. Marquez*, *supra*.)

Once having gone through the initial screening, a person loses his right to revoke his “implied consent” to being searched and must submit his person (*United States v. Aukai* (9th Cir. 2007) 497 F.3rd 955.) and his carryon luggage (*Torbet v. United Airlines, Inc.*, *supra*.) to a secondary screening, so long as the selection of those subject to such secondary screenings is done objectively.  E.g.:

- Randomly.  (*Torbet v. United Airlines, Inc.*, *supra*; carryon luggage searched even though it had already gone through an x-ray examination without incident.)

- Because defendant had attempted to board a flight *without valid identification*.  Per TSA (Transportation Security Administration) rules, anyone attempting to board a commercial airplane without a government issued, picture identification, will be subject to a secondary screening.  (*United States v. Aukai*, *supra*; defendant selected for “wanding” of his person even though he had already walked through the magnetometer without setting off an alarm.)

Per *Torbet* and *Aukai*, the first, initial screening, whether by x-ray of one’s carryon luggage, or of the defendant’s person having walked through a magnetometer, is deemed “inconclusive” even though “it doesn’t affirmatively reveal anything suspicious,” or when it fails to “rule out every possibility of dangerous contents,” thus justifying the need for a secondary screening.  So long as such secondary screenings are administered “objectively,” they are lawful.

A search of luggage bound for an airline flight may be searched (i.e., “screened”) by Transportation Security Services (TSA) officers without a warrant or probable cause as an administrative search, looking for explosives or other safety hazards.  Such a search may not be used as a ruse to conduct an exploratory search for criminal evidence.  However, evidence of criminal activity observed in plain sight during such an administrative search may be used as probable cause for a criminal investigation.  (*United States v. McCarty* (9th Cir. Sep. 9, 2011) __ F.3rd __ [2011 U.S. App. LEXIS 18874]; child pornography observed during a
lawful TSA administrative search may lawfully be used to establish probable cause to arrest.)

Note: *United States v. Aukai* (9\textsuperscript{th} Cir. 2007) 497 F.3\textsuperscript{rd} 955, found that “implied consent” is not a proper theory for upholding airport searches. Rather, a warrantless, suspicionless search of a passenger, after the passenger has passed through the magnetometer (or has put his carry-on luggage on the conveyor belt for x-raying) is lawful as an “administrative search.”
Chapter 8

Searches of Persons:

Privacy Rights: Of all the areas where a person has a legitimate “reasonable expectation of privacy” protecting the person from governmental intrusions, none, perhaps, is greater than that person’s own body. (See Winston v. Lee (1985) 470 U.S. 753, 759 [84 L.Ed.2nd 662]; “A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable;’ even if likely to produce evidence of a crime.”)

Note: However, given the relative “mobility” of one’s person, with sufficient cause, a warrantless search of a person may generally be justified. (See below)

Rule: However, where lawful, warrantless searches of a person are justifiable under one or more of the following legal theories:

- Searches Incident to Arrest
- Searches with Probable Cause
- Searches with Less Than Probable Cause

Searches Incident to Arrest: A warrantless search of a person and the area within his/her immediate reach incident to that person’s custodial arrest, with or without any probable cause to believe there is any contraband or evidence subject to seizure on the person, is lawful, and is justified by the need to keep contraband and weapons out of jail, to preserve any possible evidence, and to protect the officer. (Chimel v. California (1969) 395 U.S. 752 [23 L.Ed.2nd 685]; New York v. Belton (1981) 453 U.S. 454 [69 L.Ed.2nd 768]; People v. Diaz (2011) 51 Cal.4th 84.)

Legal Justification: “The rule allowing contemporaneous searches (incident to arrest) is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused’s person or under his immediate control.” (United States v. Ventresca (1965) 380 U.S. 102, 107 [13 L.Ed.2nd 684, 688].)

A warrantless “search incident to arrest” may be made of an arrestee and the area within her immediate reach even though the arrestee has been handcuffed and can no longer lunge for weapons or evidence. (People v. Rege (2005) 130 Cal.App.4th 1584; but see below.)
See also the concurring, minority opinion in *People v. Summers* (1999) 73 Cal.App.4th 288; for an excellent description of the legal reasoning behind searches incident to arrest, and why (at least as the argument went at that time prior to the decision in *Arizona v. Gant*, infra.) it is irrelevant that the person arrested had already been moved from the immediate location where the arrest is first made.

Such a search has traditionally been justified by the need to search “for weapons, instruments of escape, and evidence of crime” upon performing a custodial arrest. (*People v. Diaz* (2011) 51 Cal.4th 84.)

**Legal Justification Under Debate:**

The Ninth Circuit Court notes in *United States v. Weaver* (9th Cir. 2006) 433 F.3d 1104, at page 1107, that searches incident to arrest have gone well beyond the “rational underpinnings” of the Supreme Court’s original approval of such searches in *New York v. Belton*, supra. More specifically, the Court notes how “officer safety and preservation of evidence” (see *Chimel v. California*, supra.) are no longer a major concern when the arrestee is handcuffed and put into a nearby patrol car. And they quote Supreme Court Justice O’Conner who is noted to have said that, “lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel* . . . [This is] a direct consequence of *Belton’s* shaky foundation.” (Concurring opinion in *Thornton v. United States* (2004) 541 U.S. 615, 624 [158 L.Ed.2nd 905].)

Note that the U.S. Supreme Court decided in *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485], that a warrantless search of a vehicle incident to arrest is lawful only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

The theory of *Gant* is not restricted to vehicle searches. The same theory, severely restricting the search incident to arrest theory, is applicable as well to an arrest within one’s residence. (*People v. Leal* (2009) 178 Cal.App.4th 1051.)

See “Searches of Vehicles;” “Incident to Arrest,” below.
Then, in *United States v. Maddox* (9th Cir. 2010) 614 F.3rd 1046, at pages 1048-1049, the court found that a search of a metal vial on the defendant’s key chain was unlawful where, although under defendant’s control when he was physically arrested, it was no longer within reach and was beyond defendant’s ability to conceal or destroy evidence by the time it was searched because defendant had been handcuffed and put into a patrol car.

However, with the metal vial in *Maddox* being taken from defendant’s hand as he was being arrested, an argument can be made that pursuant to the subsequent California Supreme Court decision of *People v. Diaz* (2011) 51 Cal.4th 84, where it was held that containers “immediately associated with the person” are still subject to a search incident to arrest, even though the suspect has been arrested and secured, and even if the container is not searched until later. (See below.)

*Transportation Requirement:*

*Anyone who is arrested and is to be transported to jail, the police station, a detoxification center, home, etc. (i.e., a “custodial arrest”), may be fully searched prior to the transportation. (United States v. Robinson (1973) 414 U.S. 218 [38 L.Ed.2nd 427].)*

*Robinson* involved an arrest for driving on a revoked license where the arrestee was transported to the police station. In the decision, the Court referred to it as a “full custodial arrest” which, in turn, was “defined at (sic) one where an officer ‘would arrest a subject and subsequently transport him to a police facility for booking,’ . . . .” (pg. 223, fn. 2.)

Other than this brief comment (above), and in noting that Robinson had been subjected to a “full custodial arrest,” the issue of whether or not an actual transportation of the arrestee was a legal prerequisite to a “search incident to that arrest” was not discussed.

There is no such thing as a “search incident to citation,” because of the lack of a physical transportation of the subject from the scene of the arrest. (*Knowles v. Iowa* (1998) 525 U.S. 113 [142 L.Ed.2nd 492].)

In *Knowles*, the Court noted that the officer, under Iowa law, had the option of physically arresting or
only citing the driver for a speeding violation. The officer chose to do the later. Therefore, no transportation of the defendant was contemplated. The Supreme Court, in discussing the differences between a cite and release situation (albeit for an infraction) when compared to a “custodial arrest” where the subject is transported to a police station, noted the following significant factor:

“We have recognized that . . . officer safety . . is ‘both legitimate and weighty,’ [Citations]. The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest. In Robinson, we stated that a custodial arrest involves ‘danger to an officer’ because of ‘the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.’ (Italics added) 414 U.S., at 234-235 . . . . We recognized that ‘[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.’ Id., at 234, n. 5 . . . . A routine traffic stop, on the other hand, is a relatively brief encounter and ‘is more analogous to a so-called “Terry stop” . . . than to a formal arrest.’ [Citations] (“Where there is no formal arrest ... a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence”). (Parenthesis in original; pgs. 487-488.)

Note also that the California Penal Code dictates that misdemeanor-related laws apply equally to infractions. (P.C. § 19.7)

Although there has to be a transportation of the suspect in order to justify a search incident to arrest, the physical arrest does not need to be for an offense for which custody (as opposed to a citation) is mandatory. (Gustafson v. Florida (1973) 414 U.S. 260 [38 L.Ed.2nd 456].)
In *Gustafson*, defendant was lawfully arrested for driving without a valid license in his possession and searched incident to that arrest. The officer had planned to transport the defendant to the police station prior to the search; a lawful procedure under Florida law. The search was upheld as a lawful search incident to this “lawful custodial arrest.”

At page 265, the *Gustafson* Court notes that: “Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson*, and there did not exist a departmental policy establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue. [Citation] It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest, and placed the petitioner in custody.”

This comment, which is not further explained, seems to recognize a difference between a “full custodial arrest” (as it is referred to in *Robinson*) and the mere citation and release at the scene.

Also, in footnote 3 (pg. 266), again inferring a difference between citing and releasing at the scene and the taking of the suspect into “custody” for transportation, the Court notes that: “Smith (the officer) testified that he wrote about eight to 10 traffic citations per week, and that about three or four out of every 10 persons he arrested for the offense of driving without a license were taken into custody to the police station. Smith indicated that an offender is more likely to be taken into custody if he does not reside in the city of Eau Gallie. Finally, Smith testified that after making a custodial arrest, he always searches the arrestee before placing him into the patrol car.”

*A misdemeanor cite* and release at the scene of the contact (i.e., a “non-custodial arrest”), *absent probable cause* to believe the arrestee has evidence or contraband on him, would *not* be subject to a search incident to arrest for the simple reason he is *not* to be transported; i.e., it is *not* a

© 2012 Robert C. Phillips. All rights reserved
“custodial arrest.” (See People v. Brisendine (1975) 13 Cal.3rd 528; United States v. Moto (9th Cir. 1993) 982 F.2nd 1384.)

Brisendine found a search incident to arrest to be illegal where the person was to be cited at the scene and released for a misdemeanor fire code (i.e., an illegal campfire) violation. Although Brisendine was based upon a pre-Proposition 8 interpretation of the California Constitution, the Court did note at page 548, fn. 15: “We also accept the (United States Supreme Court’s) view (in Robinson and Gustafson) that transportation in a police vehicle per se justifies a limited weapons search, regardless of the likelihood that a particular arrestee is armed.”

Although the California Supreme Court in Brisendine limited searches incident to a “custodial arrest” to looking for weapons, interpreting the more restrictive California Constitution, it still preconditioned such a search upon the transportation of the arrestee.

In United States v. Moto, supra., the Ninth Circuit Court of Appeal found the defendants’ custodial arrest for an infraction, where they were transported to the police station, to be contrary to the provisions of P.C. § 853.5 mandating the release of the subject on his written promise to appear absent an exception to the rule, as provided for in the statute. Assuming without discussing the issue that a cite and release is not a custodial arrest, the Court here found the “search incident to arrest” to be a Fourth Amendment violation.

transporting and even booking a person for a fine-only offense, even if contrary to state law, is not a Fourth Amendment violation and thus does not subject the resulting evidence to suppression. However, the Court’s assumption is still valid that a “custodial arrest,” involving the transportation of the arrestee to a police station, is a necessary prerequisite to a lawful “search incident to arrest.”

*Transporting an arrested minor* (even if for only a “status offense” such as a curfew violation or truancy), whether the minor is to be transported home (*In re Demetrius A.* (1989) 208 Cal.App.3rd 1245; prowling.), or to a police station (*In re Charles C.* (1999) 76 Cal.App.4th 420; curfew.), justifies a search incident to arrest. (See also *In re Humberto O.* (2000) 80 Cal.App.4th 237; truancy.)

In *Humberto O.*, the juvenile was taken into custody for a truancy violation. However, it was noted in the decision that “the officers planned to cuff defendant’s hands behind his back, put him in the patrol car, and transport him to school.” (pg. 240.) Education Code §§ 48264 and 48265 require that the minor be transported to his parents or to school (among other choices). (pg. 241, fn. 2.) “The limited nature of a section 48264 arrest requires that the minor be transported to school, as the officers here planned to do.” (pg. 244.) Searching the backpack he was carrying incident to this custodial arrest, was upheld.

In *In re Demetrius A.*, supra, without discussing the issue of the necessity for a transportation, it was noted that the minor was arrested for prowling and was going to be transported home. A search incident to such a custodial arrest was lawful.

In *In re Charles C.*, supra, the minor was “taken into temporary custody” (i.e., “arrested,” see pg. 425, fn. 3.) and transported to the police station where he was searched “incident to the arrest.” The search was upheld, holding that it was irrelevant that the search was not conducted until after the transportation. Without further discussing the issue, the Court did note that citing (albeit for an infraction) at the scene and releasing the subject does not justify a search incident to such a citation. (pg. 424, fn. 2, citing *Knowles v. Iowa* (1998) 525 U.S. 113 [142 L.Ed.2nd 492].)
Contemporaneous in Time and Place:

General Rule: The “search incident to arrest” theory is, as a general rule, only applicable if the search is conducted “contemporaneous in time and place.” I.e., the search must be conducted at the time and location of the arrest. Searching after transportation to another location cannot be justified under this theory, absent some practical necessity for moving the person first. (See People v. Ingham (1992) 5 Cal.App.4th 326.)

“(The) ‘justifications (for allowing a search incident to arrest) are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.’” (United States v. Ventresca (1965) 380 U.S. 102, 107 [13 L.Ed.2nd 684, 688]; quoting Preston v. United States (1964) 376 U.S. 364, 367 [11 L.Ed.2nd 777, 780-781].)

See also United States v. McLaughlin (9th Cir. 1999) 170 F.3rd 889, where the search was conducted five minutes after the arrest, where the officer first drove the defendant from the scene. “The relevant distinction turns not upon the moment of arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening acts that the latter cannot be said to have been incident to the former.” (Id., at p. 983, quoting United States v. Abdul-Saboore (D.C. Cir. 1996) 85 F.3rd 664, 668; see also United States v. Hudson (9th Cir. 1996) 100 F.3rd 1409; search three minutes after the arrest valid as a search incident to arrest.)

Also, where there is preexisting probable cause to arrest, it is irrelevant whether the search occurs before or after the formal act of arrest. (In re Lennies H. (2005) 126 Cal.App.4th 1232, 1239-1240; United States v. Smith (9th Cir. 2005) 389 F.3rd 944.)

“An officer with probable cause to arrest can search incident to the arrest before making the arrest. (Rawlings v. Kentucky (1980) 448 U.S. 98, 111, . . . 65 L.Ed.2nd 633; People v. Adams (1985) 175 Cal.App.3rd 855, 861 . . .) (People v. Limon (1993) 17 Cal.App.4th 524, 538, . . .) The fact that a defendant is not formally arrested until after the search does not invalidate the search if probable cause to arrest existed prior to the search and the search was substantially contemporaneous with the arrest. (Rawlings v. Kentucky, supra, 448 U.S. at p. 111, . . .; People v. Adams, 441
Other Requirements and Limitations:

There is no such thing as a “search incident to citation,” because of the lack of the right to physically transport the subject. (Knowles v. Iowa (1998) 525 U.S. 113 [142 L.Ed.2nd 492].)

However, it is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (Atwater v. City of Lago Vista (2001) 532 U.S. 318 [149 L.Ed.2nd 549]; Virginia v. Moore (2008) 553 U.S. 164 [170 L.Ed.2nd 559]; or even for a fine-only, infraction. (People v. McKay (2002) 27 Cal.4th 601, 607; see also United States v. McFadden (2nd Cir. 2001) 238 F.3rd 198, 204; Edgerly; v. City and County of San Francisco (9th Cir. 2010) 599 F.3rd 946, 955-956.)

California’s statutory provisions require the release of misdemeanor arrestees in most circumstances. (E.g., see P.C. §§ 853.5, 853.6, V.C. §§ 40303, 40500) However, violation of these statutory requirements is not a constitutional violation and, therefore, should not result in suppression of any evidence recovered as a result of such an arrest. (People v. McKay, supra, at pp. 607-619, a violation of V.C. § 21650.1 (riding a bicycle in the wrong direction); People v. Gomez (2004) 117 Cal.App.4th 531, 538-540, seat belt violation (V.C. § 27315(d)(1)), citing: Atwater v. City of Lago Vista, supra; People v. Bennett (July 21, 2011) 197 Cal.App.4th 907, 918.)


A state statute limiting the right to search does not require the suppression of any evidence found in violation of the statute, so long as the Constitution is not also violated. (People v. Xinos (2011) 192 Cal.App.4th 637, 653; search of a vehicle’s event data recorders (EDR), or sensing and diagnostic modules (SDM), in violation of V.C. § 9951.)

It matters not that the container searched did not belong to the person arrested, so long as it was found within the arrested defendant’s “lunging area.” *(People v. Prance* (1991) 226 Cal.App.3rd 1525; *People v. Mitchell* (1995) 36 Cal.App.4th 672.)

But see *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485], below, severely limiting the search incident to an arrest where the suspect has already been secured.

*Property in the possession or under the control of a subject who is booked into custody is subject to search:* “Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. *(People v. Robertson* 240 Cal.App.2d 99, 105-106 . . . .) During their period of police custody an arrested person’s personal effects, like his person itself, are subject to reasonable inspection, examination, and test. *(People v. Chaigles* (1923) 237 N.Y. 193 [142 N.E. 583, 32 A.L.R. 676], Cardozo, J.)” *(People v. Rogers* (1966) 241 Cal.App.2nd 384, 389.)

See *People v. Diaz* (2011) 51 Cal.4th 84, allowing a search incident to arrest of items “immediately associated with the person,” even if not done until sometime after the suspect’s arrest.

*A person arrested in his home* is subject to search as is the area within his immediate reach. *(People v. Summers* (1999) 73 Cal.App.4th 288; see the concurring, minority opinion for an excellent description of the legal reasoning behind searches incident to arrest, and why it is irrelevant that the person arrested had already been moved from the immediate location where the arrest is first made.)

*However,* the U.S. Supreme Court recently restricted searches incident to arrest when searching a vehicle in *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485]. In *Gant,* it was held that a warrantless search of a vehicle incident to arrest is lawful only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. This same rule is likely to apply to searches incident to arrest in a residence, or anywhere else.
The theory of *Gant* is not restricted to vehicle searches. The same theory, disallowing a search incident to arrest when the suspect has already been secured, is applicable as well to an arrest within one’s residence. (*People v. Leal* (2009) 178 Cal.App.4th 1051.)

But, the *Leal* court, citing *Summers* and *Gant*, noted that there are limitations to this rule: “A different rule of reasonableness applies when the police have a degree of control over the suspect but do not have control of the entire situation. In such circumstances—e.g., in which third parties known to be nearby are unaccounted for, or in which a suspect has not yet been fully secured and retains a degree of ability to overpower police or destroy evidence—the *Fourth Amendment* does not bar the police from searching the immediate area of the suspect’s arrest as a search incident to an arrest.” (*Id.*, at p. 1060.)

It was also noted in *Leal* that the law was sufficiently settled prior to *Gant* that “good faith” reliance upon prior authority did not allow for the admissibility of the evidence recovered in this case. (*Id.*, at pp. 1065-1066.)

The same applies to a person arrested in his vehicle; the person and the passenger area of that vehicle may be searched incident to that arrest. (*New York v. Belton* (1981) 453 U.S. 454 [69 L.Ed.2nd 768].)


A search incident to arrest does *not* include the right to conduct a “strip search,” which, as a “serious intrusion upon personal rights” and “an invasion of personal rights of the first magnitude” (*Chapman v. Nichols* (10th Cir. 1993) 989 F.2nd 393, 395-396.), is generally not allowed prior to booking. (*Foote v. Spiegel* (Utah 1995) 903 F.Supp. 1463.)

**Searches withProbable Cause:** A person may also be searched without a search warrant any time a law enforcement officer has “probable cause” to believe the person has contraband or other seizable property on him. (*People v. Coleman* (1991) 229 Cal.App.3rd 321.)

*The “exigency”* excusing the need for a search warrant, obviously, is the fact that when probable cause develops to believe that the a person possesses contraband or evidence of a crime, there will not be an
opportunity to obtain a search warrant without risking the loss or destruction of the items sought. (See below)

*Probable cause* may be found from the defendant’s own admissions which, without independent evidence of the corpus of the crime, would not be admissible in court. The likelihood of conviction is not relevant in establishing probable cause to arrest. (*People v. Rios* (1956) 46 Cal.2nd 297; defendant’s admission that he had injected drugs two weeks earlier sufficient to establish probable cause for the past possession of a controlled substance. Search incident to the arrest was therefore lawful.)

**P.C. § 833:** By statute, in California, peace officers are authorized to search any person the officer has “legal cause to arrest” for “dangerous weapons,” and then seize such weapon pending the determination whether the person will be arrested.

*Note:* In that most of the rules on “searches incident to arrest” are constitutionally-based case decisions, anywhere they might differ from the language of this statute (i.e., the need to transport the arrested person as a condition of a search incident to arrest; see below), the case law is likely to take precedence.

See “Patdown Searches,” below.

**Order of Search & Arrest:** It is irrelevant whether the officer, with probable cause to believe a subject possesses contraband or some other tangible evidence of a crime, searches first and then arrests, or arrests first and then searches incident to that arrest (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 110 [65 L.Ed.2nd 633, 645]; *People v. Gonzales* (1989) 216 Cal.App.3rd 1185, 1189; *People v. Avila* (1997) 58 Cal.App.4th 1069.), so long as the search is “substantially contemporaneous” with the arrest. (See *People v. Cockrell* (1965) 63 Cal.2nd 659, 666; *People v. Nieto* (1990) 219 Cal.App.3rd 1275, 1277.)

A search of a vehicle incident to arrest is lawful where there exists probable cause to arrest before the search is conducted, even if, in the sequence of events, the search takes place before the actual physical arrest of the defendant, so long as the search is “roughly contemporaneous” with the arrest. (*United States v. Smith* (9th Cir. 2005) 389 F.3rd 944; see also *United States v. Lugo* (10th Cir. 1999) 170 F.3rd 996.)

The old California rule of requiring a valid arrest, even of an unconscious suspect, prior to the extraction of a blood sample (See *People v. Superior Court [Hawkins]* (1972) 6 Cal.3rd 757, 762.), was abrogated by passage of Proposition 8, in 1982. Now, so
long as probable cause exists to believe that the defendant was
driving while intoxicated, a formal arrest is not a prerequisite to a
warrantless seizure of a blood sample.  (People v. Trotman (1989)
Cal.App.3rd 1417, 1422, 1425.)

Intrusions into the Human Body: Of all the areas where a person has a
legitimate “reasonable expectation of privacy” protecting the person from
governmental intrusions, none, perhaps, is greater than that person’s own
body.  (See Winston v. Lee (1985) 470 U.S. 753, 759 [84 L.Ed.2nd 662];
“A compelled surgical intrusion into an individual’s body for evidence . . .
implicates expectations of privacy and security of such magnitude that the
intrusion may be ‘unreasonable;’ even if likely to produce evidence of a
crime.”)

Searches which “shock the conscience,” or which are unreasonable
under the circumstances, are not allowed.  (Rochin v. California
(1952) 342 U.S 165 [96 L.Ed. 183]; Winston v. Lee, supra, at pp.
760-763 [84 L.Ed.2nd at pp. 668-671].)

However, lesser intrusions into a human body may, under
some circumstances, be upheld with a sufficient exigency.
(Schmerber v. California (1966) 384 U.S. 757, 768 [16
L.Ed.2nd 908, 918]; e.g., blood withdrawal.)

“The interests in human dignity and privacy” forbid intrusions into
the human body “on the mere chance that desired evidence might
be obtained.”  (Schmerber v. California, supra; People v.
Bracamonte (1975) 15 Cal.3rd 394, 402-405.)

Factors: In determining the lawfulness of such an intrusion, such
as the forced extraction of blood, the court will consider:

- The degree of resistance by the suspect.
- The severity of the crime at issue.
- Whether the suspect posed an immediate threat to the
  safety of the officers or others.
- Whether the police refused to respect a reasonable request
  to undergo a different form of testing.
- The degree of the authorities’ need for the evidence.
(Hammer v. Gross (9th Cir. 1991) 932 F.2nd 842.)

Driving Under the Influence Cases: With probable cause to arrest, the taking of blood needed as evidence, even by force, so long as done by properly trained personnel in a medically approved manner and without use of excessive force, is approved. (Schmerber v. California, supra.)

The old California rule of requiring a valid arrest, even of an unconscious suspect, prior to the extraction of a blood sample (See People v. Superior Court [Hawkins] (1972) 6 Cal.3rd 757, 762.), was abrogated by passage of Proposition 8, in 1982. Now, so long as probable cause exists to believe that the defendant was driving while intoxicated, a formal arrest is not a prerequisite to a warrantless seizure of a blood sample. (People v. Trotman (1989) 214 Cal.App.3rd 430, 435; People v. Deltoro (1989) 214 Cal.App.3rd 1417, 1422, 1425.)

The blood test in a drunk driving case should have been suppressed when the defendant had already given a urine sample that was the functional equivalent of the blood test for evidentiary purposes. (People v. Fiscalini (1991) 228 Cal.App.3rd 1639.)

But, forcing an arrested DUI suspect to give blood after the suspect intentionally frustrated the officer’s attempts at obtaining a breath sample was held to be lawful. (People v. Sugarman (2002) 96 Cal.App.4th 210.)

Other Examples of Bodily Intrusions:

Forcing a suspect to submit to the removal of a rubber finger stall of powdered drugs from his rectum, the procedure being conducted by a physician and involving little if any pain, was approved. (People v. Woods (1956) 139 Cal.App.2nd 515.)

However, balancing the interests, the California Supreme Court determined that a magistrate could not lawfully authorize a search warrant in a child molest/incest case for a medical examination consisting of the manual massage of the prostate gland causing a discharge of semen. (People v. Scott (1978) 21 Cal.3rd 284, 291-295; “(T)he more intense, unusual, prolonged, uncomfortable, unsafe or undignified the procedure contemplated, or the more it
intrudes upon essential standards of privacy, the greater must be the showing for the procedure’s necessity.”

Surgery to remove a bullet from the accused was found, under the circumstances, to be unreasonable. (Winston v. Lee (1985) 470 U.S. 753, 760-763 [84 L.Ed.2nd 662, 668-671].)

This is not to say, however, that surgery would never be lawful. As the Supreme Court pointed out in Winston v. Lee, supra, at p. 760 [84 L.Ed.2nd at p. 669]: “The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual’s interests in privacy and security are weighed against society’s interests in conducting the procedure. In a given case, the question whether the community’s need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.” In Lee, the defendant would have had to been subjected to general anesthesia, and the prosecution’s need for the bullet was questionable, given other evidence of the defendant’s guilt.

Inserting the capped end of a ballpoint pen and prying a 2-inch wad of masking tape out of defendant’s mouth, suspected of being evidence, is not unreasonable. (People v. Fulkman (1991) 235 Cal.App.3rd 555, 563.)

Taking a DNA sample via a “buccal swab” of the mouth is a search under the Fourth Amendment, and illegal absent a search warrant or an exigent circumstance allowing for such a search. (Friedman v. Boucher (9th Cir. 2009) 580 F.3rd 847, 852-853.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off. Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police. The officer who administered the PAS test testified that used mouthpieces were normally discarded in the trash.
Thus, any subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. (*People v. Thomas* (2011) 200 Cal.App.4th 338.)

**Choking:** Searches of the person may also include the need to forcefully keep a suspect from swallowing evidence.

**Rule:** So long as the suspect can be prevented from swallowing without “choking” him, reasonable force may normally be used. (*People v. Jones* (1989) 209 Cal.App.3rd 725; *People v. Johnson* (1991) 231 Cal.App.3rd 1, 15-17.)

“Choking” is legally defined as preventing a person from breathing or by obstructing the flow of blood to his head. (*Ibid.*)

**Examples:**

Holding a subject’s Adam’s apple to prevent swallowing is okay. (*People v. Cappellia* (1989) 208 Cal.App.3rd 1331, 1337.)

Using pepper spray to cause the subject to spit out the contents of his mouth is probably not unreasonable. (*United States v. Holloway* (Kan. 1995) 906 F.Supp. 1437.)

But see *Headwaters Forest Defense v. County of Humboldt* (9th Cir. 2002) 276 F.3rd 1125, holding that the use of pepper spray on non-violent demonstrators to gain their compliance is unreasonable, and grounds for civil liability.

Inserting the capped end of a ballpoint pen and prying a 2-inch wad of masking tape out of defendant’s mouth, suspected of being evidence, is not unreasonable. (*People v. Fulkman* (1991) 235 Cal.App.3rd 555, 563.)

The use of reasonable force in extracting blood, when done in a medically approved manner, is lawful. (*Ritschel v. City of Fountain Valley* (2005) 137 Cal.App.4th 107; a misdemeanor case.)
**Searches with Less Than Probable Cause:** In certain instances, where the governmental interests are stronger than in cases of “ordinary criminal wrongdoing,” or the individual’s privacy interests are diminished, the probable cause standards have been relaxed. For instance:

*Persons in Pervasively Regulated Industries or Sensitive Positions:* In some situations, where there exists a strong governmental interest, neither a warrant nor a showing of individualized suspicion is required to support the validity of statute requiring employees to submit to a blood or urine test. For instance:

*Government Employees:* A random search, without cause, of an employee’s personal effects by a government employer, at least where the employee has prior notice that his possessions may be subject to search, has been held to be lawful. (*United States v. Gonzalez* (9th Cir. 2002) 300 F.3rd 1048)

The testing of blood or urine of *railway workers* involved in certain train accidents. (*Skinner v. Railway Labor Executives’ Assn.* (1989) 489 U.S. 602 [103 L.Ed.2nd 639].)

*Drug testing* as a condition of placement or employment for *Customs officers* in a position involving the interdiction of drugs or carrying of firearms. (*National Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656 [103 L.Ed.2nd 685]; but, similar requirements for persons who were only required to handle classified material was rejected as being too broad.)

*But,* a *urinalysis drug test* requirement for *candidates for public office* was held to violate the *Fourth Amendment.* (*Chandler v. Miller* (1997) 520 U.S. 305 [137 L.Ed.2nd 513].)

*And see Ferguson v. Charleston* (2001) 532 U.S. 67 [149 L.Ed.2nd 205], finding a *state hospital’s drug testing policy,* developed in conjunction with the police, for testing *unwed mothers* for drug abuse, to be unconstitutional, at least without informing the mothers of the purposes for the test.

*For Students:*

*Athletics and Extracurricular Activities:* Given the extent of the drug problem in public schools, and the importance of the governmental interest in preventing the problem from worsening (i.e., a “Special Needs” search), the U.S. Supreme Court has approved mandatory random drug tests for certain categories of students as the price for participating in:

The California Supreme Court approved a similar program for a national college athletic organization (NCAA). *(Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.)


Students in General:  Recognizing that students (K through high school) do retain some *Fourth Amendment* protections, and that school officials are, in effect, government employees, the Supreme Court struck a balance and found that school administrators may conduct searches of students and their personal belongings on no more than a “reasonable suspicion.” *(New Jersey v. T.L.O.* (1985) 469 U.S. 325 [83 L.Ed.2nd 720].)

A school 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 age and sex of the student and the nature of the infraction.” *(Id., at p. 342.)*

Constitutional Protections and Statutory Restrictions:

*Cal. Const., article I, section 28(c),* provides that students and staff of public schools have “the inalienable right to attend campuses which are safe, secure, and peaceful.”

*Ed. Code § 49050:* The *Education Code* provides that “(n)o school employee shall conduct a search that involves:

- Conducting a body cavity search of a pupil manually or with an instrument.
- Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil.”
With information from another student that a minor (Marissa) was supplying other students with prescription and over-the-counter pills at school, that alcohol could be obtained at the plaintiff Savana Safford’s home, and information from Marissa that Savana had supplied her with the pills and with pills and other contraband being found in Savana’s day planner that was in Marissa’s possession (which Savana admitted was hers), a search of Savana’s backpack and outer clothing by school administrators was justified by a reasonable suspicion that Savana might have more pills in her possession. However, this level of suspicion was not sufficient to justify the greater intrusion of having Savana strip down to her underwear and pull her bra and panties out to see what fell out, thus partially exposing herself to school officials. *(Safford Unified School District #1 v. Redding (2009) 557 U.S. 354 [174 L.Ed.2nd 354]; finding that the school officials were entitled to qualified immunity from civil liability under these circumstances.)*

Using a *drug-sniffing dog* to do sniffs of a student, being more intrusive, are considered to be a search and controlled by the **Fourth Amendment**, but only requires a finding of a “*reasonable suspicion*” when the person sniffed is a student. *(B.C. v. Plumas (9th Cir. 1999) 192 F.3rd 1260; random and suspicionless drug-sniff search of students held to be unreasonable under the circumstances.)*

It is the opinion of the California Attorney General that a policy of unannounced, random, neutral dog sniffing of students’ personal belongings, such as backpacks, purses, jackets, and outer garments, after ordering students to leave these items in a classroom and remain in another area, would be unconstitutional absent some suspicion or probable cause to support the search. *(83 Opn.Cal. Atty. Gen. 257 (2000))*

Use of *metal detectors* at the entrances of a school building, despite the lack of individualized suspicion, is lawful as a “*special needs*” search. *(In re Latasha W. (1998) 60 Cal.App.4th 1524.)*

*Patting a non-student down for possible weapons* on a high school campus, where the defendant/minor was to be moved to the security office, need not be justified by an
articulable suspicion that he might be armed. *In re Jose Y.* (2006) 141 Cal.App.4th 748.)

*A school resource officer*, although employed as a municipal police officer, while working full time on a high school campus he adopts the relaxed “reasonable suspicion” standard applicable to school officials. *(In re William V.)* (2003) 111 Cal.App.4th 1464; see also *In re Alexander B.* (1990) 220 Cal.App.3rd 1572, 1577-1578.)

The suspicionless search of a student was upheld where it was conducted pursuant to an established policy applying to all students and was consistent with the type of action on the part of a school administrator that fell well within the definition of “special needs” of a governmental agency. The search was of a limited nature, being told only to empty out his pockets, as he was not subjected to physical touching of his person nor was he exposed to the intimate process required for a urine sample necessary for drug testing. The purpose of the search was to prevent the introduction of harmful items (weapons and drugs) into the school environment. Given the general application of the policy to all students engaged in a form of rule violation that could easily lend itself to the introduction of drugs or weapons into the school environment (i.e., leaving during the school day without permission and returning later), further individualized suspicion was not required. *(In re Sean A.)* (2010) 191 Cal.App.4th 182, 186-190.)

But see the dissent (pgs. 191-198) criticizing the decision as a non-particularized, suspicionless search of a student in violation of the principles of *New Jersey v. T.L.O.* (1985) 469 U.S. 325 [83 L.Ed.2nd 720], where the Supreme Court held that a reasonable suspicion is required. *(See above)*

*Frisks* (or *Patdowns*) are considered searches, albeit limited in intrusiveness and scope.

**Defined:** Frisks generally consist of a police officer doing no more than feeling the outside of a suspect’s clothing, checking for the feel of any potential offensive weapons. *(See *Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2nd 889].)*

A “stop and frisk” is *constitutionally permissible* if two conditions are met:
• The investigatory stop must be lawful; i.e., when a police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense.

• The police officer must reasonably suspect that the person stopped is armed and dangerous.


A frisk is a limited search for weapons only. (Santos v. Superior Court (1984) 154 Cal.App.3rd 1178.)

E.g.: Wrong answer: “I patted him down for weapons and/or contraband.”

Patting a person down for identification is not lawful even though the person has been lawfully stopped and claims to have no identification. (People v. Garcia (2006) 145 Cal.App.4th 782.)

But see “Searching for Identification,” below.

The police officer needs to be able to articulate facts establishing a “reasonable” or “rational” suspicion that the person may be armed. (Terry v. Ohio, supra.)

At least one court referred to the test as being a “reason to believe” that the subject may be armed. (People v. Lopez (2004) 119 Cal.App.4th 132; see also In re H.H. (2009) 174 Cal.App.4th 653, 657.)

A traffic stop for an equipment violation in a “high crime” (i.e., gang) area at night is not reasonable suspicion, by itself, sufficient to justify a detention or patdown for weapons. (People v. Medina (2003) 110 Cal.App.4th 171.)

Patting down a suspect in a mail theft, merely because the interview is to take place in a small, crowded interview room, that the interview might turn confrontational, and it was felt that patting the suspect down would be the “prudent” thing to do, is not sufficient reasonable suspicion to believe the person might be armed. (United States v. Flatter (9th Cir. 2006) 456 F.3rd 1154.)
Patting a non-student down for possible weapons on a high school campus, where the defendant/minor was to be moved to the security office, need not be justified by an articulable suspicion that he might be armed. (In re Jose Y. (2006) 141 Cal.App.4th 748.)

Stopping, detaining, and patting down a known gang member, observed running through traffic in a gang area, while looking back nervously as if fleeing from a crime (as either a victim or a perpetrator), is lawful In re H.M. (2008) 167 Cal.App.4th 136.

A person’s assertion of his Fourth Amendment right not to be searched cannot be used to establish a reasonable suspicion to believe that he might be armed. (In re H.H. (2009) 174 Cal.App.4th 653, citing People v. Dickey (1994) 21 Cal.App.4th 952.)

The test is an objective one. An officer need not later demonstrate that he was in actual fear. (People v. Osborne (2009) 175 Cal.App.4th 1052, 1061-1062.)

Patting down a passenger in a vehicle for weapons held to be justified based upon the defendant’s observed furtive movements of the passenger during the stop of the vehicle, along with his apparently false denial and then unreasonable explanation for the furtive movements. (United States v. Burkett (9th Cir. 2010) 612 F.3rd 1103.)

A probation officer confronted with an uncooperative, irate individual who was present in the house of a juvenile probationer during a Fourth wavier search, when the detained visitor appeared to be a gang member and who was overly dressed for the weather, and who attempted to turn away and cover his stomach when ordered not to do so, lawfully patted down the suspect for weapons. (People v. Rios (2011) 193 Cal.App.4th 584, 598-600.)

The Court further determined that a probation officer has the legal authority to detain and patdown a non-probationer pursuant to P.C. § 830.5(a)(4) (i.e.; enforcing “violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment.”) (Id, at p. 600.)
The “nature of the crime” suspected is a factor in determining whether a frisk for weapons is lawful. “(C)ertain crimes carry with them the propensity for violence, and individuals being investigated for those crimes may be pat searched without further justification.” (People v. Osborne (2009) 175 Cal.App.4th 1052, 1059; see also Sibron v. New York (1968) 392 U.S. 40, 74 [20 L.Ed.2nd 917].) For instance:

Mail theft: No. (United States v. Flatter (9th Cir. 2006) 456 F.3rd 1154.)

Robbery: Yes. (Terry v. Ohio (1968) 392 U.S. 1 [20 L.Ed.2nd 889]; United States v. Hill (9th Cir. 1976) 545 F.2nd 1191.

Nighttime Burglary: Yes. (United States v. Mattarolo (9th Cir. 2000) 209 F.3rd 1153.)

Counterfeiting: No. (United States v. Thomas (9th Cir. 1988) 863 F.2nd 622.)

Large-scale narcotics dealing: Yes. (United States v. $109,179 in U.S. Currency (9th Cir. 2000) 228 F.3rd 1080; United States v. Post (9th Cir. 1979) 607 F.2nd 847.)


Drug-Related Offense: Yes. (United States v. Davis (9th Cir. 2008) 530 F.3rd 1069, 1082-1083; “Because officers reasonably suspected that Richard Davis was involved in narcotics activity, it was also reasonable for them to suspect that he might be armed.”)

See also People v. Collier (2008) 166 Cal.App.4th 1374; traffic stop where the odor of marijuana was detected and defendant was wearing baggy clothing through which any possible bulges could not be seen; patdown lawful.)

Drug-Related Offense; Under the Influence Only: No. (Ramirez v. City of Buena Park (9th Cir. 2009) 560 F.3rd 1012, 1021-1023: The fact that the defendant was reasonably believed to be under the influence of a
controlled substance, by itself, was not cause to pat him down for weapons.)

Vehicle Burglary: No, but when combined with tools lying nearby, including screwdrivers that could be used as a weapon, the fact that the suspect might be on parole, and he was acting “real nervous,” patting him down for weapons was justified. (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1059-1062.)

*Vehicle Drivers and Passengers:*

The driver of a motor vehicle stopped for a traffic offense, ordered by a police officer to exit his vehicle, is subject to be patted down for offensive weapons whenever it is determined that there is a reasonable suspicion to believe that he or she “might be armed and presently dangerous.” (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 112 [54 L.Ed.2nd 331].)

The same rule applies to passengers in the motor vehicle. They are subject to being ordered out of the vehicle (*Maryland v. Wilson* (1997) 519 U.S. 408, 415 [137 L.Ed.2nd 41].), may be detained for the duration of the traffic stop (*Brendlin v. California* (2007) 551 U.S. 249 [168 L.Ed.2nd 132].) and patted down with a reasonable suspicion to believe that they may be armed. (*Arizona v. Johnson* (2009) 555 U.S. 323 [172 L.Ed.2nd 694].)

See also *Knowles v. Iowa* (1998) 525 U.S. 113, 117-118 [142 L.Ed.2nd 492]; Officers who conduct “routine traffic stop[s]” may “perform a ‘patdown’ of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.” (See also *Arizona v. Johnson*, supra., at p. 324.)

*Procedures:*

A frisk is *limited to the outer clothing*, except when the clothing (or purse, etc.) is so resistant as to prevent feeling a possible weapon below the clothing. (*People v. Brisendine* (1975) 13 Cal.3rd 528, 542.)

E.g.: Where the officer responded to a 9-1-1 call of a disturbance, and was directed to the defendant who was wearing a fanny pack in which the officer
could see the apparent outline of a pistol, taking the fanny pack from the defendant and unzipping the outer compartment to remove what was in fact determined to be a pistol was not unreasonable. *(People v. Ritter (1997) 54 Cal.App.4th 274.)*

When an object is felt which might be a *weapon* of any sort, that object may then be removed and inspected. *(People v. Snyder (1992) 11 Cal.App.4th 389; bottle; People v. Atmore (1970) 13 Cal.App.3rd 244, 247; shotgun shell.)*


**P.C. § 833.5**: California provides legal authority for peace officers to detain and “*conduct a limited search*” of a person the officer has “*reasonable cause*” to believe has a firearm or other deadly weapon and to seize any weapon found. If the person is convicted of a charge related to the firearm or weapon, it shall be deemed a nuisance and disposed of pursuant to P.C. §§ 18000 & 18005 (formerly, P.C. § 12028).

*Note:* In that most of the rules on “*patdown searches*” are from constitutionally-based case decisions, anywhere they might differ from the language of this statute, the case law is likely to take precedence.

**Problems:**

During a “*consensual encounter*?” A patdown is probably *not* lawful, although it may never become an issue in that if an officer observes something giving him or her a *reasonable suspicion* that the consensually encountered person may be armed, that same reasonable suspicion would likely elevate the situation into one justifying a lawful detention as well as a patdown. *(See People v. Lee*
During “execution of a search warrant” or a “Fourth Waiver” search, at least for narcotics: Courts tend to recognize the likelihood that narcotics suspects are often armed and may allow a patdown with no more than the conclusionary opinion that the “need for officer safety” dictated the need for a patdown. (*People v. Samples* 1996) 48 Cal.App.4th 1197.)

Note *Ybarra v. Illinois* (1979) 444 U.S. 85 [62 L.Ed.2nd 238], where the United States Supreme Court determined to be illegal the detention and patdown of anyone and everyone at the scene of the execution of a narcotics search warrant (i.e., a bar), absent evidence connecting each person to be detained and patted down with the illegal activity being investigated.

During a “Fourth Waiver” search of a narcotics suspect’s home: A patdown of a “known associate” of a probationer whose home is being searched according to that person’s terms of probation with evidence of drug abuse occurring at the house, but without an articulable suspicion that the defendant might be armed, but just because it is “the safe thing to do,” is illegal. (*People v. Sandoval* (2008) 163 Cal.App.4th 205.)

Officer feels a controlled substance (or other items subject to seizure) during the patdown for weapons: If the officer has the training and expertise to recognize that the object is probably an illegal substance or object, he may do a full search based upon that newly developed probable cause. (*People v. Lee* (1987) 194 Cal.App.3rd 975; *People v. Thurman* (1989) 209 Cal.App.3rd 817, 825-826.)

E.g.: Feeling a lump which could not have been a weapon, plus other factors (prior lawful observation of pagers, gram scale upon which there was an odor of methamphetamine, and a plastic baggie), justified a finding of probable cause to search for contraband. (*People v. Dibb* (1995) 37 Cal.App.4th 832.)
However, if the officer feels what might be a controlled substance in the pocket, and “manipulates” (Minnesota v. Dickerson (1993) 508 U.S. 366, 378 [124 L.Ed.2nd 334, 345]; People v. Dickey (1994) 21 Cal.App.4th 952, 957.) or “shakes” it (United States v. Miles (9th Cir. 2001) 224 F.3rd 1009.) in an attempt to confirm or verify his suspicions, the manipulation or shaking of the object is a search for contraband, done without probable cause, and illegal.

Unless the incriminating character of the contraband becomes “immediately apparent” to the officer, he may not retrieve it and may not manipulate it in an attempt to determine what the item may be. (United States v. Davis (9th Cir. 2008) 530 F.3rd 1069, 1082-1084.)

But, feeling a bulge that is believed to be a weapon, and manipulating it in an attempt to verify that it is a weapon, which requires no more than a reasonable suspicion, is lawful. (United States v. Mattarolo (9th Cir. 1999) 209 F.3rd 1153.)

Feeling a bulge and being unable to determine whether or not it is a weapon, it is okay to ask the suspect. If the suspect admits that it is contraband, this will give the officer probable cause to arrest and search. (People v. Avila (1997) 58 Cal.App.4th 1069, 1075-1977.)

But feeling a bulge and recognizing that it is not a weapon (a film canister, in this case), and then asking the subject what it is, has been argued by some to be illegal as a “preliminary step to an illegal search” (see People v. Valdez (1987) 196 Cal.App.3rd 799, 807); a questionable decision at best.

Feeling a bulge which the officer immediately recognized as car keys, after the subject had denied having any car keys on him, and with other evidence tending to connect him to a recent carjacking during which the car keys were taken, was sufficient probable cause to believe that the car keys were evidence of a crime and to justify the
retrieval of the keys from his pocket. *(In re Lennies H.)* (2005) 126 Cal.App.4th 1232.)

**Frisk for a Firearm based upon an Uncorroborated Anonymous Tip:**

A detention and patdown for weapons, based upon an uncorroborated anonymous tip alone, is not lawful in that anonymous information has repeatedly been held to be legally insufficient to establish a *reasonable suspicion*. There is no such thing as a “*firearms exception*” to this rule. *(Florida v. J.L.* (2000) 529 U.S. 266 [146 L.Ed.2nd 254].)

*But note:* The U.S. Supreme Court, in dicta, hinted strongly that had the anonymous tipster warned of something more dangerous, such as a bomb, a patdown based upon this tip alone might be upheld. The Court also indicated that certain areas where there is a lessened expectation of privacy, such as in an airport or on school grounds, may also be an exception to this rule. *(Id., at pp. 273-274 [146 L.Ed.2nd at p. 262].)*

The Court, in a concurring opinion, also briefly discusses “*predictive information*” which may supply the necessary corroboration, such as being able to correctly describe future actions of the suspect. Also, unconnected anonymous informants, or anything which would add the element of credibility to the information, might sufficiently corroborate the anonymous informant. *(Id., at p. 275 [146 L.Ed.2nd at p. 263].)*

See “*Detentions,*” above.

Taking the hint, the appellate court in *People v. Coulombe* (2001) 86 Cal.App.4th 52, found sufficient corroboration justifying a patdown for a firearm when the information came from two separate informants, where the tips were close in
time, the informants contacted the officer personally (thus putting their anonymity at risk), and the setting was in a crowded throng of celebrants at a New Year’s Eve street party, thus increasing the danger.

The fact that the physical description of a suspect who is reported by an anonymous tipster to have a gun in his pocket is very specific, still does not corroborate the tipster’s information. Absent at least some suspicious circumstances observed by the responding police officers, finding the person described by the tipster does not create a reasonable suspicion justifying a detention or a patdown for weapons. *(People v. Jordan* (2004) 121 Cal.App.4th 544, 553-652; the quick confirmation of the physical description of the defendant and his location, by itself, is legally insufficient.)*

A late night radio call concerning two specifically described males causing a disturbance, with one possibly armed, in a known gang area at an address where a call concerning a daytime shooting days earlier resulted in the recovery of two firearms, and where the described males are found within minutes of the call, is sufficient to justify a detention and a patdown. *(In re Richard G.* (2009) 173 Cal.App.4th 1252, 1257-1258, fn. 1.)*

**Other Situations:**

Frisk of a person for weapons was lawful when it had been reported to police by a witness that one of several people present had been seen with a firearm, defendant was uncooperative and belligerent, and he kept reaching for an area in his baggy pants where there appeared to be a large, heavy object. *(People v. Lopez* (2004) 119 Cal.App.4th 132.)*

Stopping someone suspected of having just committed an armed carjacking, with the observation of a knife and bullets, and then a gun, all in plain sight, was more than enough to justify a cursory check of the suspects for possible weapons. Then, feeling objects which, as the
deputy testified, could be, or could contain, weapons, the deputy was justified in removing and inspecting those items. (*United States v. Hartz* (9th Cir. 2006) 458 F.3rd 1011, 1018-1019.)

Patting a non-student down for possible weapons on a high school campus, where the defendant/minor was to be moved to the security office, need not be justified by an articulable suspicion that he might be armed. (*In re Jose Y.* (2006) 141 Cal.App.4th 748.)

A traffic stop where the odor of marijuana was detected and defendant was wearing baggy clothing through which any possible bulges could not be seen, held to be lawful. (*People v. Collier* (2008) 166 Cal.App.4th 1374.)

Abandoned Property:

*General Rule*: There is no expectation of privacy in abandoned, or discarded, property. Such property, therefore, may be searched or seized without a warrant or even probable cause.

Property abandoned by a suspect, without both a subjective and an objectively reasonable expectation of privacy, may be seized and searched without probable cause and without a warrant. (*In re Baraka H.* (1992) 6 Cal.App.4th 1039.)

E.g.: *Trash Cans*: There is no reasonable expectation of privacy in the trash one places in trash cans out at the curb for pick up. (*California v. Greenwood* (1988) 486 U.S. 35 [100 L.Ed.2nd 30].)

The “Threatened Illegal Detention”: What happens when the property is abandoned as a direct result of a police officer’s attempt to illegally stop and detain a suspect?

The United States Supreme Court resolved a previous three-way split of authority: There is no constitutional violation in a “threatened unlawful detention.” The Fourth Amendment does not apply to such a situation until the person is actually illegal detained; i.e., when the officer actually catches the defendant or the defendant otherwise submits to the officer’s authority (i.e.; he gives up). (*California v. Hodari D.* (1991) 499 U.S. 621 [113 L.Ed.2nd 690].)
Result: Any evidence abandoned (e.g., tossed or dropped) during a foot pursuit of a fleeing suspect, even without any reasonable suspicion justifying a detention (i.e., a “threatened unlawful detention”), is admissible as abandoned property (as well as supplying the necessary “reasonable suspicion” to justify the suspect’s detention upon being caught).

But, if the suspect does not abandon the contraband until after he has been caught, and thus illegally detained, then it is subject to suppression as “fruit of the poisonous tree;” i.e., the unlawful detention.

Searching for Identification:

A patdown of an individual for identification is illegal; patdowns on less than probable cause being allowed only for the purpose of discovering offensive weapons, and then only when the officer is able to articulate a “reasonable suspicion” for believing why the person might be armed. (People v. Garcia (2006) 145 Cal.App.4th 782.)

A circumstance allowing for a check for identification has been found where the defendant claimed to have none, but the officer could see that he had a wallet in his pocket. (People v. Long (1987) 189 Cal.App.3rd 77; telling the suspect to check his wallet and then insisting on watching him do so justified by the need to insure that he didn’t conceal evidence or retrieve a weapon.)

Retrieving a wallet from a suspect where the wallet was visible in his pocket, after the suspect, who was lawfully detained, said he didn’t have any identification, done for the purpose of checking the wallet for identification, was lawful “under the unique facts of this case.” (People v. Loudermilk (1987) 195 Cal.App.3rd 996.)

Also note that the California Supreme Court has ruled that during a lawful traffic stop, at least after a demand for the driver’s license and other vehicle documentation is made and a negative response is obtained (see United States v. Lopez (C.D.Cal. 1979) 474 F.Supp. 943, 948-949.), a warrantless, suspicionless intrusion into the vehicle for the limited purpose of locating such documentation is lawful, even if the driver denies that any such documentation exists. In so doing, the officer may look in any location where it is reasonable to believe he or she might find such documentation.
(In re Arturo D. (2002) 27 Cal.4th 60; Arturo D. was joined with the companion case, People v. Hinger (using the same cite) out of the Fourth District Court of Appeal.

This would include under the front seat (whether looking from the front or rear of the seat), in a glove compartment, and over the visor. It would probably not include within containers found in the vehicle or the trunk, absent some articulable reason to believe why such documentation might actually be there. (Id., at p. 86, and fn. 25.)

See “Searching a Vehicle for a Driver’s License and/or Vehicle Registration, VIN Number, Proof of Insurance, etc.,” under “Searches of Vehicles,” below.

Fingerprint Evidence:

Upon being arrested, an arrestee has no legal right to refuse a fingerprint examination. (Virgle v. Superior Court (2002) 100 Cal.App.4th 572.)

The legal authority for fingerprinting an arrestee can be inferred from various state statutes:

P.C. § 7(21): Describing the obtaining of fingerprints as part of the booking procedure.

P.C. § 853.6(g): The requirement that persons arrested and released on a misdemeanor citation provide fingerprints prior to the person’s scheduled court appearance.

P.C. §§ 13125, 13127: Providing for the retention of certain basic information, including fingerprint identification numbers, on arrested individuals.

“Fingerprints taken pursuant to an arrest are part of so-called ‘booking’ procedures, designed to ensure that the person who is arrested is in fact the person law enforcement officials believe they have in custody. (fn. omitted)” (United States v. Kinkade (9th Cir. 2003) 345 F.3rd 1095, 100-1101 (Reversed on other grounds); citing Smith v. United States (D.C. Cir. 1963) 324 F.2nd 879, 883; and Napolitano v. United States (1st Cir. 1965) 340 F.2nd 313, 314.)
Fingerprints taken upon arrest for identification purposes are lawful, even if the product of an illegal arrest. \(\text{(Immigration and Naturalization Service v. Lopez-Mendoza (1984) 468 U.S. 1032, 1039-1040 [82 L.Ed.2nd 778].)}\)

If, however, the fingerprints are found to have been obtained for “investigative purposes,” such prints are subject to suppression absent probable cause justifying the arrest. \(\text{(Davis v. Mississippi (1969) 394 U.S. 721 [22 L.Ed.2nd 676]; Hayes v. Florida (1985) 470 U.S. 811 [84 L.Ed.2nd 705]; United States v. Beltran (9th Cir. 389 F.3rd 864.)}}\)

However, even after fingerprints are taken for investigative purposes, and therefore suppressed as the product of an illegal arrest, the court, upon request, can require defendant to submit a new set of fingerprints for purposes of trial on the new criminal offense. \(\text{(United States v. Garcia-Beltran (9th Cir. 2006) 443 F.3rd 1126; United States v. Parga-Rosas (9th Cir. 2001) 238 F.3rd 1209; United States v. Ortiz-Hernandez (9th Cir. 2005) 427 F.3rd 567.)}\)

It can be argued that refusal to cooperate in providing fingerprints during the booking procedure is a violation of P.C. § 148(a)(1), for interfering with the officer in the performance of his or her duties. \(\text{(See People v. Quiroga (1993) 16 Cal.App.4th 961, 971; where defendant’s conviction for P.C. § 148 upheld for refusing to identify himself during the booking procedure.)}\)

In that fingerprint evidence does not involve any Fifth Amendment, self-incrimination issues (see \text{Schmerber v. California (1966) 384 U.S. 757, 764 [16 L.Ed.2nd 908, 916].}), an arrestee has no right to refuse to provide them at his or her booking. \(\text{(United States v. Kelly (2nd Cir. 1932) 55 F.2nd 67; People v. Jones (1931) 112 Cal.App. 68.)}\)

While excessive force is not permissible (People v. Matteson (1964) 61 Cal.2d 466.), reasonable force which does not “shock the conscience” may be used if necessary in order to secure fingerprints from the arrested subject. \(\text{(People v. Williams (1969) 71 Cal.2nd 614, 625.)}\)
Absent an arrest, the refusal to provide law enforcement with fingerprints is not a crime. However, it is apparently lawful to stop and fingerprint a particular suspect on less than probable cause, at least if done at the scene and without transportation to a police station. \((Davis v. Mississippi\) (1969) 394 U.S. 721 [22 L.Ed.2\textsuperscript{nd} 676]; \(Hayes v. Florida\) (1985) 470 U.S. 811 [84 L.Ed.2\textsuperscript{nd} 705]; \(Virgle v. Superior Court, supra; Kaupp v. Texas\) (2003) 538 U.S. 626, 630, fn. 2 [155 L.Ed.2\textsuperscript{nd} 814, 820].)

The taking of a defendant's fingerprints is not a critical stage of criminal proceedings at which a defendant needs the presence of counsel. Therefore, there is no right to the presence of counsel at the taking of fingerprints. \((People v. Williams\) (1969) 71 Cal.2\textsuperscript{nd} 614, 625; citing \(United States v. Wade\) (1967) 388 U.S. 218, 227-228 [18 L.Ed.2d 1149, 1157-1158].)

Five deputies holding down a resisting criminal defendant for the purpose of obtaining his fingerprints, in a courtroom (but out of the jury’s presence), where there were found to be less violent alternatives to obtaining the same evidence, is force that “shocks the conscience” and a violation of the defendant’s Fourteenth Amendment due process rights. \((People v. Herndon\) (2007) 149 Cal.App.4\textsuperscript{th} 274; held to be “harmless error” in light of other evidence and because defendant created the situation causing the force to be used.)

\textit{Handwriting} (and other types of) \textit{Exemplars}:

Similarly, a criminal arrestee does not have a Fifth Amendment self-incrimination right not to provide a handwriting exemplar. \((Schmerber v. California\) (1966) 384 U.S. 757, 768 [16 L.Ed.2\textsuperscript{nd} 908, 918]; \(Gilbert v. California\) (1967) 388 U.S 263 [18 L.Ed.2\textsuperscript{nd} 1178]; \(People v. Graves\) (1966) 64 Cal.2\textsuperscript{nd} 208.)

The same legal theory applies to a “voice exemplar” \((United States v. Dionisio\) (1973) 410 U.S. 1 [35 L.Ed.2\textsuperscript{nd} 67].), as well as submitting to being photographed. \((Schmerber v. California, supra.)

\textit{Prisoner Searches}:

A person who is to be booked, and who has objects in his possession, may be subjected to an inventory search despite the lack of probable cause. \((Illinois v. Lafayette\) (1983) 462 U.S. 640 [77 L.Ed.2\textsuperscript{nd} 65].)
A “search incident to arrest” does not include a “strip search” which, as a “serious intrusion upon personal rights” and “an invasion of personal rights of the first magnitude” (Chapman v. Nichols (10th Cir. 1993) 989 F.2nd 393, 395-396.), is generally not allowed prior to booking. (Foote v. Spiegel (Utah 1995) 903 F.Supp. 1463.)

Warrantless searches may be made by jail and prison officials to accommodate legitimate “institutional needs and objectives;” primarily internal security. (Hudson v. Palmer (1984) 468 U.S. 517, 524 [82 L.Ed.2nd 393, 401].)

Other purposes include:

- To prevent the introduction of drugs and other contraband (including weapons) into the premises;
- The detection of escape plots; and
- The maintenance of sanitary conditions.

(See Hudson v. Palmer, supra, at p. 527 [82 L.Ed.2nd at pp. 403-404]; United States v. Cohen (2nd Cir. 1986) 796 F.3nd 20, 22-23.)

- To collect evidence against inmates, including pretrial detainees.

(People v. Davis (2005) 36 Cal.4th 510, 523-529.)

Booking (and inventory) searches:

“Booking” entails the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested. (See People v. Superior Court [Simon] (1971) 7 Cal.3rd 186, 208; see also P.C. § 7, subd. 21.)

Booking searches are justified under a number of legal theories:

See Gov’t. Code § 26640; duty of the sheriff to take charge of, and safely keep, the property of a prisoner.


- To discover evidence pertaining to the crime for which the person was arrested. (*People v. Maher* (1976) 17 Cal.3rd 196, 200-201.)

Older authority has held that a booking search is really a “search incident to arrest with an inconsequential time lag.” (*People v. Superior Court [Murry]* (1973) 30 Cal.App.3rd 257, 263; and *United States v. Edwards* (1974) 415 U.S. 800, 803 [39 L.Ed.2nd 771, 775-776].)

Containers: The right to conduct a warrantless booking search includes the right to search containers (e.g., purse, wallet, etc.) in the possession of the person to be booked. (*Illinois v. Lafayette*, supra; *People v. Hamilton* (1988) 46 Cal.3rd 123, 137.)

A defendant detained at a jail for failure to present satisfactory evidence of identification, pursuant to V.C. § 40307, may properly be subjected to a booking search even though not formally booked into the jail. (*People v. Benz* (1984) 156 Cal.App.3rd 483, 489.)

Impounded Property: A warrantless search of a prisoner’s impounded property, such as a wallet or a purse, which was not searched until after completion of the booking process, and when there is no exigency, violates the inmate’s privacy rights. A search warrant will be required to lawfully search the impounded wallet, purse, or other item. (*People v. Smith* (1980) 103 Cal.App.3rd 840; evidence recovered from a wallet, not previously searched, in the defendant’s booked property.)

Exceptions: Although *Smith* has never been expressly overruled, its continuing validity is seriously in question. At the very least, the exceptions to *Smith* have just about eaten up the rule. For instance:

No warrant is necessary for a post-booking search when the personal property searched has previously been viewed by officials. (E.g.; during the booking
process or during a lawful search incident to arrest.) 
(People v. Davis (2000) 84 Cal.App.4th 390; United
States v. Holzman (9th Cir. 1989) 871 F.2nd 1496,
1505; United States v. Thompson (5th Cir. 1988)
837 F.2nd 673, 675; United States v. Johnson (9th
Cir. 1987) 820 F.2nd 1065, 1071-1072.)

Property which is evidence of a crime may be taken
from the person of the defendant without a warrant,
even hours after booking, for the purpose of
examination and testing. (United States v. Edwards
(1974) 415 U.S. 800, 806 [39 L.Ed.2nd 771, 777];
defendant’s clothing, worn at the time of the
booking, taken from him ten hours later, after
replacement clothing was purchased for him.)

Note, however, the Supreme Court refused
to “conclude that the Warrant Clause of the
Fourth Amendment is never applicable to
post-arrest seizures of the effects of an
arrestee. [fn. Omitted]” (Id., at p. 808 [39
L.Ed.2nd at p. 778].)

Recovery of a ring from defendant’s booked
property, contained in, and readily visible through, a
transparent property bag, without the need to search
any containers, was lawfully seized from
defendant’s property without the need for a warrant.
(People v. Superior Court [Gunn] (1980) 112
Cal.App.3rd 970.)

Note, however, the Court’s discussion
indicating that the right to search property
without a warrant may even be broader:
“Once articles have lawfully fallen into the
hands of the police they may examine them
to see if they have been stolen, test them to
see if they have been used in the
commission of a crime, return them to the
prisoner on his release, or preserve them for
use as evidence at the time of trial.
[Citation] During their period of police
custody an arrested person’s personal
effects, like his person itself, are subject to
reasonable inspection, examination, and test.
[Citation] 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. [Citation]” (Id., at pp. 974-975.)

Ring worn by defendant in a robbery, visible to and identifiable by the victim, and properly in the custody of the sheriff after booking, does not hold the “vestige of privacy” as did the wallet in Smith, and was therefore properly retrieved from his impounded property in the jail and used as evidence in trial. (People v. Bradley (1981) 115 Cal.App.3rd 744, 751; see also People v. Davis (2000) 84 Cal.App.4th 390.)

The warrantless search of defendant’s personal effects, as an extension of the booking process, is okay. (People v. Panfili (1983) 145 Cal.App.3rd 387, 392-394; where the arresting officer was instructed to isolate the property for a more detailed search later.)

Strip Searches of Prisoners: Whether a prison or county jail inmate may be lawfully subjected to a “strip search” depends upon the circumstances, with Fifth and Fourteenth Amendment “due process,” as well as Fourth Amendment “search and seizure” implications.

The Fourth Amendment right of the people to be secure against unreasonable searches and seizures “extends to incarcerated prisoners; however, the reasonableness of a particular search is determined by reference to the prison context.” (Michenfelder v. Sumner (9th Cir. 1988) 860 F.2nd 328, 332; Bell v. Wolfish (1979) 441 U.S. 520, 545; [60 L. Ed.2nd 447]; Bull v. City and County of San Francisco (9th Cir. 2010) 595 F.3rd 964, 972.)

Note also authority (albeit the minority rule) from another circuit holding that prisoners have no privacy interests protected by the Fourth Amendment. (Johnson v. Phelan (7th Cir. 1995) 69 F.2rd 144, 150.)
Even if the Fourth Amendment is inapplicable, the Fourteenth Amendment “due process” clause prohibits prison officials from “treating prisoners in a fashion so ‘brutal’ and ‘offensive to human dignity’ as to ‘shock the conscience.’” (Vaughn v. Ricketts (9th Cir. 1988) 859 F.2nd 736, 742; digital cavity searches conducted in a brutal fashion.)

However, even if a prisoner retains some degree of his or her Fourth Amendment rights, strip searches are reasonably related to legitimate penological interests, and therefore, if conducted properly, and limited to when necessary under the circumstances, are legal. (Michenfelder v. Sumner, supra, at p. 333.)

“Reasonableness,” under the Fourth Amendment, requires the court to balance the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the intrusion, the justification for initiating it, and the place in which it is conducted. (Bell v. Wolfish (1979) 441 U.S. 520, 559 [60 L.Ed.2nd 447, 480].)

The constitutionality of a visual inspection of a prison inmate’s unclothed body, including body cavities, depends upon a balancing of (1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating the search, and (4) the place in which it is conducted. (People v. Collins (2004) 115 Cal.App.4th 137, 152-153.)

The Court also noted that the more intrusive, “physical body cavity search” requires judicial authorization (i.e., a search warrant) and the use of properly trained medical personnel. (Id., at p. 143.)

California Code of Regulations, Title 15, § 3287(b), allows for a visual search of an inmate, clothed or unclothed, whenever there is a “substantial reason to believe the inmate may have unauthorized or dangerous items concealed on his or her person.” (Italics added) Judicial authorization (i.e., a search warrant), and the use of “medical personnel in a medical setting,” is only required in the case of a “physical (as
opposed to a non-contact visual) body cavity search.” In Collins, a visual inspection of the defendant’s rectal area was intended, for which it is generally accepted that the rigorous requirements of the more intrusive “physical body cavity search” is not required.

Such visual body cavity searches have been upheld under circumstances constituting less than even a reasonable suspicion, such as after a visit to the law library, infirmary or exercise room, or an encounter with an outsider. (Id., at pp. 152-155; Goff v. Nix (8th Cir. 1986) 803 F.2nd 358, 368-371; Campbell v. Miller (7th Cir. 1986) 787 F.2nd 217, 228; and Arruda v. Fair (1st Cir. 1983) 710 F.2nd 886, 886-888.)

Note: Violation of the administrative provisions for the searching of prisoners in a prison, absent a constitutional violation, does not require the suppression of any resulting evidence. (People v. Collins, supra, at p. 156.)

The fact that the offense for which the defendant was arrested is classified as a felony does not mean that a strip search is constitutional. The seriousness of the offense must be balanced with all the other factors. (Kennedy v. Los Angeles (9th Cir. 1989) 901 F.2nd 702, 710-716; arrest for grand theft did not warrant a visual strip search, under the circumstances.)

But, a visual strip search was upheld for a person arrested for grand theft auto, in that this offense is sufficiently associated with violence to justify the intrusion into defendant’s privacy. (Thompson v. Los Angeles (9th Cir. 1989) 885 F.2nd 1439, 1445-1448.)

Thompson v. Los Angeles, supra, however, was overruled in Bull v. City and County of San Francisco (9th Cir. 2010) 595 F.3rd 964, in so far as it noted that strip searches must be based upon a reasonable suspicion that the arrestee is carrying contraband and not on whether he is going to be placed in a jail’s general population.

© 2012 Robert C. Phillips. All rights reserved
Also, searches which are excessive, vindictive, harassing, or unrelated to any legitimate penological interest will not be upheld. (Michenfelder v. Sumner, supra, at p. 332; routine and repeated visual body cavity searches upheld for inmates in a maximum security prison holding Nevada’s 40 most dangerous prisoners.)

Contact body cavity searches of female inmates conducted by police officers, without medical personnel, in a non-hygienic manner and in the presence of male officers, rejected as unreasonable. (Bonitz v. Fair (1st Cir. 1986) 804 F.2nd 164, 172-173.)

However, female prison guards subjecting male inmates to periodic body cavity searches is not a Fourteenth Amendment due process violation, nor an Eighth Amendment “cruel and unusual punishment,” and therefore will not subject the guards to any civil liability. (Somers v. Thurman (9th Cir. 1997) 109 F.3rd 614.)

A “partial strip search” (i.e., with the prisoner clothed in his boxer shorts only) of a male prisoner by a female detentions cadet (or any such “cross-gender” strip search), is a Fourth Amendment violation absent an emergency situation. (Byrd v. Maricopa County Sheriff’s Department (9th Cir. 2011) 629 F.3rd 1135, 1140-1147; but see the dissent, pgs. 1147-1154.)

A full body cavity search of a group of 40 to 44 inmates returning to an honor farm from a day’s work furlough was upheld when based upon information that marijuana was being brought into the honor farm. The body cavity searches were conducted by a doctor using an acceptable medical procedure. (People v. West (1985) 170 Cal.App.3rd 326.)

X-raying all incoming prisoners being moved from one high-risk prison to a second high-risk prison is lawful. (People v. Pifer (1989) 216 Cal.App.3rd 956.)

An en banc panel of the Ninth Circuit reversed its prior decisions in this case and in Thompson v. City of Los
Angeles (9th Cir. 1989) 885 F.2nd 1439, and Giles v. Ackerman (9th Cir. 1984) 746 F.2nd 614, and held that a sheriff’s blanket policy of doing non-contact strip searches of all persons being placed into the general jail population was reasonable and lawful. (Bull v. City and County of San Francisco (9th Cir. 2010) 595 F.3rd 964.)

The constitutionality of a policy allowing the strip search of all prisoners booked into a county jail is presently before the United States Supreme Court in Florence v. Bd. of Chosen Freeholders of Burlington (3rd Cir. 2010) 621 F.3rd 296; cert. granted.)

See Cal. Code of Reg., Title 15, § 3287(b), for statutory rules on strip searches of prison inmates.

Misdemeanor Booking Searches:

Due Process: Balancing the interests involved, it has been held to be a Fourteenth (and Fifth) Amendment due process violation to strip-search a misdemeanor arrestee where the arrestee is not to be intermingled with the general jail population, the offense for which she was arrested is not one commonly associated with the possession of weapons or contraband (i.e., DUI in this case), and there is no cause to believe she may possess either. (Logan v. Shealy (4th Cir. 1981) 660 F.2nd 1007.)

An en banc panel of the Ninth Circuit Court of Appeal, in Bull v. City and County of San Francisco (9th Cir. 2010) 595 F.3rd 964, overruled itself in this case and in its prior decision of Giles v. Ackerman (9th Cir 1984) 746 F.2nd 614, Giles having held that a person arrested on minor misdemeanor arrest warrants, with no prior criminal history or any relationship to drugs or weapons, could not be subjected to a strip search even though she was to be put into the general jail population.

Restrictions: In the case of most misdemeanors, the California Legislature has restricted the right to conduct “strip” and “visual” or “physical” body cavity searches. (P.C. § 4030; see below.)

The following restrictions apply only to pre-arraignment detainees arrested for infraction and...
misdemeanor offenses, and minors detained prior to a detention hearing for infraction and misdemeanor violations. They do not apply to prisoners of the Department of Corrections or the California Youth Authority, or to post-arraignment inmates in local custody. (P.C. § 4030(b))

Definitions:

P.C. § 4030(c): “Strip Search” means any search which requires the officer to remove or arrange some or all of that person’s clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia of the person.

P.C. § 4030(d)(1): “Body Cavity” means the stomach or rectal cavity of a person, and vagina of a female person.


P.C. § 4030(d)(3): “Physical Body Cavity Search” means physical intrusion into a body cavity for the purpose of discovering any object concealed in the body cavity. (Often referred to as a “manual body cavity search” in federal cases.)

P.C. § 4030(e): Any person arrested and taken into custody may be subjected to a patdown search, metal detector search, and thorough clothing search, in order to discover and retrieve concealed weapons and contraband prior to being placed in a booking cell.

P.C. § 4030(f): Unless, and until, a person (or minor, prior to a detention hearing), arrested for an infraction or misdemeanor, is moved into the general jail population (see subd. (g) for the prerequisites for moving a person arrested for an infraction or misdemeanor into the general population), he or she may not be subjected to a
“strip search” or a “visual body cavity search” unless:

- The offense for which he or she was arrested involved weapons, controlled substances, or violence; or

- A peace officer has a “reasonable suspicion,” based upon articulable facts, that the person is concealing a weapon or contraband and a strip search will result in the discovery of the weapon or contraband.

No strip search or visual body cavity search may be conducted without prior written authorization of the supervising officer on duty, with such authorization specifying the articulable facts and circumstances upon which the reasonable suspicion determination was made by the supervisor.

An arrest for the misdemeanor offense of being under the influence of a controlled substance, per H&S § 11550, does not justify a later visual body cavity search at the jail prior to being taken into the general jail population, despite this statute to the contrary, absent any specific articulable facts amounting to a reasonable suspicion that the arrestee does in fact possess a controlled substance. (Way v. County of Ventura (2006) 445 F.3rd 1157.)

P.C. § 4030(h): No person (nor a minor, prior to a disposition hearing) arrested for an infraction or a misdemeanor offense shall be subjected to a “physical body cavity search” except under the authority of a search warrant issued by a magistrate specifically authorizing the physical body cavity search.
P.C. § 4030(j): Persons conducting a “strip search” or a “visual body cavity search” shall not touch the breasts, buttocks, or genitalia of the person being searched.

P.C. § 4030(k): “Physical body cavity searches” may be conducted only:

- Under sanitary conditions.
- Only by a physician, nurse practitioner, registered nurse, licensed vocational nurse or emergency medical technician Level II, licensed to practice in this state.

P.C. § 4030(l): All persons conducting or otherwise present for a “strip search,” or a “visual” or “physical body cavity search,” except for physicians or licensed medical personnel, shall be of the same sex as the person being searched.

P.C. § 4030(m): All “strip searches,” or “visual” or “physical body cavity searches” shall be conducted in an area of privacy so that the search cannot be observed by persons not participating in the search. Persons are considered to be participating in the search if their official duties relative to search procedure require them to be present at the time the search is conducted.

P.C. § 4030(n): Violation of any of the above is a misdemeanor; 6 months and $1,000 fine. (P.C. § 19)

P.C. § 4030(o), (p): Civil remedies for violations.

Case law:

People v. Wade (1989) 208 Cal.App.3rd 304: Probable cause existed for a visual body cavity search of a defendant arrested for a narcotics violation, although other P.C. § 4030 requirements were not met. However, P.C. § 4030 does not provide for suppression of evidence as a remedy for violating the terms of this section, and the search was valid under federal constitutional law.
Therefore, the resulting evidence was admissible despite the P.C. § 4030 violation.

A blanket policy of strip searching in-coming county jail prisoners, without at least a reasonable suspicion to believe that the searched prisoner possesses contraband or weapons, just because the prisoner is classified for housing in the general jail population regardless of the crime for which he or she is charged, is a due process violation. (Bull v. City and County of San Francisco (9th Cir. 2008) 539 F.3rd 1193.)

The necessary “reasonable suspicion” justifying a strip search can be supplied by “the nature of the offense, the arrestee’s appearance and conduct, and the prior arrest record.” (Id., at p. 1198.)

Jail Cells: The United States Supreme Court has upheld the random, warrantless searches of an inmate’s prison cell, concluding that the Fourth Amendment’s proscription against unreasonable searches and seizures is not applicable because an inmate has no reasonable expectation of privacy in his or her cell. (Hudson v. Palmer (1984) 468 U.S. 517, 526 [82 L.Ed.2nd 393, 402-403].)

The courts have found the rules for prisons to be no different than those for a county jail. (See DeLancie v. Superior Court (1982) 31 Cal.3rd 865, overruled on other grounds.)

The California Supreme Court is in accord, applying the rule of Hudson v. Palmer to a defendant’s jail cell. (People v. Bittaker (1989) 48 Cal.3rd 1046, 1096.)

In discussing the warrantless seizure of materials from the defendant’s jail cell that were relevant to a pending murder prosecution, the California Supreme Court, at pages 1095-1096, noted that: “(D)efendant had no reasonable expectation of privacy in property within his jail cell either under federal law (see Hudson v. Palmer (1984) 468 U.S. 517, 526 [82 L.Ed.2d 393, 402-403 . . . ] or under California decisions which govern searches antedating DeLancie v. Superior Court (1982) 31
Since Budds could have seized the manuscript without asking for or receiving consent, the issues defendant raises are immaterial to the validity of the seizure.”

The California Supreme Court has also interpreted **Hudson** to mean that eavesdropping on jail inmates’ (including pretrial detainees) conversations is lawful due to the lack of an expectation of privacy, and even if done for the purpose of collecting evidence. (*People v. Davis* (2005) 36 Cal.4th 510, 523-529; recognizing that some courts disagree on whether pretrial detainees have a higher expectation of privacy than do convicted inmates.)

See **Cal. Code of Reg., Title 15, §§ 3287(a) and 4711** for statutory rules on the searches of prison cells and other inmate property.

**Monitoring of Jail Visitations and Telephone Calls:**

*Rule:* Given an inmate’s lack of any reasonable expectation of privacy, the California Supreme Court, in **People v. Loyd** (2002) 27 Cal.4th 997, overruling its previous decision in **Delancie v. Superior Court** (1982) 31 Cal.3rd 865, has recently upheld the **constitutionality** of the following, even when done for the sole purpose of seeking incriminating evidence, **despite the lack of a warrant or other judicial authorization.**

- Monitoring and recording of **jail visitations.**
- Monitoring and recording of jail conversations over **internal phone lines.**
- Monitoring and recording of jail conversations over **external phone lines.**

**P.C. §§ 2600 & 2601(d),** purporting to provide state prison (and by inference, county jail) inmates with a right to visitors, were amended by the Legislature in 1997, eliminating that right.

The Court in **Loyd,** however, specifically declined to decide the applicability of **Title III of the**

See People v. Zepeda (2001) 87 Cal.App.4th 1183, where the need to obtain judicial authorization was assumed, without discussion, to be the law.

However, under Title III; “(I)t shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication where . . . one of the parties to the communication has given prior consent to such interception.” (18 U.S.C. § 2511(2)(c))

Based upon this, it has been held that where a sign has been posted indicating that “telephone calls may be monitored and recorded,” inmates are on notice, and his or her “decision to engage in conversations over those phones constitute implied consent to that monitoring and takes any wiretap outside the prohibitions of Title III.” (People v. Kelly (2002) 103 Cal.App.4th 853, 858; warrantless recording of defendant’s telephone conversations to parties on the outside approved.)

Such warning signs also take such telephone calls outside the search warrant provisions of California’s wiretap statutes. (P.C. §§ 629.50 et seq.; Id., at pp. 859-860.)

See also People v. Windham (2006) 145 Cal.App.4th 881: The warrantless monitoring and recording of a jail inmates’ telephone calls, where signs were posted, a message was heard at the beginning of every call, and jail rules provided to inmates, all noted that telephone calls would be monitored, violated neither the federal Title III rules nor California’s Privacy Act provisions (P.C. §§ 630 et seq.)
Note also, a phone used during a physical visitation by a prisoner and his or her visitor does not meet the requirements of a “wire communication,” not using a line in interstate or foreign commerce. It is therefore not subject to the wiretap restrictions of P.C. § 631. (People v. Santos (1972) 26 Cal.App.3rd 397, 402.)

The California Supreme Court interprets Hudson to similarly allow eavesdropping on the conversations of inmates (including pretrial detainees) due to the lack of an expectation of privacy, even if done for the purpose of collecting evidence. (People v. Davis (2005) 36 Cal.4th 510, 523-529.)

See also People v. Leonard (2007) 40 Cal.4th 1370, 1404, where the California Supreme Court found no violation of the Fourth Amendment, the California Constitution’s right to privacy, and Title III of the federal Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3711) by videotaping the defendant’s end of a telephone conversation with his father when the defendant knew he was being videotaped.

The Ninth Circuit Court of Appeal is in accord. (United States v. Van Poyck (9th Cir. 1996) 77 F.3rd 285, 291; “(A)ny expectation of privacy in outbound calls from prison is not objectively reasonable and . . . the Fourth Amendment is therefore not triggered by the routine taping of such calls.”)

See also United States v. Monghur (9th Cir. 2009) 576 F.3rd 1008, 1011; noting that the defendant conceded, “as he must, that he had no expectation of privacy in those calls” from county jail, where warnings were posted that telephone conversations from jail were monitored and recorded; citing Van Poyck, supra.)

Exceptions: There are a number of very important exceptions with which law enforcement must be aware:

- P.C. § 636(a): Makes it a felony to eavesdrop on, or record, by means of an electronic device, a
conversation between a person in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and that person’s attorney, religious advisor, or licensed physician.  (See In re Jordan (1972) 7 Cal.3rd 930, 937-938, fn. 3; People v. Lopez (1963) 60 Cal.2nd 223, 248.)

Subdivision (b) makes it a felony to eavesdrop on such a conversation by “nonelectronic” means, but excludes inadvertently overhearing such a conversation, or when the conversation is in a courtroom or other room used for adjudicatory proceedings.

- Where jail officers acted so that the suspect “and his wife were lulled into believing that their conversation would be confidential.”  (North v. Superior Court (1972) 8 Cal.3rd 301, 311; People v. Loyd (2002) 27 Cal.4th 997, 1002.)


An inmate’s “legal mail” (i.e., correspondence with the prisoner’s attorney) may be opened as well, so long as it is not read.  (People v. Poe (1983) 145 Cal.App.3rd 574; People v. White (1984) 161 Cal.App.3rd 246.)

Outgoing mail may also be monitored, “to prevent any threats emanating from inmates.”  (People v. Jones, supra, see Cal. Code Regs, Title 15, § 3138(a))

The sole exception is legal correspondence to the defendant’s attorney.  (Cal. Code Regs, tit. 15, § 3141(b), (c)): “An attorney at law listed with a state bar.”  (subd. (c)(6))
The marital communication privilege does not protect defendant’s personal letters to his wife. 
(United States v. Griffin (9th Cir. 2006) 440 F.3rd 1138.)

“Intra-jail mail” between inmates may also be read “to discover any threats that might be made to an inmate, ‘snitch jackets’ placed on other inmates, and to detect coordination of possible escape attempts between inmates in custody.” (People v. McCaslin (1986) 178 Cal.App.3rd 1, 4.)

Prison authorities may enact and enforce rules restricting the receipt of magazines and other literature so long as such regulations “support the legitimate penological interests of reducing prohibited behaviors such as sexual aggression and gambling and maintaining respect for legitimate authority.” (Bahrampour v. Lampert (9th Cir. 2004) 356 F.3rd 969.)

Under the theory of People v. Loyd (2002) 27 Cal.4th 997, it would seem that monitoring all non-legal mail, coming in and going out of a facility, would be constitutionally permissible even if the purpose is to look for incriminating evidence.

Note: None of the above cases have required, or indicated the need for, a search warrant to monitor jail mail.

Regulating Jail/Prison Visitations:

There is no constitutionally guaranteed “due process” right to visitation for jail or prison inmates. “The denial of prison access to a particular visitor ‘is well within the terms of confinement ordinarily contemplated by a prison sentence,’ Hewitt v. Helms (1983) 459 U.S. 460, 468 [96 L.Ed.2nd 654, 686], and therefore is not independently protected by the Due Process Clause.” (Kentucky Department of Corrections v. Thompson (1989) 490 U.S. 454, 461 [104 L.Ed.2nd 506, 515].)

It is not a violation of the constitutional right of association (First Amendment), against cruel and unusual punishment (Eight Amendment), nor due process (Fifth and Fourteenth Amendments) to limit the number and relationship of visitors, such regulations being reasonably

However, a state may create such enforceable liberty interests in the prison, and presumably county jail, settings by statute. (Ibid.; Hewitt v. Helms, supra, at p. 469 [96 L.Ed.2nd at p. 686].)

P.C. §§ 2600 & 2601(d), purporting to provide state prison (and by inference, county jail) inmates with a right to visitors, were amended by the Legislature in 1997, eliminating that right.

A person who intends to visit a prison or county jail inmate will be subject to a strip search, including a “visual body cavity search,” whenever there is a “reasonable suspicion” to believe the visitor possesses weapons and/or contraband. (In re Roark (1996) 48 Cal.App.4th 1946.)

However, it has been held, at least for purposes of persons attempting to visit an inmate of any of the prisons of the California Department of Corrections, while justifying the lowered search standard on the theory that keeping weapons and contraband out of a prison is an important governmental interest and that therefore searching visitors is an “administrative search,” the visitor must be given the option of forgoing the visit, and leaving, rather than submitting to a strip search. (Estes v. Rowland (1993) 14 Cal.App.4th 508; see below.)

Estes v. Rowland, supra, also imposes the following requirements upon the Department of Corrections before a strip search of a prison visitor or the search of the person’s vehicle will be allowed:

- All persons eligible to visit inmates must be mailed written notice in English and Spanish of a dog search policy, the reasons for the policy, and the consequences of finding contraband in a vehicle or on the person of a prison visitor.

- Immediately prior to a proposed search, the driver of each vehicle must be informed orally and in writing (again, in English and Spanish) of what the search will entail, the reasons for it, and the
consequences of finding contraband. The notice must advise the driver that he or she has the option of leaving and returning without the car without losing visiting privileges for that day. Searches may be conducted only after written consent for the search is first obtained from the driver.

- If the driver decides to leave, passengers may stay and cannot be denied their visit.

- Local police officers may not be involved in the search process, and may not be present at the search unless there is some valid reason for their presence. Violations of the Vehicle Code may not be reported to any law enforcement agency.

- No vehicle may be delayed more than ten (10) minutes prior to the search. A wait of up to 30 minutes is allowed “in unusual situations” (see p. 529 of the decision) “where the exigency is not created by the Department (of Corrections).”

- A search should take no longer than reasonably necessary.

- Dogs must be kept at least twenty (20) feet from visitors at all times.

- Searchers may not read books, letters or other documents in possession of the visitors absent a reasonable suspicion that they are contraband.

- A visitor may be requested to submit to a strip search if a drug dog alerts on the individual or drugs are found in the vehicle. The person must be given the reasons for the search orally and in writing, and given the option of refusing to be searched and leaving the grounds.

- The Department of Corrections must adopt regulations encompassing the conditions and must distribute them to all institutions.

A “manual” or “physical” body cavity search, requiring a touching and constituting more than a mere visual

486
inspection, may require “probable cause” and a search warrant. There is no local authority telling us what the standards should be. But see:

*Laughter v. Kay* (D. Utah 1997) 986 F.Supp. 1362; where probable cause and a search warrant were required.

*Long v. Norris* (6th Cir. 1991) 929 F.2nd 1111; inferring that no more than a reasonable suspicion is necessary, and that a search warrant was not required.

Note: The body cavity visual inspection of all inmates in a federal prison institution, made after contact visits with persons from the outside, was held to be reasonable and not prohibited by the Fourth Amendment. (*Bell v. Wolfish* (1979) 441 U.S. 520 [60 L.Ed.2nd 447].)

A county jail, including lockers located outside the visitor center but maintained by the jail personnel, particularly with signs warning visitors that they were subject to search, is the equivalent to a closely regulated business allowing for a warrantless search of a visitor and the property he deposits in the lockers. (*People v. Boulter* (2011) 199 Cal.App.4th 761.)

**Retained Constitutional Rights:**

*Infringement of Rights:* It has been held that prison inmates do retain certain basic constitutional rights that may be infringed on, if at all, only when rationally related to “institutional penological interests.” (*Overton v. Bazzetta* (2003) 539 U.S. 126 [156 L.Ed.2nd 162].)

“When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.” (*Procunier v. Martinez* (1974) 416 U.S. 396, 405-406 [40 L.Ed.2nd 224, 236].)

However, absent a showing that prison regulations or practices “create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety . . . (or) involve the infliction
of pain or injury, or deliberate indifference to the risk that it might occur,” there is no constitutional violation. (*Overton v. Bazzetta*, *supra*, at p. 137 [156 L.Ed.2nd at p. 173].)

**Rights retained** by prison inmates include:

- The right to “petition the government for a redress of grievances” (*First Amendment*). (*Johnson v. Avery* (1969) 393 U.S. 483 [21 L.Ed.2nd 718].)

- The right to be protected from “invidious racial discrimination” (*Fourteenth Amendment, Equal Protection*). (*Lee v. Washington* (1968) 390 U.S. 333 [19 L.Ed.2nd 1212].)


**DNA Profiling of Prisoners and other Persons Arrested for Felonies:**

**P.C. § 295(a):** The DNA and Forensic Identification Database and Data Bank Act of 1998, as amended.

**P.C. § 295(b):** *Statement of Intent.* “It is the intent of the people of the State of California, in order to further the purposes of this chapter, to require DNA and forensic identification data bank samples from all persons, including juveniles, for the felony and misdemeanor offenses described in subdivision (a) of Section 296.” (Para. (2))

**P.C. § 295(c):** *Purpose:* The stated purpose is to establish a data bank and database to assist federal, state, and local criminal justice and law enforcement agencies in the expeditious detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children.

**P.C. § 295(d):** Describes these provisions as “an administrative requirement to assist in the accurate identification of criminal offenders.”
P.C. § 295(e): Unless otherwise requested by the Department of Justice, collection of biological samples for DNA analysis from qualifying persons is limited to collection of inner cheek cells of the mouth (“buccal swab samples”).

P.C. § 295(f): Authorizes the collection of blood specimens from federal, state or local law enforcement agencies when necessary in a particular case or would aid DOJ in obtaining an accurate forensic DNA profile for identification purposes.

P.C. § 295(g) & (h): Department of Justice is responsible for the management and administration of the DNA and Forensic Identification Database and Data Bank Program, and for liaison with the FBI. Provisions for the enactment of local and state policies and procedures.

Provisions for providing information to an international DNA database and data bank program does not violate defendant’s privacy rights and is therefore constitutional. *(People v. McCray* (2006) 144 Cal.App.4th 258.)*

P.C. § 295(i): Counties’ Responsibilities:

(1): When the specimens, samples and print impressions are collected at a county jail or other county facility, including a private community correctional facility, the county sheriff or chief administrative officer of the county jail or other facility shall be responsible for all the following:

(A): Collect the specimens, etc., immediately following arrest, conviction, or adjudication, or during the booking or intake or reception center process at that facility, or reasonably promptly thereafter.

(B): Collect the specimens, etc., as soon as administratively practicable after a qualifying person reports to the facility for the purpose of providing them.
(C): Forward the collected specimens, etc., immediately to the Department of Justice, and in compliance with department policies.

(2): The specimens, etc., shall be collected by a person using a collection kit approved by the Department of Justice and in accordance with the requirements and procedures set forth in P.C. § 298.

(3): Counties to be reimbursed for expenses.

P.C. § 295(j): Portion of the costs may be paid by defendants at sentencing.

P.C. § 295(k): Funds to be deposited in the DNA Testing Fund.

P.C. § 295(l): The Department of Justice DNA Laboratory to be known as the “Jan Bashinski DNA Laboratory.”

P.C. § 296(a): The below listed persons shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples as described in the statutes, for law enforcement identification analysis:

(1): Any person, including any juvenile, who is convicted of or pleads guilty or no contest to any felony offense, or any juvenile who is adjudicated under W&I § 602 for committing any felony offense.

The mandatory requirements of this section have withstood constitutional attack, as far as adult defendants are concerned, a number of times. (See People v. King (2000) 82 Cal.App.4th 1363; Alfaro v. Terhune (2002) 98 Cal.App.4th 492; People v. Travis (2006) 139 Cal.App.4th 1271.)

It has also been held that the requirement that a minor comply with this section is constitutional (i.e., no Fourth Amendment violation) despite the stronger privacy interest in Juvenile Court proceedings. (In re Calvin S. (2007) 150 Cal.App.4th 443.)
Reduction of defendant’s felony conviction to a misdemeanor, after having successfully completed certain terms and conditions of probation for one year, does not entitle defendant to the expungement of the DNA data or return or destruction of the DNA sample. (*Coffey v. Superior Court* (2005) 129 Cal.App.4th 809.)

(2): Any adult who is arrested for or charged with any of the following felony offense:

(A): All felony P.C. § 290 (sex registration) offenses, or attempts to commit such offense.

(B): Murder or voluntary manslaughter, or attempts to commit such offense.

(C): Any felony offense (effective 1/1/2009).

The constitutionality of forcing pre-convictees to provide DNA samples is pending decision in the Ninth Circuit Court of Appeal in *Haskell v. Brown* (10-15152).

This provision was held to be unconstitutional in state court as a violation of the Fourth Amendment, in so far as it requires people for whom there has not even been a determination of probable cause to provide a DNA sample. (*People v. Buza* (2011) 197 Cal.App.4th 1424.)

Review was granted by the California Supreme Court (2011 Cal. LEXIS 10796 (Cal. Oct. 19, 2011), making this case unavailable for citation pending further decision.
(3): Any person, including any juvenile, who is required to register per P.C. §§ 290 (sex) or 457.1 (arson) because of the commission of, or attempt to commit, a felony or misdemeanor offense, or any person, including any juvenile, who is housed in a mental health facility or sex offender treatment program after referral to such facility or program by a court after being charged with any felony offense.

All registered sex offenders, even when convicted prior to the DNA statutes were passed, are required to provide a DNA sample. The statutes added by Proposition 69, adding more offenses to the list of people who must provide a DNA sample, are retroactive. ([Good v. Superior Court][People] (2008) 158 Cal.App.4th 1494.)

(4): Includes attempts.

(5): These provisions are not intended to preclude the collection of samples as a condition of a plea for a non-qualifying offense.

P.C. § 296(b): Provisions apply to all qualifying persons regardless of the sentence imposed.

P.C. § 296(c): Provisions apply to all qualifying persons regardless of placement or confinement in any mental hospital or other public or private treatment facility, and shall include, but not be limited to, the following persons including juveniles:

(1): Any person committed to a state hospital or other treatment facility as a mentally disordered sex offender, per W&I §§ 6300 et seq.

(2): Any person who has a severe mental disorder, per P.C. §§ 2960 et seq.

(3): Any person found to be a sexually violent predator, per P.C. §§ 6600 et seq.

P.C. § 296(d): Provisions are mandatory, and apply even if not so advised by the court.
One’s religious beliefs might provide a particular defendant, under the “Religious Freedom Restoration Act” with a legal excuse for declining to provide a blood sample if the defendant can:

- Articulate the scope of his beliefs;
- Show that his beliefs are religious;
- Prove that his beliefs are sincerely held; and
- Establish that the exercise of his sincerely held religious beliefs is substantially burdened.

If defendant can prove the above, the government may still require that he provide a blood sample if it can show

- Requiring that he provide a blood sample furthers a compelling governmental interest;
- Through the least restrictive means.

(United States v. Zimmerman (9th Cir. 2007) 514 F.3rd 851.)

The Ninth Circuit has held that a warrantless, suspicionless forced mouth swap of a pre-trial detainee in Nevada, for inclusion in the state’s cold case data bank, when there is no qualifying conviction, is a Fourth Amendment violation. (Friedman v. Boucher (9th Cir. 2009) 580 F.3rd 847.)

The California Supreme Court, in contrast, has held that mistakenly collecting blood samples for inclusion into California’s DNA data base (See P.C. § 296), when the defendant did not actually have a qualifying prior conviction, is not a Fourth Amendment violation, but even if it were, it does not require the suppression of the mistakenly collected blood samples, nor is it grounds to suppress the resulting match of the defendant’s DNA with that left at a crime scene. (People v. Robinson (2010) 47 Cal.4th 1104, 1116-1129.)
P.C. § 296(e): Duty of a prosecutor to notify the court of a defendant’s duty to provide the required samples.

P.C. § 296(f): Duty of a court to inquire and verify that the required samples have been collected. Abstract of judgment to show that a defendant was ordered to provide such samples, and advisal to a defendant that he or she will be included in the DNA data bank. Failure to so notify a defendant is not grounds to invalidate an arrest, plea conviction or disposition, or affect the defendant’s duty to provide such samples.

P.C. § 296.1(a): The specimens, samples, and print impressions shall be collected from persons as described in P.C. § 296(a) for “present and past qualifying offenses of record” as follows:

Subd. (a)(1): Collection from any adult following arrest for a felony offense as described in P.C. § 296(a)(2)(A), (B) and (C):

(A): Immediately following arrest, or during the booking or intake or reception center process, or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody; or

(B): Upon mandatory order of the court to report within five calendar days to a county jail facility or to a city, state, local, private, or other designated facility.

Subd. (a)(2): Collection from persons (adult or juvenile) already confined or in custody after conviction or adjudication:

(A): Immediately upon intake, or during the prison reception center process, or as soon as administratively practicable at the appropriate custodial or receiving institution or program, if:

(i): The person has a record of any past or present conviction or
adjudication as a ward of the court in California of a qualifying offense described in P.C. § 296(a), or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in P.C. § 296(a); and

(ii): The person’s specimens, etc., are not in the possession of the Department of Justice DNA Laboratory, or have not been recorded as part of DOJ’s DNA data bank program.

Subd. (a)(3): Collection from persons on probation, parole, or other release:

(A): Any person, including a juvenile, who has a record of any past or present conviction or adjudication for any offense listed in P.C. § 296(a), who is on probation or parole for any felony or misdemeanor whether or not listed under P.C. § 296(a), shall provide the required samples if

(i): The person has a record of any past or present conviction or adjudication as a ward of the court in California of a qualifying offense described in P.C. § 296(a), or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in P.C. § 296(a); and

(ii): The person’s specimens, etc., are not in the possession of the
Department of Justice DNA Laboratory, or have not been recorded as part of DOJ’s DNA data bank program.

(B): The person shall have the required specimens, etc., collected within five calendar days of being notified by the court, or a law enforcement agency or other agency authorized by the Department of Justice. The specimens, etc., shall be collected in accordance with P.C. § 295(i) at a county jail facility or a city, state, local, private, or other facility designated for this collection.

Subd. (a)(4): Collection from parole violators and others returned to custody:

(A): If a person, including a juvenile, who has been released on parole, furlough, or other release for any offense or crime, whether or not set forth in P.C. § 296(a), is returned to a state correctional or other institution for a violation of a condition of his or her parole, furlough, or other release, or for any other reason, that person shall provide the required samples at a state correctional or other receiving institution, if

(i): The person has a record of any past or present conviction or adjudication as a ward of the court in California of a qualifying offense described in P.C. § 296(a), or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in P.C. § 296(a); and

(ii): The person’s specimens, etc., are not in the possession of the
Department of Justice DNA Laboratory, or have not been recorded as part of DOJ’s DNA data bank program.

Subd. (a)(5): Collection from persons accepted into California from other jurisdictions:

(A): When an offender from another state is accepted into this state under the various listed agreements and compacts, whether or not the offender is in custody, the acceptance is conditional on the offender providing the required specimens if the offender has a record of any past or present conviction or adjudication in California of a qualifying offense as listed in P.C. § 296(a), or has a record of any past or present conviction or adjudication in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, would have been punishable as an offense as described in P.C. § 296(a).

(B): If the person is not in custody, the required specimens, etc., must be provided within five calendar days after the person reports to the supervising agent or within five calendar days of notice to the person, whichever occurs first. The person shall report to a county jail facility in the county where he or she resides or temporarily is located to have the specimens collected, in accordance with P.C. § 295(i).

(C): If the person is in custody, the required specimens, etc., shall be collected as soon as practicable after receipt in the facility.

Subd. (a)(6): Collection from persons in federal custody:

(A): Subject to the approval of the FBI, persons confined or incarcerated in a federal prison or federal institution who have a
record of any past or present conviction or juvenile adjudication for an offense listed in
P.C. § 296(a), or a similar crime under the laws of the United States or any other state
that would constitute an offense described in PC. § 296(a), are subject to the
requirements of these sections if any of the following apply:

(i): The person committed the qualifying offense in California;

(ii): The person was a resident of California at the time of the qualifying offense;

(iii): The person has any record of a California conviction for an offense described in P.C. § 296(a) regardless of when it was committed; or

(iv): The person will be released in California.

(B): The Department of Justice DNA Laboratory shall forward portions of the required specimens, etc., to the U.S. Department of Justice, upon request. Samples will be collected in accordance with P.C. § 295(i).

P.C. § 296.1(b): The above provisions are retroactive.

P.C. § 296.2: Procedures for obtaining replacement samples when the originals are not usable.

P.C. § 297: Analysis of crime scene samples.

P.C. § 298: Procedures for collection of samples:

(a): The Director of Corrections, or the Chief Administrative Officer of the detention facility, jail or other facility at which the specimens, etc., were collected shall cause them to be forwarded promptly to the Department of Justice. The specimens, etc., shall be collected by a person using a Department of
Justice approved collection kit and in accordance with the requirements and procedures set forth below.

(b)(1): Department of Justice’s responsibility for providing kits.

(b)(2): The withdrawal of blood shall be performed in a medically approved manner by health care providers trained and certified to draw blood.

(b)(3): Buccal swab samples may be procured by law enforcement or correctional personnel or other individuals trained to assist in buccal swab collection.

(b)(4): Thumb and palms prints shall be taken on forms prescribed by the Department of Justice, with palm print forms to be forwarded to, and maintained by, the Bureau of Criminal Identification and Information, Department of Justice. Thumbprints to be placed on the sample and specimen containers and forms as directed by the Department of Justice, and forwarded to, and maintained by, the DNA Laboratory.

(b)(5): The collecting agencies responsibility to confirm that the person from whom the specimens, etc., are collected, qualifies.

(b)(6): The DNA Laboratory is responsible for establishing procedures for entering data bank and database information.

(c): Protection from civil or criminal liability for errors in the above. Mistakes also not grounds for invalidating an arrest, plea, conviction, or disposition.

P.C. § 298.1(a): Sanctions for failure to provide the required samples upon written notification: Misdemeanor; 1 year and $500 fine. For persons already confined in state prison; “by sanctions for misdemeanors according to a schedule determined by the Department of Corrections.”
P.C. § 298.1(b)(1): Authorized law enforcement, custodial, or corrections personnel, including peace officers as defined in P.C. §§ 830, 830.1, 830.2(d), 830.5, and 830.55, may employ reasonable force to collect blood specimens, saliva samples, or thumb or palm print impressions from individuals who, after a written or oral request, refuse to provide those specimens, samples, or thumb or palm print impressions.

P.C. § 298.1(c)(1)(A), (2)(A): “Use of Reasonable Force” is defined as force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to gain compliance.

P.C. § 298.1(c)(1)(B), (2)(B): The use of force must be preceded by written authorization by the supervising officer on duty, which must include the details of the request and the subject’s refusal.

P.C. § 298.1(c)(1)(C), (2)(C): The use of force must be preceded by efforts to secure voluntary compliance.

P.C. § 298.1(c)(1)(D), (2)(D): If the use of force includes a jail “cell extraction,” the extraction shall be videotaped.

P.C. § 298.1(b)(2): The withdrawal of blood shall be performed in a medically approved manner in accordance with the requirements of P.C. § 298(b)(2) (above).

P.C. § 299: Expungement of Data.

Reduction of defendant’s felony conviction to a misdemeanor, after having successfully completed certain terms and conditions of probation for one year, does not entitle defendant to the expungement of the DNA data or return or destruction of the DNA sample. (Coffey v. Superior Court (2005) 129 Cal.App.4th 809.)

P.C. § 299.5: Confidentiality requirements and permitted disclosures.

P.C. § 299.6: Dissemination of information to law enforcement agencies:
(a): Sharing or dissemination of population database or data bank information, DNA profile or forensic identification database or data bank information, analytical data and results generated for forensic identification database and data bank purposes, or protocol and forensic DNA analysis methods and quality assurance or quality control procedures, may be made with:

(1): Federal, state or local law enforcement agencies.

(2): Crime laboratories, public or private, that serve federal, state and local law enforcement agencies, that have been approved by the Department of Justice.

(3): The attorney general’s office of any state.

(4): Any state or federally authorized auditing agent or board that inspects or reviews the work of the Department of Justice DNA Laboratory for the purpose of ensuring that the laboratory meets described standards.

(5): Any third party DOJ deems necessary to assist the department’s crime laboratory with statistical analyses of population databases, or the analyses of forensic protocol, research methods, or quality control procedures, or to assist in the recovery or identification of human remains for humanitarian purposes, including identification of missing persons.

(b): The population databases and data banks of the DNA Laboratory may be made available to and searched by the FBI and any other agency participating in the FBI’s CODIS System or any other national or international law enforcement database or data bank system.

(c): The Department of Justice may provide portions of biological samples (as described) to
local public law enforcement DNA laboratories for identification purposes provided that the privacy provisions are followed, and if each of the following conditions are met:

(1): The procedures used for handling of specimens and samples and the disclosure of results are as established by DOJ pursuant to P.C. §§ 297, 298 and 299.5.

(2): The methodologies and procedures used for DNA or forensic identification analysis are compatible with those established by DOJ pursuant to P.C. § 299.5(i), or otherwise are determined by DOJ to be valid and appropriate for identification purposes.

(3): Only tests of value to law enforcement for identification purposes are performed and a copy of the results of the analysis are sent to DOJ.

(4): All provisions concerning privacy and security are followed.

P.C. § 299.7: Disposal of samples.

P.C. §§ 300 et seq.: Construction and severability.

Case Law:

The provisions of these statutes (formerly, P.C. § 290.2), requiring the providing of the listed samples, are constitutional. (People v. King (2000) 82 Cal.App.4th 1363.)

The new provisions replacing P.C. § 290.2 (P.C. §§ 295 et seq.) have similarly been held to be constitutional. (Alfaro v. Terhune (2002) 98 Cal.App.4th 492.)

The taking of blood samples from prison inmates, parolees and probationers for the purpose of completing a federal DNA database, is lawful. (United States v. Kincade (9th Cir. 2004) 379 F.3rd 813.)
See also *United States v. Lujan* (9th Cir. 2007) 504 F.3rd 1003; upholding the federal “DNA Analysis Backlog Elimination Act of 2000,” 42 U.S.C. §§ 14135-14135e, when challenged on the basis that the Act violates the Fourth Amendment, the Ex Post Facto Clause, that it is a “Bill of Attainder, and that it contravenes constitutional “separation of powers” restrictions, when challenged by a federal felon who, when the requirement that she provide a DNA sample was imposed, was on supervised release.

Similarly, further amendment to this legislation by passage of the “Justice for All Act of 2004,” expanding the DNA collection requirements to all federal felonies, crimes of violence, and all sexual abuse crimes, where the defendant is on probation, parole or supervised release, is constitutional. (*United States v. Kriesel* (9th Cir. 2007) 508 F.3rd 941.)

Requiring a defendant, pretrial, to provide a DNA sample as a condition of his pretrial release in order to definitively determine his identity held to be constitutional. The court found that a magistrate’s finding of probable cause was a “watershed event” allowing for application of the totality of the circumstances exception to the Fourth Amendment's warrant requirement. The government’s interest in definitively determining defendant's identity outweighed his privacy interest in giving a DNA sample as a condition of pretrial release, particularly as the government's use of the DNA was limited to identification purposes. (*United States v. Pool* (9th Cir. 2010) 621 F.3rd 1213; upholding the DNA provisions of the federal “Bail Reform Act,” at 18 U.S.C. § 314(b) and (c)(1)(A))

This decision was vacated and dismissed as moot. (2011 U.S. App. LEXIS 19260 (9th Cir. Cal. Sept. 20, 2011)
Reduction of defendant’s felony conviction to a misdemeanor, after having successfully completed certain terms and conditions of probation for one year, does not entitle defendant to the expungement of the DNA data or return or destruction of the DNA sample. (Coffey v. Superior Court (2005) 129 Cal.App.4th 809.)

The amendments to P.C. § 296(a)(1), providing for the mandatory collection of DNA samples from anyone convicted of a felony offense, do not violate a defendant’s Fourth (Search and Seizure) or Fourteenth (Equal Protection and Due Process) rights, and is not an Ex Post Facto violation despite being enacted after the date of defendant’s offense. (People v. Travis (2006) 139 Cal.App.4th 1271; felony DUI case.)

The “Kelly/Frye” (People v. Kelly (1976) 17 Cal.3rd 24; Frye v. United States (D.C. Cir. 1923) 293 F. 1013.) standard does not apply to a DNA data base search used to identify a possible suspect. Requiring inmates to supply a DNA sample, even though not a criminal suspect at the time of the taking of the sample, is a constitutional “search” pursuant to P.C. § 295. (People v. Johnson (2006) 139 Cal.App.4th 1135.)

All registered sex offenders, even when convicted prior to the DNA statutes were passed, are required to provide a DNA sample. The statutes added by Proposition 69, adding more offenses to the list of people who must provide a DNA sample, are retroactive. (Good v. Superior Court [People] (2008) 158 Cal.App.4th 1494.)

The seizure of DNA from pretrial felony defendants without a warrant, as a condition of pre-trial release, at least where probable cause has been established in court or before a grand jury, has been upheld by the 9th Circuit Court of Appeal. (United States v. Pool (9th Cir. 2010) 621 F.3rd 1213.)

This decision was vacated and dismissed as moot. (2011 U.S. App. LEXIS 19260 (9th Cir. Cal. Sept. 20, 2011)
California’s provisions for extracting DNA samples from convicted felons, even over a prisoner’s objection and through the use of reasonable force, does not violate either the Fourth Amendment search or seizure rules, the Eighth Amendment (“reckless and deliberate indifference”), nor Fourteen Amendment due process. (Hamilton v. Brown (9th Cir. 2010) 630 F.3rd 889.)

The constitutionality of forcing pre-convictees to provide DNA samples for California’s DNA database is pending decision in the Ninth Circuit Court of Appeal in Haskell v. Brown (10-15152).
Chapter 9

Searches of Vehicles:

**General Rule:** Search warrants are not needed to lawfully seize and search a motor vehicle, at least in most instances.

Sometimes referred to as the “automobile exception” to the search warrant requirement, it is accepted that the automobile is commonly an exigent circumstance in and of itself. *(People v. Nicholson (1984) 207 Cal.App.3rd 707, 711-712; People v. Superior Court [Nasmeh] (2007) 151 Cal.App.4th 85, 100-102.)*

*Note:* Assuming that there is an “automobile exception” to the search warrant requirement is perhaps a dangerous assumption. There are still situations where there are viable arguments that a search warrant is necessary in order to lawfully search a vehicle. (See below)

This rule is justified by:

- The ready mobility of the automobile. *(Carroll v. United States (1925) 267 U.S. 132 [69 L.Ed.2nd 543]; United States v. Ross (1982) 456 US. 798 [72 L.Ed.2nd 572]; People v. Superior Court [Nasmeh], supra.)*

- The lessened expectation of privacy in a vehicle, resulting from the pervasive governmental regulation of vehicles capable of traveling on public highways. (see *Cady v. Dombrowski* (1973) 413 U.S. 433 [37 L.Ed.2nd 706]; *South Dakota v. Opperman* (1976) 428 U.S. 354 [49 L.Ed.2nd 1000].)

- The expense, delay, and risk of loss in securing a vehicle while a search warrant is obtained. *(People v. Superior Court [Valdez] (1983) 35 Cal.3rd 11, 16.)*


**Warrantless Searches of Vehicles** can be justified under one or more of seven legal theories:

- **Incident to Arrest**
With Probable Cause
When the Vehicle Itself is Evidence of a Crime
Inventory Searches
The “Patdown” (or “Protective Search”) of a Vehicle for Weapons
Statutory Automobile Inspections
Searching a Vehicle for a Driver’s License and/or Vehicle Registration, VIN Number, Proof of Insurance, etc.

Incident to Arrest: Any time a person is arrested in, or even “near” (see below), or even as a “recent occupant” of his or her vehicle (see below), a search of the suspect and the area immediately surrounding the suspect is lawful. (New York v. Belton (1981) 453 U.S. 454 [69 L.Ed.2nd 768]; United States v. Robinson (1973) 414 U.S. 218 [38 L.Ed.2nd 427]; People v. Molina (1994) 25 Cal.App.4th 1038, 1044; Thornton v. United States (2004) 541 U.S. 615 [158 L.Ed.2nd 905].)

The Rationale: The traditional rationale of warrantless searches incident to arrest is the two-fold need to (1) uncover evidence of the crime, to prevent its destruction, and (2) to preclude the possibility the arrestee might reach for a weapon with which he could injure the arresting officer or effect an escape. (Preston v. United States (1964) 376 U.S. 364, 367 [11 L.Ed.2d 777, 780]; United States v. Rabinowitz (1950) 339 U.S. 56, 72-75 [94 L.Ed. 653, 663-665]; Agnello v. United States (1925) 269 U.S. 20, 30 [70 L.Ed. 145, 148]; United States v. Edwards (1974) 415 U.S. 800, 802-803 [39 L.Ed.2nd 771]; People v. Diaz (2011) 51 Cal.4th 84.)

But see Arizona v. Gant (2009) 556 U.S. 332 [173 L.Ed.2nd 485], which has severely limited searches incident to arrest in vehicle, at least where the arrested subject has already been secured and can no longer lunge for evidence or weapons. (See “Limitation of the Chimel/Belton ‘Bright Line’ Test; When the Arrestee Has Been Secured,” below.)

Containers in the Vehicle: The searchable area includes any containers found in that area, even if not the arrestee’s property. (People v. Mitchell (1995) 36 Cal.App.4th 672; People v. Prance (1991) 226 Cal.App.3rd 1525; purses belonging to passengers.)

See also Wyoming v. Houghton (1999) 626 U.S. 295 [143 L.Ed.2nd 408]; search of another person’s purse when the search based upon probable cause (below).

However, a search of the female defendant’s purse left in the car when an officer is conducting a parole search of a male parolee, is illegal absent a reasonable suspicion to believe that the parolee had
joint access, possession or control over the purse. (People v. Baker (2008) 164 Cal.App.4th 1152.)

**Probable Cause Not Needed:** Except for that which is necessary to justify the arrest, there need not be any separate probable cause to believe there is anything there to seize, in order to justify the search of the vehicle. The arrest alone justifies the search. (United States v. Robinson, supra; People v. Molina (1994) 25 Cal.App.4th 1038.)

**Limitations:**

“The Lunging area:” The area to be searched is limited by Chimel v. California (1969) 395 U.S. 752 [23 L.Ed.2nd 685], to the “lunging area” within the vehicle. (People v. Summers (1999) 73 Cal.App.4th 288.) See the concurring, minority opinion in Summers discussing the legal justification for a search after the suspect has been immobilized and removed from the “grabbing area,” delaying the search until it can be done safely.

The “lunging area” of Chimel generally includes the entire passenger area of the car. (New York v. Belton (1981) 453 U.S. 454, 460 [69 L.Ed.2nd 768, 775].) This includes the rear area of a hatchback vehicle, so long as that area is accessible to the passengers in the vehicle, whether or not that storage area is covered. (United States v. Mayo (9th Cir. 2005) 394 F.3rd 1271; see also United States v. Caldwell (8th Cir. 1996) 97 F.3rd 1063, 1067; United States v. Doward (1st Cir. 1994) 41 F.3rd 789, 794.) See also United States v. Olguin-Rivera (10th Cir. 1999) 168 F.3rd 1203, 1205-1207; covered cargo area of a sport utility vehicle.

And United States v. Pino (6th Cir. 1988) 855 F.2nd 357, 364; cargo area of midsize station wagon.

Contemporaneous: Defendant must be arrested in or near his car, and, except when impractical to do so under the circumstances, the search must be “roughly contemporaneous in time and place” with the arrest. (People v. Stoffle (1992) 1 Cal.App.4th 1671; People v. Boissard (1992) 5 Cal.App.4th 972; United States v. Weaver (9th Cir. 2006) 433 F.3rd 1104.)
If his car is within the “lunging area” of Chimel, the passenger area of the car may be searched despite the fact that the defendant was not in it when arrested. (Thornton v. United States (2004) 541 U.S. 615 [158 L.Ed.2nd 905]; analyzing whether the arrestee was an occupant or a “recent occupant” as the definitive test.)

See “Searches where Arrestee is a ‘Recent Occupant,’” below.

Federal law is in accord as to the requirement that the search be contemporaneous with the arrest. (Preston v. United States (1964) 376 U.S. 364 [11 L.Ed.2nd 777]; United States v. McLaughlin (9th Cir. 1999) 170 F.3rd 889.)

A ten to fifteen minute delay between an arrest in a vehicle and the search of that vehicle with no intervening occurrences is still a lawful warrantless search incident to arrest. (United States v. Weaver, supra.)

Arresting defendant a block and a half away after a foot pursuit, and when the car is then searched “well after” the arrest, is neither contemporaneous in time or place with defendant’s arrest. (United States v. Caseres (9th Cir. 2008) 533 F.3d 1064, 1070-1074.)

See also United States v. Vasey (9th Cir. 1987) 834 F.2nd 782, 787; finding unauthorized a vehicle search conducted 30 to 45 minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a police car.

Limitation of the Chimel/Belton “Bright Line” Test; When the Arrestee Has Been Secured:

Rule Criticized: In addition to the above, a number of courts criticized the application of a “bright line rule” allowing for the search of a vehicle incident to arrest in those circumstances where a the arrestee has been removed from the vehicle and secured, and where there is no reasonable possibility he can still lunge for weapons and/or evidence. (E.g., see United States v. Weaver, supra, at p. 1107; Thornton v. United States (2004) 541 U.S. 615, 624 [158 L.Ed.2nd 905]; concurring opinion.)
Arizona v. Gant: Finally, the U.S. Supreme Court decided in Arizona v. Gant (2009) 556 U.S. 332 [173 L.Ed.2nd 485], that a warrantless search of a vehicle incident to arrest is lawful only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. (Overruling New York v. Belton (1981) 453 U.S. 454, 460 [69 L.Ed.2nd 768, 775], in so far as it has been interpreted to allow the warrantless, suspicionless search of a motor vehicle incident to arrest after the suspect has been handcuffed and secured in a patrol car from where he could no longer lunge for weapons or destroy evidence.)

The theory of Gant is not restricted to vehicle searches. The same theory, disallowing a search incident to arrest when the suspect has already been secured, is applicable as well to an arrest within one’s residence. (People v. Leal (2009) 178 Cal.App.4th 1051.)

Citing United States v. Fleming (7th Cir. 1982) 667 F.2nd 602, 605-608, the Leal Court noted that handcuffing alone is probably not enough to fully secure the suspect. (Id., at p. 1062.)

“Handcuffs are a temporary restraining device; they limit but do not eliminate a person's ability to perform various acts. They obviously do not impair a person's ability to use his legs and feet, whether to walk, run, or kick. Handcuffs do limit a person's ability to use his hands and arms, but the degree of the effectiveness of handcuffs in this role depends on a variety of factors, including the handcuffed person's size, strength, bone and joint structure, flexibility, and tolerance of pain. 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, and in so doing to cause
injury to his intended victim, to a bystander, or even to himself."

However, apparently putting a suspect into a locked patrol vehicle while unhandcuffed is sufficient to trigger the rule of Gant. (See United States v. Ruckes (9th Cir. 2009) 586 F.3rd 713; issue not discussed.)

Gant's Alternative Theory: The Gant Court, however, also mentions that there is a second legal theory justifying the warrantless search of a vehicle, incident to arrest, even if the suspect has been removed from the vehicle and secured: i.e., when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the car.” (Id., 129 S.Ct. at p. 1719.)

Note: The Supreme Court in Gant mentions this as an “alternate” theory justifying the warrantless search of a vehicle incident to arrest, but fails to explain when and how it is applicable, merely citing Thornton v. United States, supra, as authority for its application.

Thornton v. United States, supra, at pp. 629-632 (a concurring opinion), describes its applicability to vehicle searches citing as its authority United States v. Rabinowitz (1950) 339 U.S. 56 [94 L.Ed. 653].

United States v. Rabinowitz, supra, is a case involving the warrantless search of a business office, however, based upon probable cause, itself being severely criticized later in Chimel v. California (1969) 395 U.S. 752, 759-768 [23 L.Ed.2d 685].

Also, the phrase “reasonable to believe” is not defined (e.g., “probable cause” or “reasonable suspicion?”) Neither are the other legal parameters (e.g., is it limited to the passenger area of the car, must it be contemporaneous with the arrest in time and place, etc.?) even discussed.

Note: A “reasonable suspicion” is probably all that is required in that warrantless vehicle searches based upon “probable cause” are
already legal under these circumstances, but without the necessity of proving that an occupant has been arrested or that the suspected evidence is related to the cause of an arrest. (See “With Probable Cause,” below.)

See People v. Osborne (2009) 175 Cal.App.4th 1052, 1065, where “reasonable basis to believe” in a Gant search of a vehicle was defined as “a standard less than probable cause.” (See also People v. Nottoli (2011) 199 Cal.App.4th 531, 551, fn. 9, & 553.)

Arresting a person for driving on a suspended license does not establish a “reasonable basis to believe” that the car will contain any evidence of this offense. (United States v. Ruckes (9th Cir. 2009) 586 F.3rd 713, 718; citing Gant at 129 S.Ct. p. 1719.)

Also, Thornton (at p. 632) indicates that this theory is likely to be limited to warrantless vehicle searches that are “incident to arrest,” based upon the relatively lower expectation of privacy involved in one’s motor vehicle.

Arresting defendant for vehicle burglary, sitting in a vehicle, particularly with tools visible in the vehicle, justified the warrantless search of the vehicle upon “a reasonable basis to believe” that evidence related to the suspected vehicle burglary might be found in the car. (People v. Osborne (2009) 175 Cal.App.4th 1052, 1062-1065.)

Osborne interprets “reasonable basis to believe” to be something less than “probable cause.” (Id., at p. 1065.)

The search of a cell phone at the scene of an arrest in a vehicle is lawful so long as it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” When the driver is arrested for driving under the influence of drugs,
and the record contains expert testimony concerning the use of cell phones by drug users, the warrantless search of the driver’s cell phone is lawful. (*People v. Nottoli* (2011) 199 Cal.App.4th 531, 544-559.)

**Subsequent Case Law:**

Stopped and physically arrested for driving on a suspended license (with a prior conviction for the same), defendant was secured in the back seat of a patrol car. The subsequent search of his vehicle, resulting in recovery of cocaine and an illegal firearm (defendant being a convicted felon), was found to be in violation of the rule of *Gant*. (*United States v. Ruckes* (9th Cir. 2009) 586 F.3rd 713, 716-718; evidence was held to be admissible, however, under the inevitable discovery rule in that the vehicle was to be impounded and subjected to an inventory search; pp. 718-719.)

The Seventh Circuit Court of Appeal has found that in a drug conspiracy-related arrest, there is commonly going to be “*a reasonable basis to believe*” that evidence related to the drugs or the conspiracy are going to be found in the defendant’s vehicle. (*United States v. Slone* (7th Cir. 2011) 636 F.3rd 845, 852; defendant arrested while in the process of conducting security or counter-surveillance operations in a drug trafficking conspiracy.)

Two searches of defendant’s car were not justified as incident to his arrest for interfering with an investigation. The first search did not fall within the *Gant* first prong (arrestee within reaching distance of vehicle) because defendant had been Tased and detained, and was lying face down on the ground with officers on him. The second search was conducted at the impound yard. But under the second *Gant* prong, it was not reasonable to believe evidence of interfering would remain in the vehicle after defendant was removed. A reasonable belief to search a vehicle for evidence of the offense of arrest exists when the nature of the offense, considered in conjunction with the particular facts of the case, gave rise to a degree of suspicion.
commensurate with that sufficient for limited intrusions. Reasonable suspicion, not probable cause, is required. Therefore, the automobile exception also did not justify either search. Probable cause was not established by defendant's erratic driving, nervousness, or refusal to exit the car, or by the location of the stop in gang territory, or the discovery of baggies and cash in the first search. (People v. Evans (2011) 200 Cal.App.4th 735, 743-755.)

The Court further rejected both the “inventory search” and “inevitable discovery” theories in that neither theory was sufficiently developed at the trial court level. (Id., at pp. 755-756.)

**Exception:** Where the person is arrested and transported to the police station, property in his immediate possession may be searched (and/or his property taken for laboratory analysis) upon arrival at the station, there being little perceived difference between searching in the field and shortly thereafter at the police station. (United States v. Edwards (1974) 415 U.S. 800, 803-804 [39 L.Ed.2nd 771, 775-776]; In re Charles C. (1999) 76 Cal.App.4th 420, 425; see also United States v. Finley (5th Cir. 2007) 477 F.3rd 250, 260, fn. 7; People v. Diaz (2011) 51 Cal.4th 84.)

The warrantless search of a cell phone (or other personal property) is lawful so long as it is “immediately associated with the person of an arrestee,” even if the search is delayed. (Ibid.)

Contrary case law from another jurisdiction (State v. Smith (Ohio 2009) 920 N.E. 949), makes the Diaz issue ripe for United States Supreme Court review. However, the US Supreme Court has denied certiorari. (Diaz v. California (Oct. 3, 2011) 132 S.Ct. 94; 181 L.Ed.2nd 23.)

**Is Gant Retroactive?**

Following Gant, a gun found during the search of a vehicle in which the defendant was a passenger, searched incident to the arrest of another passenger and after defendant himself had been handcuffed...
and secured in a patrol car, should have been suppressed. (*United States v. Gonzalez* (9th Cir. 2009) 578 F.3rd 1130; also noting that the decision in *Gant* applies retroactively to any case not yet final (i.e., still on appeal) despite the officer’s good faith in following the old rule that was valid at the time of the search.)

However, the issue of retroactivity is now before the United States Supreme Court in *Davis v. United States*, 09-11328, reviewing a decision out of the federal Eleventh Circuit ruling that the officer’s good faith belief in the rule of *Belton*, which was the law at the time of the search in issue here, allowed for the search of the defendant’s car in violation of the later decision in *Gant*.

**Transportation:** The arrestee must be subject to a post-arrest transportation to jail or the police station, or perhaps a detoxification facility, before a search incident to arrest is justified. (*People v. Brisendine* (1975) 13 Cal.3rd 528.) Therefore, if the procedure is to cite and release the subject at the scene of the arrest, no “search incident to arrest” is lawful. The theory is that a person is not as prone to attempt to destroy evidence or reach for a weapon if he is only to be cited, as opposed to taken to jail. (*Ibid.*)

See “Search Incident to Arrest,” under “Searches of Persons,” above.

**Citations:** There is no such thing as legal justification for a “search incident to citation,” because of the lack of the right to physically transport the subject from the scene. (*Knowles v. Iowa* (1989) 525 U.S. 113 [142 L.Ed.2nd 492].)

*However,* it is not unconstitutional to make a custodial arrest (i.e., transporting to jail or court) of a person arrested for a minor misdemeanor (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [149 L.Ed.2nd 549].), or even for a fine-only, infraction. (*People v. McKay* (2002) 27 Cal.4th 601, 607; see also *United States v. McFadden* (2nd Cir. 2001) 238 F.3rd 198, 204; see also *Virginia v. Moore* (2008) 553 U.S. 164 [170 L.Ed.2nd 559].)
California’s statutory provisions require the release of misdemeanor arrestees in most circumstances. (e.g., see P.C. §§ 853.5, 853.6, V.C. §§ 40303, 40500) However, violation of these statutory requirements is not a constitutional violation and, therefore, should not result in suppression of any evidence recovered as a result of such an arrest. (People v. McKay, supra, at pp. 607-619, a violation of V.C. § 21650.1 (riding a bicycle in the wrong direction); People v. Gomez (2004) 117 Cal.App.4th 531, , 538-539, seat belt violation (V.C. § 27315(d)(1)), citing: Atwater v. City of Lago Vista (2001) 532 U.S. 318 [149 L.Ed.2nd 549]; People v. Bennett (July 21, 2011) 197 Cal.App.4th 907, 918.)

A state statute limiting the right to search does not require the suppression of any evidence found in violation of the statute, so long as the Constitution is not also violated. (People v. Xinos (2011) 192 Cal.App.4th 637, 653; search of a vehicle’s event data recorders (EDR), or sensing and diagnostic modules (SDM), in violation of V.C. § 9951.)

See also; “Search Incident to Arrest,” under “Searches of Persons,” above.

Searches where Arrestee is a “Recent Occupant:”

The arrestee need not have been arrested while physically within his vehicle so long as he is at least a “recent occupant” of the vehicle. (Thornton v. United States (2004) 541 U.S. 615 [158 L.Ed.2nd 905].)

See United States v. Osife (9th Cir. 2005) 398 F.3rd 1143, where the Court, without discussing the issue, found the defendant to be a “recent occupant” where he had left his vehicle, gone into a store, and returned to it before being arrested.

But where defendant is arrested a block and a half away after a foot pursuit from his vehicle, so that when arrested he is no longer within reach of the passenger area of his car, the Ninth Circuit is of the belief that he does not qualify as a “recent occupant.” (United States v. Caseres (9th Cir. 2008) 533 F.3d 1064, 1070-1074.)

Being a “recent occupant” of a vehicle does not add a requirement that in order to search the passenger area of the vehicle there must be some reason to believe the vehicle contains evidence related to the crime for which the defendant was arrested. (United States v.
With Probable Cause: Search with Probable Cause to believe there is contraband or other seizable items in a vehicle:

General Rule: If police officers have probable cause to search a car, they may make a warrantless search anywhere a warrant could have authorized.  
(Pennsylvania v. Labron (1996) 518 U.S. 938 [135 L.Ed.2nd 89];

Warrantless search of defendant’s vehicle justified by exigent circumstances (looking for a missing eight-year-old girl) and probable cause (blood seen in the vehicle and a cord hanging out of the trunk).  (People v. Panah (2005) 35 Cal.4th 395, 468-469.)

This includes any compartments and containers in the vehicle; assuming the item for which there is probable cause for which to search would reasonably be expected to be in the container searched.  (United States v. Ross (1982) 456 U.S. 798 [72 L.Ed.2nd 572]; People v. Chavers (1983) 33 Cal.3rd 462, 466-467.)

Even if the container searched does not belong to the defendant, it is subject to search.  (Wyoming v. Houghton (1999) 526 US. 295 [143 L.Ed.2nd 408]: Where defendant was a passenger in the vehicle, the search of defendant’s purse which was left in the car when the passengers were ordered out is okay.)


However, a search of the female defendant’s purse left in the car when an officer is conducting a parole search of a male parolee, is illegal absent a reasonable suspicion to believe that the parolee had joint access, possession or control over the purse.  (People v. Baker (2008) 164 Cal.App.4th 1152.)
It is not relevant that the car must be damaged to get to the hidden compartments. *Wimberly v. Superior Court* (1976) 16 Cal.3rd 557, 571.

It is also lawful to make a warrantless seizure of a vehicle, found in any public area, when an officer has probable cause to believe that the vehicle itself is “forfeitible contraband” *Florida v. White* (1999) 526 U.S. 559 [143 L.Ed.2nd 748]; see also *Carroll v. United States* (1925) 267 U.S. 132, 150-151 [69 L.Ed. 543]., or is transporting contraband. *United States v. Alverez-Tejeda* (9th Cir. 2007) 491 F.3rd 1013.

“(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.” *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485], citing *Thornton v. United States* (2004) 541 U.S. 615, 629-632 [158 L.Ed.2nd 905].

*Note:* This theory for justifying a warrantless search, which is likely to be limited to the searches of vehicles (*Thornton v. United States*, infra, at p. 632.) generates more questions than it answers: For instance, “reasonable to believe” is not defined (e.g., “probable cause” or “reasonable suspicion?”) Neither are the other legal parameters (e.g., is it limited to the passenger area of the car, must it be contemporaneous with the arrest in time and place, etc.?) even discussed. The theory itself comes from the concurring (two justices) opinion in *Thornton v. United States* (2004) 541 U.S. 615, at pp. 629-632 [158 L.Ed.2d 905]. *Thornton* itself cites as its authority *United States v. Rabinowitz* (1950) 339 U.S. 56 [94 L.Ed. 653], which was itself all but overruled in *Chimel v. California* (1969) 395 U.S. 752, 759-768 [23 L.Ed.2d 685].

The warrantless search of a vehicle pursuant to the “automobile exception” to the warrant requirement is no less justified merely because the vehicle is parked at the defendant’s apartment in a nearby carport. The “twin justifications” for not requiring search warrants to search vehicles; i.e., “the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility,” applies just as much as when the car is out on the street. *People v. Hockstraser* (2009) 178 Cal.App.4th 883, 902-905.
Having probable cause to arrest a passenger in a vehicle for providing false information to a peace officer concerning her age does not constitute probable cause to believe that she is hiding identification in a car when she tells the officer that she does not have any identification with her.  (*United States v. Rodgers* (9th Cir. 2011) 656 F.3\textsuperscript{rd} 1023.)

During a traffic stop, defendant gave counterfeit bills to another passenger who stuffed them, folded, into the weather stripping between the right front passenger door and window.  An officer noticed the partially-visible bills, removed them, unfolded them, and observed that they were counterfeit. The appellate court determined that suppression was not warranted because (1) the circumstances presented a fair probability that the money was involved in drug trafficking and that a search of the car would have revealed evidence of a crime since the passenger was nervous, a parolee, and appeared intoxicated, and the money was located in a place that suggested an effort to conceal its presence and called to the officer’s mind the door compartments and other hiding places used by drug couriers to transport contraband and cash, and (2) a separate search did not occur when the officer unfolded the bills since the money was within the scope of the search.  (*United States v. Ewing* (9th Cir. 2011) 638 F.3\textsuperscript{rd} 1226.)

Two searches of defendant’s car were not justified under the probable cause theory in that probable cause was not established by defendant's erratic driving, nervousness, or refusal to exit the car, or by the location of the stop in gang territory, or the discovery of baggies and cash in the first search.  (*People v. Evans* (2011) 200 Cal.App.4\textsuperscript{th} 735, 753-755.)

**Problem:** Does finding a limited amount of contraband in the passenger area of a car, such as during a search incident to arrest or with a plain-sight observation, provide an officer with probable cause to search the rest of the vehicle (e.g., the trunk) for more contraband?

The former rule was that finding a limited amount of evidence does not necessarily provide probable cause to believe more might be contained in other areas of the car, such as the trunk or the engine compartment.  (See *Wimberly v. Superior Court* (1976) 16 Cal.3\textsuperscript{rd} 557; *People v. Gregg* (1974) 43 Cal.App.3\textsuperscript{rd} 137.)

The new rule is that anywhere in the vehicle where an officer might logically expect to find whatever it is that there is probable cause to believe is there, is subject to a warrantless search.  (*People v. Dey* (2000) 84 Cal.App.4\textsuperscript{th} 1318; finding that the old rule, as
expressed in *Wimberly*, was in effect overruled by *United States v. Ross* (1982) 456 U.S. 789 [72 L.Ed.2nd 572], establishing a “bright line” test for vehicle searches.)

*Dey* was reaffirmed in *People v. Hunter* (2005) 133 Cal.App.4th 371, where a vehicle’s trunk was searched based upon a limited amount of marijuana found in the passenger area. Passage of Proposition 8, the “Truth in Evidence” Initiative in June, 1982, dictated that trial courts follow *Ross*.

The Court in *Hunter* criticized the trial judge for not following *Dey*, noting that the rules of “Stare Decisis” did not allow a trial court an option.

The Court in *Hunter* also ruled, however, that even if *Wimberly* were still the rule, the arresting officers in this case had “probable cause” to believe that more contraband would be found in the trunk based upon the vehicle occupants’ suspicious actions when first stopped and the fact that one occupant was a known drug dealer and a second a CYA parolee. (*Id.*, at p. 379.)

**Problem**: What if the vehicle is already impounded and in police custody, and a search would no longer be “contemporaneous in time and place?”

The “contemporaneous in time and place” requirement only applies to “searches incident to arrest.” If probable cause to believe a vehicle contains contraband or other seizable items existed at the time the vehicle is seized and impounded, a delayed, warrantless search is no less valid than if searched at the time of seizure. The courts have held that such a delayed search imposes no greater intrusion upon a defendant’s privacy rights than if it had been immediately searched upon initial seizure. (*People v. Nicholson* (1989) 207 Cal.App.3rd 707; *United States v. Johns* (1985) 469 U.S. 478 [83 L.Ed.2nd 890]; *United States v. Garcia* (9th Cir. 2000) 205 F.3rd 1182.)


*But note; A Search Warrant Required*: Based upon the reasoning of the above cases, it is arguable that when a vehicle is impounded at a time when there is no probable cause to believe it contains
contraband or other seizable items, developing probable cause to search the vehicle at a later time *probably does not* allow a warrantless search after impound. There no longer being any legal theory allowing for a warrantless search, nor any exigent circumstances, a search warrant should be obtained.

**Problem:** Searches of “closed containers” in a vehicle:

**Old Rule:** If a police officer had probable cause to believe a particular closed container in a vehicle contained contraband, as opposed to probable cause to believe that there was contraband in some unknown location in the vehicle in general, then the container itself would have to be seized and a search warrant obtained before opening it. (*United States v. Chadwick* (1977) 433 U.S. 1 [53 L.Ed.2nd 538].)

**New Rule:** Recognizing the absurdity of trying to distinguish the rule of *Ross* (*United States v. Ross* (1982) 456 U.S. 789 [72 L.Ed.2nd 572].), allowing a warrantless search of containers in a vehicle if there was probable cause to search the car in general (above), and the rule of *Chadwick*, requiring a warrant for a particular container when there was probable cause to believe a known container in a vehicle itself contained contraband or other seizable items, the United States Supreme Court finally overruled *Chadwick* in *California v. Acevedo* (1991) 500 U.S. 565, 580 [114 L.Ed.2nd 619, 634].

Now, pursuant to *Acevedo*, any time a closed container is found in a car, whether searched (1) incident to arrest, (2) with probable cause to believe there is contraband or other seizable evidence somewhere in the car, or (3) with probable cause to believe a specific container within the vehicle contains contraband or seizable items, the container may be searched without a search warrant. (See also *People v. Molina* (1994) 25 Cal.App.4th 1038; see also *People v. Thompson* (2010) 49 Cal.4th 79, 112.)

This includes a closed container belonging to a passenger even though the passenger is not arrested (*People v. Mitchell* (1995) 35 Cal.App.4th 672; *People v. Prance* (1991) 226 Cal.App.3rd 1525.) and even though the passenger has already been ordered out of the vehicle. (*Wyoming v. Houghton* (1999) 526 U.S. 295 [143 L.Ed.2nd 408].)
If, however, the passenger takes the container (such as a purse) with him or her upon being ordered out of a vehicle, is that container subject to search? Probably not (see United States v. Vaughan (9th Cir. 1983) 718 F.2nd 332.), absent some reason to believe it may contain a weapon, in which case a “patdown” of the container (i.e., the purse) may be appropriate. (See “Frisks,” above.)

The California Supreme Court applied this exception to permit the warrantless seizure of goods or chattels consigned to a common carrier for shipment. The court held that when the police have probable cause to believe that a package consigned to a common carrier contains contraband, they are entitled either to search it immediately without a warrant or to seize and hold it until they can obtain a warrant. (People v. McKinnon 1972) 7 Cal.3rd 899, 909; see also Robey v. Superior Court [People] 200 Cal.App.4th 1, 5.)

Problem: A motorhome (and other similar “vehicles”):

A motorhome, although having many of the attributes of a private residence, is mobile and subject to registration like any other motor vehicle, and is therefore included within the vehicle exception to the search warrant requirement. (California v. Carney (1985) 471 U.S. 386 [85 L.Ed.2nd 406].)

“When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception (i.e., ‘mobility’ and ‘lessened expectation of privacy’) come into play.” (California v. Carney, supra, at pp. 392-393 [85 L.Ed.2nd at p. 414].)

Thus, when a motorhome is not “readily capable of . . . use” on the highway, and is found stationary in a place which is “regularly used for residential purposes,” (i.e., such as when hooked up in the residential area of a park), then the rules for searching homes would apply.

Defendant’s pickup/camper, which the parties stipulated was actually defendant’s residence, but which was found parked on the street within 1000 feet of an elementary school, was held not to come within the “residence” exception to P.C. § 626.9 (firearm in a vehicle within a “gun-free school zone”) when a firearm was found in it. (People v. Anson (2002) 105 Cal.App.4th 22, 26-27.)
The same rule applies to a houseboat (United States v. Hill (10th Cir. 1988) 855 F.2nd 664, 668; United States v. Albers (9th Cir. 1998) 136 F.3rd 670.). and for a trailer used for residential purposes but hooked up to a vehicle and moved to a non-residential area. (Garber v. Superior Court (2010) 184 Cal.App.4th 724; discussing whether the exceptions to the concealed and loaded firearms statutes (P.C. §§ 12025 & 12031) applied to defendant’s trailer that he lived in; holding that, under the circumstances, they did not.)

Bicycles ridden on public streets are like cars and can be searched without a warrant when there is probable cause to believe it contains contraband. (People v. Allen (2000) 78 Cal.App.4th 445.)

The vehicle exception has been used with other types of vehicles, such as an airplane. (See United States v. Rollins (11th Cir. 1983) 699 F.2nd 530.)

Problem: Expanding the scope of the search beyond the purposes of the original cause for the traffic stop:

Having a drug-sniffing dog check the outside of a vehicle stopped for a traffic violation does not require any independent reasons for believing contraband is in the car in order to be lawful. The drug sniff is not a search, and thus does not implicate the Fourth Amendment. (Illinois v. Caballes (2005) 543 U.S. 405 [160 L.Ed.2nd 842], rejecting the argument that to do so “unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation.”


Evidence of Probable Cause: Probable cause to search a motor vehicle is established just as in any other case. (People v. Carrillo (1995) 37 Cal.App.4th 1662; defendant claiming no ownership interest in a vehicle when a registration check showed the vehicle to be registered to him, adds to the evidence needed to prove probable cause.)

When the Vehicle Itself is Evidence of a Crime: Although there is not a lot of authority on the issue, and what authority there is tends to be a bit vague and inconsistent, it has been held that when the vehicle itself constitutes evidence of a crime, or is the instrumentality of a crime, rather than the mere container of evidence, seizure and a warrantless search of that vehicle is lawful. For instance:
It is lawful to make a warrantless seizure of a vehicle, found in any public area, when an officer has probable cause to believe that the vehicle itself is “forfeitable contraband.” (Florida v. White (1999) 526 U.S. 559 [143 L.Ed.2nd 748]; see also Carroll v. United States (1925) 267 U.S. 132, 150-151 [69 L.Ed. 543].)

Where the defendant’s bloody shoeprint was observed on the floorboard of his vehicle, the vehicle itself was found to be evidence of the crime. (People v. Griffin (1988) 46 Cal.3rd 1011.)

When the vehicle was used to kidnap the victim, it was found to be the “instrumentality” of the crime of kidnapping. (North v. Superior Court (1972) 8 Cal.3rd 301.)

Note: The United States Supreme Court has never recognized the category of evidence referred to as “the instrumentality of the crime,” and there are no recent California cases upholding this theory. (See People v. Xinos (2011) 192 Cal.App.4th 637, 662, and fn. 9.)

The vehicle in which the victim was shot was evidence of the crime. (People v. Teale (1969) 70 Cal.2nd 497.)

When the defendant was arrested for committing lewd acts on children where it was suspected that he took pictures of his victims in his van, the van became evidence of the crime. (People v. Rogers (1978) 21 Cal.3rd 542.)

The California Supreme Court noted that this theory for justifying the warrantless seizure and search of a vehicle where the vehicle is itself evidence of, or the instrumentality of, a crime is implicit in a number of United States Supreme Court decisions as well. (People v. Griffin, supra, at p. 1025, citing Cardwell v. Lewis (1974) 417 U.S. 583, 592-593 [41 L.Ed.2d 325, 336]; Coolidge v. New Hampshire (1971) 403 U.S. 443, 464 [29 L.Ed.2d 564, 581-582]; Cooper v. California (1967) 386 U.S. 58 [17 L.Ed.2d 730]; Carroll v. United States (1925) 267 U.S. 132, 153, 156 [69 L.Ed. 543, 551, 552-553]; United States v. Di Re (1948) 332 U.S. 581, 586 [92 L.Ed. 210, 216].)

Question: When a vehicle has within it a “false compartment” (i.e., a “box, container, space or enclosure that is intended for use or designed for use to conceal, hide, or otherwise prevent discovery of any controlled substance within or attached to a vehicle, . . .”) See People v. Arias (2008) 45 Cal.4th 169.), per H&S § 11366.8. is the vehicle itself “evidence of a crime?” No known case has yet to rule on this issue.
Inventory Searches: A lawfully impounded vehicle may be searched for the purpose of determining its condition and contents at the time of impounding, to avoid later disputes. Anything observed in the vehicle during the inventory search will be admissible in court. (*Florida v. Wells* (1990) 495 U.S. 1 [109 L.Ed.2nd 1].)

Evidence found during a lawful inventory search is admissible in court. (See *Harris v. United States* (1968) 390 U.S. 234 [19 L.Ed.2nd 1067].)

However, such searches are only proper if done according to standardized procedures used by the involved law enforcement agency. (*Ibid.*)

Such “standardized procedures” need not be formal or even in written form, so long as the searching officer is not allowed to act in his own “unfettered discretion.” (*People v. Needham* (2000) 79 Cal.App.4th 260, 265; oral vehicle inventory search policy of sheriff’s department taught to deputies justified an inventory search of property on a motorcycle.)

It has been held that V.C. § 22651(p) and “established department practices” are enough to meet this requirement. (*People v. Benites* (1992) 9 Cal.App.4th 309; *People v. Steeley* (1989) 210 Cal.App.3rd 887.)

The standard inventory procedures which prevail throughout the country and approved by an overwhelming majority of courts, if followed by the searching officers, will provide the standards necessary to make an inventory search legal. (*People v. Green* (1996) 46 Cal.App.4th 367.)


If containers are to be opened, the standardized procedures must cover that topic as well, so as to preclude the inventory search being used as a ruse for a general rummaging for any incriminatory evidence. (*Florida v. Wells, supra,* at p. 4 [109 L.Ed.2nd at p. 6]; *People v. Williams* (1999) 20 Cal.4th 119, 138.)

See *People v. Nottoli* (2011) 199 Cal.App.4th 531, 545-546, where the lack of any evidence as to the arresting officer’s department’s policies and procedures concerning the searching of containers, including cell phones, led to the finding that the cell phone in question could not be opened.
and searched as a part of the inventory search of a lawfully
impounded vehicle.

However, the impounding of a vehicle done merely as a pretext for
conducting an investigatory search is not lawful, and the resulting
evidence will be suppressed. (People v. Aguilar (1991) 228 Cal.App.3rd
1049.)

See also People v. Valenzuela (1999) 74 Cal.App.4th 1202; noting
that the rule allowing a “pretext” stop under Whren v. United
States (1996) 517 U.S. 806 [135 L.Ed.2nd 89] is inapplicable to
stops or detentions when the legal excuse is to conduct an
“administrative search,” such as inspecting the licensing of a
taxicab or an inventory search of a vehicle.

The sole legal basis for doing inventory searches is to (1) protect
the owner’s property while it is in police custody, (2) insure
against claims of lost, stolen or vandalized property, or (3) protect
the police from danger. (South Dakota v. Opperman (1976) 428
U.S. 364 [49 L.Ed.2nd 1000].)

Using an inventory search of a vehicle as a “ruse for a general
rummaging in order to discover incriminating evidence” is not a
legal justification, or at least can’t be the only reason why a car is
searched. (Florida v. Wells (1990) 495 U.S. 1 [109 L.Ed.2nd 1];
People v. Williams (1999) 20 Cal.4th 119, 126.)

Note: Officers must be familiar with their own
department’s policies for doing vehicle inventory searches
and be prepared to testify to the correct legal justifications
for conducting such a search.

Impounding a vehicle for the purpose of allowing the officer to do
an inventory search of the vehicle in the hopes of finding
narcotics-related evidence, when none of the “community
caretaking function” elements apply, is illegal. While stopping
the vehicle may be for an ulterior purpose, so long as there is also an
objectively reasonable basis for doing so (e.g., seeing a traffic
violation), the officer’s subjective motivations are in issue when
evaluating the legality of impounding the vehicle and conducting
an inventory search. (People v. Torres (2010) 188 Cal.App.4th
775, 785-793; impoundment and inventory search held to be illegal
when the officer admitted that his purpose was to look for
narcotics-related evidence.)
Unless required by the officer’s department inventory procedures, the officer is not required to allow a subject to remove personal items prior to conducting the inventory of an impounded vehicle. *(United States v. Penn* (9th Cir. 2000) 233 F.3rd 1111.)*

*Note:* The evidence was suppressed in *Penn* in an unpublished decision on remand and after rehearing, based upon evidence that the officer opened and looked into a closed container in violation of his department’s written inventory procedures. (2001 U.S. Dist. LEXIS 19649.)

Impounding a vehicle pursuant to *V.C. § 22651(p)*, when neither the driver nor the passenger could (or would) produce a valid driver’s license, was held to be lawful. *(People v. Hoyos* (2007) 41 Cal.4th 872, 892.)*

See “Impounding Vehicles, below.

The standardized criteria requirements, however, only relate to an inventory search. They were not intended to necessarily apply to an officer’s decision to impound the vehicle in the first place. Although an impoundment decision made pursuant to standardized criteria is more likely to satisfy the *Fourth Amendment* than one not made pursuant to standardized criteria, it is not legally necessary that that be the case. The reasonableness of impounding a vehicle based upon the circumstances is the test under the *Fourth Amendment*. *(People v. Shafrir* (2010) 183 Cal.App.4th 1238.)

*The “Patdown” (or “Protective Search”) of a Vehicle for Weapons:*

Whenever, during a lawful contact with an individual, an officer develops a “reasonable belief,” based on specific articulable facts, that the suspect’s vehicle may contain a weapon, anywhere within the passenger area of that vehicle that a weapon may reasonably be expected to be found may be checked for that purpose. *(Michigan v. Long* (1983) 463 U.S. 1032, 1049 [77 L.Ed.2nd 1201, 1220].)*

Anything else seen in plain sight during such a check for weapons is admissible in court. (See “*Plain Sight Observations,*” above)

Examples:

Observation of a knife in the vehicle in plain sight during a traffic stop, whether the knife is legal or not, justifies a search of the vehicle for additional weapons. *(People v. Lafitte* (1989) 211 Cal.App.3rd 1429.)
Contact of two people in a car behind a 24-hour market, in a dark area, with knowledge that one of the suspects was recently arrested for a weapons offense, justifies a search of the vehicle for weapons. (*People v. Brueckner* (1990) 223 Cal.App.3rd 1500.)

Observation of a passenger reaching under the seat (i.e., a “furtive movement”) and the sound of metal hitting metal justifies checking under that seat for weapons. (*People v. King* (1990) 216 Cal.App.3rd 1237.)

An officer may constitutionally search the compartments of a vehicle upon a “reasonable belief” that “the suspect poses a roadside danger” arising from “the possible presence of weapons in the area surrounding a suspect.” (*People v. Bush* (2001) 88 Cal.App.4th 1048; based upon six-year-old information that the person stopped was a kick-boxer and had a history of violence.)

Checking the passenger area of vehicle for firearms based upon a “reasonable suspicion,” which came as a result of an identified citizen’s report to law enforcement, enhanced by the driver’s lack of cooperation, that the occupants may have guns, held to be lawful. (*Haynie v. County of Los Angeles* (9th Cir. 2003) 339 F.3rd 1071.)

Based upon anonymous information that defendant was sitting in his vehicle with a handgun, such information being sufficiently corroborated to amount to a reasonable suspicion, the detention of the defendant and other passengers and a search of the vehicle for the gun was legally justified. (*People v. Dolly* (2007) 40 Cal.4th 458.)

*But,* searching a vehicle for weapons, despite the driver’s attempt to evade the officer by making a couple of quick turns and hiding in the dark, is illegal absent specific and articulable reasons to believe that the driver is dangerous or that he might gain immediate control of a weapon. (*Liberal v. Estrada* (9th Cir. 2011) 632 F.3rd 1064, 1083-1084.)

It is irrelevant that the subject has already been removed from the vehicle. The courts feel that the subject may break away from police control, or may be permitted to reenter the vehicle and retrieve a weapon before the “*Terry*” investigation is over. (*Michigan v. Long,* supra, at pp. 1051-2052 [77 L.Ed.2nd at p. 1221].)

Referring to *Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2nd 889].)
Statutory Automobile Inspections:

V.C. § 2805(a): Elements:

Any law enforcement officer who is member of:

- The California Highway Patrol;
- A city police department;
- A county sheriff’s office; or
- A district attorney’s office as an investigator;

Whose primary responsibility is to conduct vehicle theft inspections;

For the purpose of locating stolen vehicles;

May inspect:

- Any vehicle of a type required to be registered under the Vehicle Code; or
- Any identifiable vehicle component thereof;

When found on a highway; or at 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 storage pool; or
- Other similar establishment; or

Any agricultural or construction work location where work is being actively performed;

May inspect the title and registration of such vehicles;

In order to establish, as to that vehicle or identifiable vehicle component, the rightful:

- Ownership; or
- Possession.


“The regulatory scheme authorizing warrantless inspections must meet three requirements: (1) the scheme must serve a substantial government interest; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program “must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” (*Id.*, at p. 619; citing (*New York v. Burger* (1987) 482 U.S. 691, 702-703 [96 L.Ed.2nd 601].))

However, see *People v. Turner* (1994) 8 Cal.4th 137, 182, where V.C. § 2805 was cited by the California Supreme Court as authority for an officer to check an already lawfully stopped vehicle, in an other-than-commercial context, for its registration.

*Non-commercial property*: Section 2805 does not authorize the warrantless search of property not being used for commercial purposes or otherwise open to the public. (*People v. Roman* (1991) 227 Cal.App.3rd 674; *People v. Calvert*, supra, at pp. 1828-1829.)

*Use of Force*: And should the owner/occupant of the business refuse, he or she is subject to arrest, however, forcible entry of the business is not lawful. An administrative search warrant should be obtained. (See *People v. Woolsey*, supra, at p. 1004; (*Colonade Catering Corp. v. v. United States* (1970) 397 U.S. 72, 74 [25 L.Ed.2nd 60]).)
V.C. § 2805(b): Elements:

Provides the same authority to inspect:

The following equipment:

- Implements of husbandry;
- Special construction equipment;
- Forklifts;
- Special Mobile equipment;

When at:

The places listed in subd. (a) (above); or

Upon a highway either while:

- Incidentally operated; or
- Being transported.

Note: Subd. (c) provides that, whenever possible, such inspections shall be conducted at a time and in a manner so as to minimize any interference with, or delay of, business operations.

Penalties:

Refusing to comply with an officer’s request to conduct a lawful search pursuant to P.C. § 2805(a) or (b) is a misdemeanor. (See V.C. § 2800(a) and P.C. § 148(a)(1); and People v. Woolsey (1979) 90 Cal.App.3rd 994, 1000, 1001, fn. 3)

Relevant Definitions:

Identifiable Vehicle Component: Any component which can be distinguished from other similar components by a serial number or other unique distinguishing number, sign, or symbol. (V.C. § 2805(a))

Garage: A building or other place wherein the business of storing or safekeeping vehicles of a type required to be registered under this code and which belong to members of the general public is conducted for compensation. (V.C. § 340)
Repair Shop: A place where vehicles subject to registration under this code are repaired, rebuilt, reconditioned, repainted, or in any way maintained for the public at a charge. (V.C. § 510)

Terminal: A place where a vehicle of a type listed in V.C. § 34500 is regularly garaged or maintained, or from which the vehicle is operated or dispatched. (V.C. § 595) (Note: Section 34500 lists “motortrucks,” “truck tractors,” “buses,” large trailers, and similar large vehicles.)

Automobile Dismantler: Any person (not excluded by V.C. § 221) who is engaged in the business of buying, selling, or dealing in vehicles of a type required to be registered under this code, including nonrepairable vehicles, for the purpose of dismantling the vehicles, who buys or sells the integral parts and component materials thereof, in whole or in part, or deals in used motor vehicle parts. (V.C. § 220; see this section and section 221 for exceptions.)

Case Law:


However, a Legislature may enact statutes authorizing warrantless administrative searches of commercial property without violating the Fourth Amendment. (Donovan v. Dewey (1981) 452 U.S. 594, 598-599 [69 L.Ed.2nd 262, 268-269]; People v. Paulson (1990) 216 Cal.App.3rd 1480, 1483-1484.)

Note: Commercial vehicles may be constitutionally subjected to warrantless administrative inspections under the Fourth Amendment, commercial trucking being a “pervasively regulated industry” under the criteria as set out in New York v. Burger, supra. (United States v. Delgado (9th Cir. 2008) 545 F.3rd 1195; upholding a Missouri statute allowing for such inspections.)

V.C. § 2805 has been held to meet the standards for a “closely regulated business,” and thus have a relaxed search and seizure standard. (People v. Calvert (18 Cal.App.4th 1820; People v. Woolsey (1979) 90 Cal.App.3rd 994.)
An auto repair garage may be subjected to a warrantless search by auto theft detectives under authority of V.C. § 2805, whether or not the business is open to the public. (*People v. Potter* (2005) 128 Cal.App.4th 611.)

Such a statute is constitutional under the **Fourth Amendment** if it serves a substantial governmental interest, the warrantless search is done to further the statutory scheme, and the inspection program serves the two basic functions of a search warrant; i.e., giving the owner notice that the search is being made pursuant to law and limiting the scope of the search. **Section 2805** meets these requirements. (*Ibid.*)

The section has been held to be constitutional. *People v. Calvert*, supra, at pp. 1831-1834; *People v. Woolsey*, supra, at pp. 1001-1002; *Solander v. Municipal Court* (1975) 45 Cal.App.3rd 664, 667.)

However, there are **limitations**: **Section 2805** does not authorize the warrantless search of property not being used for commercial purposes or otherwise open to the public. (*People v. Roman* (1991) 227 Cal.App.3rd 674; *People v. Calvert*, supra, at pp. 1828-1829.)

**Use of Force**: And should the owner/occupant of the business refuse, he or she is subject to arrest, however, forcible entry of the business is not lawful. An administrative search warrant should be obtained. (See *People v. Woolsey*, supra, at p. 1004; *Colonade Catering Corp. v. United States* (1970) 397 U.S. 72, 74, 77 [25 L.Ed.2nd 60, 63-65].)

**V.C. § 9951(c)(2):** Downloading the Contents of an “Event Data Recorder” (i.e., “EDR”):

A court order is required for law enforcement to retrieve data from a “Event Data Recorder” (“EDR”), also known as a “Sensing and Diagnostic Module” (“SDM”), or a “Black Box.”

**b:** As used in this section, “recording device” means a device that is installed by the manufacturer of the vehicle and does one or more of the following, for the purpose of retrieving data after an accident:

(1) Records how fast and in which direction the motor vehicle is traveling.
(2) Records a history of where the motor vehicle travels.
(3) Records steering performance.
(4) Records brake performance, including, but not limited to, whether brakes were applied before an accident.
(5) Records the driver's seatbelt status.
(6) Has the ability to transmit information concerning an accident in which the motor vehicle has been involved to a central communications system when an accident occurs.

(d): Information retrieved by a motor vehicle dealer or automotive technician for diagnostic purposes, as allowed under subd. (c)(3) or (4), may not be released to law enforcement.

By its own terms, section 9951 applies only to “motor vehicles manufactured on or after July 1, 2004.” (Subd. (f))

Violating the court order requirements of the section (i.e., failing to get a search warrant) does not require suppression of the retrieved data in that suppression is not required by the United States Constitution. (People v. Xinos (2011) 192 Cal.App.4th 637, 653-654.)

However, failing to retrieve the data until after the defendant has pled guilty (or no contest) means that any pre-existing probable cause that may have existed no longer exists, making such a search a Fourth Amendment violation. (Id., at pp. 659-663.)

The Xinos court further recognized a person’s reasonable expectation of privacy in the digital contents of the SDM. (Id., at pp. 653-659.)

Searching a Vehicle for a Driver’s License and/or Vehicle Registration, VIN Number, Proof of Insurance, etc.:

The general rule, now perhaps totally eaten up by the exceptions, not to mention the recognized dangerousness of a traffic stop, is that an officer making a traffic stop must allow an occupant of a motor vehicle to locate and produce his own driver’s license and registration. (People v. Jackson (1977) 74 Cal.App.3rd 361.)

Case law has been quick to find exceptions. For instance, a police officer may check for registration (or a driver’s license) without permission when:

- The circumstances call for further investigation of the vehicle’s ownership. (People v. Webster (1991) 54 Cal.3rd 411, 430-431.)
The driver tells the officer where it is and does not object to the officer entering to look for it. (Ingle v. Superior Court (1982) 129 Cal.App.3d 188, 194.)

Under the circumstances, the officer reasonably felt that it was necessary for his or her own protection. (People v. Martin (1972) 23 Cal.App.3d 444, 447.)

Where a legitimate concern for “officer’s safety” dictates that the officer control the movements of the occupant of a vehicle. (People v. Faddler (1982) 132 Cal.App.3d 607, 610-611; see also People v. Hart (1999) 74 Cal.App.4th 479.)

The vehicle is abandoned. (People v. Turner (1994) 8 Cal.4th 137, 181-183.)

The California Supreme Court has ruled that during a lawful traffic stop, at least after a demand for the driver’s license and other vehicle documentation is made and a negative response is obtained (see United States v. Lopez (C.D. Cal. 1979) 474 F.Supp. 943, 948-949.), a warrantless, suspicionless intrusion into the vehicle for the limited purpose of locating such documentation is lawful, even if the driver denies that any such documentation exists. In so doing, the officer may look in any location where it is reasonable to believe he or she might find such documentation. (In re Arturo D. (2002) 27 Cal.4th 60; Arturo D. was joined with the companion case, People v. Hinger, out of the Fourth District Court of Appeal.

This would include under the front seat (whether looking from the front or rear of the seat), in a glove compartment, and over the visor. It would probably not include within containers found in the vehicle or the trunk, absent some articulable reason to believe why such documentation might actually be there. (Id., at p. 86, and fn. 25.)

This right of police officers to conduct such searches is constitutionally acceptable “in light of the pervasive regulation of vehicles capable of traveling on the public highways, . . . (and the) reduced expectation of privacy while driving a vehicle on public thoroughfares.” (Id., at p. 70; citing People v. Webster, supra, and New York v. Class (1986) 475 U.S. 106 [89 L.Ed.2nd 81].)

Some of that “pervasive regulation,” cited by the Supreme Court in Arturo D., includes:
- **V.C. § 4462(a):** Requirement that the *vehicle’s registration* be produced on demand of a peace officer.

- **V.C. § 12951(b):** Requirement that the *driver’s license* be produced on demand of a peace officer.

- **V.C. § 2805(a):** Right of the California Highway Patrol and other listed peace officers whose primary duties are to conduct vehicle theft investigations to inspect a motor vehicle for its title in order to determine ownership.

- Although not mentioned by the Supreme Court, it would seem that **V.C. § 16028(a)**, requiring production of proof of insurance upon demand when being cited for another offense, could be added to this list.

Checking for a *Vehicle’s Identification Number* ("VIN") under the hood of a car has been held to be a search, and is illegal absent probable cause. *(United States v. Soto (9th Cir. 1979) 598 F.2nd 545.)*

But merely moving papers off the dash so as to make visible the VIN commonly found in that location, resulting in observation of a gun on the floor, was held to be lawful. *(New York v. Class, supra.)*

**Impounding Vehicles:**

*The “Community Caretaking Doctrine:”* The Ninth Circuit Court of Appeal has ruled that impounding a vehicle can be justified under the “Community Caretaker Doctrine” whenever such vehicle may impede traffic, threaten public safety, or be subject to vandalism. *(United States v. Jensen (9th Cir. 2005) 425 F.3rd 698, 706.)*

*However,* the Ninth Circuit has also held that a statute allowing for the pre-court-hearing impounding of a vehicle may be in violation of the **Fourth Amendment** absent a legitimate need to prevent it from again being driven illegally, from creating a hazard to others drivers, or being a target for vandalism. *(Miranda v. City of Cornelius (9th Cir. 2005) 429 F.3rd 858; driver driving without a license.)*

The mere fact that its driver is cited or even physically arrested does not necessarily implicate the “community caretaking doctrine.” *(Ibid.)*
On the issue of whether the officer has a duty to make sure the unlicensed driver doesn’t continue to illegally drive the car, the Court noted that “the need to deter a driver’s unlawful conduct is by itself insufficient to justify a tow under the ‘caretaker’ rationale.” However, the rule is otherwise (thus allowing for a tow) where it can be proved that “the driver is unable to remove the vehicle from a public location without continuing its illegal operation.”  (Ibid.)

But, where the defendant has been physically arrested and taken to jail, impounding the car to prevent him from continuing the offense is unlawful.  (United States v. Caseres (9th Cir. 2008) 533 F.3d 1064, 2074-1075; see also People v. Torres (2010) 188 Cal.App.4th 775, 792, indicating that believing defendant may repeat his offense of driving without a valid license is never grounds for impounding his car.)

California is now in accord with the rule as set down in Miranda v. City of Cornelius.  (People v. Williams (2006) 145 Cal.App.4th 756; impounding the car, per V.C. § 22651(h)(1), subsequent to the driver’s arrest on an outstanding warrant.)

Towing and impounding a vehicle merely because it is illegally parked, without prior notice to the vehicle’s owner and a pre-seizure hearing, absent an exigency requiring immediate action (such as in an emergency, where notice would defeat the entire point of the seizure, or where the interests at stake are small relative to the burden that giving notice would impose; e.g., the car is parked in the path of traffic, blocking a driveway, obstructing a fire lane, or appears to be abandoned, or where there is no current registration stickers and there’s no guarantee the owner won’t move or hide the vehicle instead of paying the fine for illegal parking), is a Fourteenth Amendment due process violation despite statutes allowing for the towing, and may generate some civil liability for the police.  (Clement v. City of Glendale (9th Cir. 2008) 518 F.3rd 1090; an unregistered vehicle with a “planned non-operation (PNO) certificate” filed, parked in a publicly accessible parking lot in violation of V.C. § 22651(o).)

But, at least one federal trial court has upheld the impounding of a vehicle, per V.C. § 22651(o)(1), which had an out-of-date registration of over six months.  (United States v. McCartney (E.D. Cal. 2008) 550 F.Supp.2d 1215, 1225.)
V.C. § 22651(h)(1) authorizes the impounding of a vehicle “(w)hen an officer arrests any person driving or in control of a vehicle for an alleged offense” and takes that person into custody.” However, impounding a vehicle under authority of this section is constitutional only if impoundment serves some “community caretaking function.” Whether or not the community caretaking function justifies the impounding of a vehicle depends upon the location of the vehicle and the police officer’s duty to prevent it from creating a hazard to other drivers or from being a target for vandalism or theft. When it was found that an arrested defendant’s vehicle was lawfully parked only two houses down from his own home, impounding it was held to be illegal. (United States v. Caseres (9th Cir. 2008) 533 F.3rd 1064, 1074-1075.)

Impounding a vehicle pursuant to V.C. § 22651(p), when neither the driver nor the passenger could (or would) produce a valid driver’s license, was held to be lawful. (People v. Hoyos (2007) 41 Cal.4th 872, 892.)

Note: The “Community Caretaking Doctrine” was not raised in this case.

Impounding a vehicle where the driver was driving on a suspended license, with a Washington state statute allowing for the impoundment of the car where the driver has been cited once before for the same, was assumed to be lawful (without discussing the issue) when the car was on a freeway (Interstate 5), defendant was going to jail, and no one else was available to take possession of the car. (United States v. Ruckes (9th Cir. 2009) 586 F.3rd 713, 719.)

The decision to impound a vehicle following an arrest when made pursuant to standardized departmental criteria is more likely to satisfy the Fourth Amendment than one not made pursuant to such criteria. However, it is not legally necessary that that be the case. The reasonableness of impounding a vehicle based upon the circumstances is the test under the Fourth Amendment. (People v. Shafrir (2010) 183 Cal.App.4th 1238; defendant’s newer Mercedes lawfully impounded following his arrest for DUI because, in the officers’ opinions, the car would not be safe if left at the site of the arrest.)

Impounding a vehicle for the purpose of allowing the officer to do an inventory search of the vehicle in the hopes of finding narcotics-related evidence, when none of the “community caretaking function” elements apply, is illegal. While stopping the
vehicle may be for an ulterior purpose, so long as there is also an objectively reasonable basis for doing so (e.g., seeing a traffic violation), the officer’s subjective motivations are in issue when evaluating the legality of impounding the vehicle and conducting an inventory search. (People v. Torres (2010) 188 Cal.App.4th 775, 785-793; impoundment and inventory search held to be illegal when the officer admitted that his purpose was to look for narcotics-related evidence.)

Doing an inventory search of a vehicle under the theory that it is to be impounded, absent any evidence that any of the “community caretaking” factors apply (i.e., it is abandoned, impeding traffic, or threatening public safety or convenience), is unlawful, particularly in light of the fact that the defendant told the officer that he had a friend who could come out and retrieve his vehicle. (United States v. Maddox (9th Cir. 2010) 614 F.3rd 1046, 1049-1050.)

Driving on a Suspended License (or Never Had a License), per V.C. § 14601.1 (or V.C. § 12500): The authority to impound a vehicle and hold it for 30 days, per V.C. § 14602.6(a)(1), when a person is arrested for driving on a suspended license or never had a license, including when the vehicle has been in an accident, is a discretionary act by law enforcement and does not generate civil liability when the vehicle is not held for 30 days. (California Highway Patrol v. Superior Court [Walker] (2008) 162 Cal.App.4th 1144.)

Use of V.C. §§ 14602.6 and 22852 to impound vehicles and hold them for 30 days, with the provisions for a post-seizure administrative hearing within two days of a request from the vehicle’s owner to determine whether the impound was proper and the existence of any mitigating factors, was held to be lawful and not a violation of equal protection, due process, or the Fourth Amendment’s search and seizure requirements. (Alviso v. Sonoma County Sheriff’s Department et al. (2010) 186 Cal.App.4th 198.)

Note: The initial impound of the vehicle was not contested, eliminating any need to discuss the possible applicability of the rules on law enforcement’s “community caretaking” function. (Id., at p. 214.)

Impounding a Vehicle Used for Prostitution, per Local Ordinance: Also, the California Supreme Court has ruled that a local ordinance that purports to allow for the seizure and forfeiture of a motor vehicle used for purposes of prostitution or to acquire any controlled substance has been preempted...
by state law and therefore unenforceable. *(O’Connell v. City of Stockton* (2007) 41 Cal.4\textsuperscript{th} 1061.)

**V.C. § 2814.1:** A County Board of Supervisors is authorized by statute to establish a vehicle-inspection checkpoint to check for violations of **V.C. §§ 27153** and **27153.5** (exhaust and excessive smoke violations).

**V.C. § 2814.2:** Impoundment of a Vehicle at a Sobriety Checkpoint:

**Subd. (a):** A driver of a motor vehicle who fails to stop and submit to a sobriety checkpoint inspection conducted by a law enforcement agency when signs and displays are posted requiring that stop is guilty of an infraction.

**Subd. (b):** Impoundment of a vehicle at a sobriety checkpoint is prohibited if the driver’s only offense is a violation of **V.C. § 12500** (driving without a valid license).

**Subd. (c):** Requires a law enforcement officer, in the case of a driver who is in violation of **V.C. § 12500**, to make a reasonable attempt to identify the registered owner of the vehicle and release the vehicle to him or her if licensed, or to a licensed driver authorized by the registered owner. If a notice to appear is issued to the unlicensed driver, the name and driver’s license number of the licensed driver to whom the car is released shall be listed on the officer’s copy of the notice. When a vehicle cannot be released, it shall be removed pursuant to **V.C. § 22651(p)**, whether or not a notice to appear is issued.

**V.C. § 14602:** A vehicle removed pursuant to this section shall be released to the registered owner or his or her agent at any time the facility to which the vehicle has been removed is open, upon presentation of the registered owner’s or his or her agent’s valid driver’s license and proof of current vehicle registration.
Chapter 10

Searches of Residences and Other Buildings:

Private Residences enjoy the perhaps highest “expectation of privacy” of any object or place that may be subject to a search. (People v. Ramey (1976) 16 Cal.3rd 263; Payton v. New York (1980) 445 U.S. 573 [63 L.Ed.2nd 639].)

“It is axiomatic that the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” (Welsh v. Wisconsin (1984) 466 U.S. 740, 748 [80 L.Ed.2nd 732]; United States v. United States District Court (1972) 407 U.S. 297, 313 [32 L.Ed.2nd 752, 764]; United States v. Brooks (9th Cir. 2004) 367 F.3rd 1128, 1133; People v. Thompson (2006) 38 Cal.4th 811, 817.)

Individuals ordinarily possess the highest expectation of privacy within their homes, which is an area that typically is “afforded the most stringent Fourth Amendment protection.” (United States v. Martinez-Fuerte (1976) 428 U.S. 543, 561 [49 L.Ed.2nd 1116, 1130].)

This same degree of privacy is accorded the curtilage of the home, as well. (United States v. Warner (9th Cir. 1988) 843 F.2nd 401, 405; United States v. Romero-Bustamente (9th Cir. 2003) 337 F.3rd 1104, 1109; United States v. Davis (2008) 530 F.3rd 1069; see below.)

However, the protections afforded the “curtilage” of one’s home do not apply “to an empty structure used occasionally as sleeping quarters.” (United States v. Barajas-Avalos (9th Cir. 2004) 359 F.3rd 1204, 1209-1216.)

See “Curtilage of the Home,” below.

Query: Does not the human body enjoy an even higher expectation of privacy? See “Searches of Persons,” above.

General Rule: More so than any other thing or place which is subject to search, a warrantless entry into a residence is presumptively unreasonable and, therefore, absent proof of an exception to the rule, is unlawful. (People v. Williams (1988) 45 Cal.3rd 1268, 1297; People v. Bennett (1998) 17 Cal.4th 373, 384.)

Warrantless entries by police into a residence are presumed illegal unless justified by either consent, or probable cause with exigent circumstances. (Payton v. New York, supra, at p. 586 [63 L.Ed.2nd at pp. 650-651]; People v. Coddington (2000) 23 Cal.4th 529, 575.)
“As a general rule, to satisfy the **Fourth Amendment**, a search of a home must be supported by probable cause, *and* there must be a warrant authorizing the search.” ([United States v. Brooks](9th Cir. 2004) 367 F.3rd 1128, 1133, citing [Nathanson v. United States](1933) 290 U.S. 41, 47 [78 L.Ed. 159].)

“Government officials ‘bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests’ (within one’s home).” ([Conway v. Pasadena Humane Society](1996) 45 Cal.App.4th 163, 172.)

**Other Buildings and Places:**

*Hotel* and *motel* *rooms* are accorded the same protection as one’s residence.

**Hotel:** [Stoner v. California](1964) 376 U.S. 483, 490 [11 L.Ed.2nd 856, 861]; [United States v. Alvarez](9th Cir. 1987) 810 F.2nd 879; see also [United States v. Brooks](9th Cir. 2004) 367 F.3rd 1128; [United States v. McCenton](3rd Cir. 1995) 53 F.3rd 584, 587-588; see also [People v. Villalobos](2006) 145 Cal.App.4th 310; [United States v. Young](9th Cir. 2009) 573 F.3rd 711, 715-716.)

**Motel:** [People v. Williams](1988) 45 Cal.3rd 1268, 1297, [People v. Bennett](1998) 17 Cal.4th 373, 384-386; [United States v. Cormier](9th Cir. 2000) 220 F.3rd 1103, 1108-1108; [United States v. Bautista](9th Cir. 2004) 362 F.3rd 584; [People v. Villalobos, supra.]; [People v. Parson](2008) 44 Cal.4th 332, 345; [United States v. Franklin](9th Cir. 2010) 603 F.3rd 652.)

After a hotel (or motel) guest’s rental period has expired, or has been lawfully terminated, or the defendant has abandoned the room, the guest no longer has a legitimate expectation of privacy in the hotel room. ([United States v. Haddad](9th Cir. 1977) 558 F.2nd 968, 975.)

However, it has also been held that any additional time established by the hotel/motel’s pattern and practice for allowing guests to stay past the listed checkout time, and taking into account any specific agreement between the management and the guest, will be added to the time period the guest is lawfully in the room. He or she does not lose his or her expectation of privacy until this occurs, making a warrantless entry up until then unlawful. ([United States v. Dorais](9th Cir. 2001) 241 F.3rd 1124.)
Also, one who rents a hotel room with a stolen credit card does not have standing to challenge the otherwise unlawful entry of the room by law enforcement. (*People v. Satz* (1998) 61 Cal.App.4th 322.)

The Ninth Circuit Court of Appeal disagrees, and has held that despite renting a motel room with a stolen credit card, the defendant did not lose his standing to challenge an unlawful entry until the motel’s manager took some affirmative steps to repossess the room. In this case, the manager was still seeking payment for the room. The Court noted that at the time the officers entered the defendant’s room, the status of the credit card as stolen was yet to be confirmed. (*United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584.)

Also, a defendant has not lost his expectation of privacy in his hotel room (which was later, after the fact, discovered to have been rented with a stolen credit card) by the hotel locking him out where he was locked out pursuant to a policy to do so after a dangerous weapon (a firearm) is found in the room by hotel employees. Locking him out, in this case, was not done with the intent to evict him. (*United States v. Young* (9th Cir. 2009) 573 F.3rd 711, 715-720.)

The Ninth Circuit, straining to differentiate the facts of *Bautista*, also held that the occupant of a hotel room has no reasonable expectation of privacy when the occupancy is achieved through credit card fraud. (Also see *United States v. Cunag* (9th Cir. 2004) 386 F.3rd 888.)

In *Cunag*, the defendant was never a lawful occupant. In *Bautista*, the Court ruled that the defendant was a lawful occupant, despite the use of a stolen credit card, until the motel’s manager took affirmative steps to repossess the room; a questionable distinction.

Also, paying the rent with counterfeit bills does not deprive a defendant of her expectation of privacy in her motel room absent evidence that she knew the
bills she used were counterfeit. Also, the defendant’s expectation of privacy does not abate absent evidence to the effect that the motel manager had attempted to evict the defendant, or enlist the police to help him do so. (*People v. Munoz* (2008) 167 Cal.App.4th 126.)

Whether or not a defendant abandoned a motel room is a question of the defendant’s intent, as determined by “objective factors” (as opposed to his actual subjective intent) such as the defendant’s words and actions. Abandonment does not “necessarily” turn on whether a motel’s management elects to repossess. (*People v. Parson* (2008) 44 Cal.4th 332, 342-348; defendant fled from the motel room in order to avoid arrest.)

The issue is “whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.” (*Id.*, at p. 346.)

The Court, in *Parson*, also rejected the argument that abandonment may not be found where the motel manager did not retake physical possession of the motel room from the guest prior to the challenged search. (*Id.*, at pp. 347-348.)

Even though the occupant intends to use the motel room for only one night for some illicit purpose, having a home nearby, it is still an “inhabited dwelling” for purposes of finding a first degree burglary and a first degree robbery (P.C. §§ 460(a), 212.5(a), respectively.) that occurs in the room. (*People v. Villalobos* (2006) 145 Cal.App.4th 310.)

There is no reasonable expectation of privacy in the guest register of a hotel or motel. Police officers, therefore, are not precluded from viewing such a register for the purpose of checking the residents for warrants. (*United States v. Cormier* (9th Cir. 2000) 220 F.3rd 1103, 1107-1108.)

A rented room in a *boarding house* receives the same protections. (*United States v. McDonald* (1948) 335 U.S. 451 [93 L.Ed. 153].)

A *garage* to one’s residence receives the same constitutional protections as the residence itself. (*United States v. Oaxaca* (9th Cir. 2000) 233 F.3rd 1154.)
A **weekend fishing retreat** is an “inhabited dwelling.” (*United States v. Graham* (8th Cir. 1992.) 982 F.2nd 315.)


**Military Housing:**

Military personnel, living off base in a motel, but with the housing paid for by the military as an alternative to living in the on-base barracks, retain the same privacy protections as anyone else in the civilian world. (*People v. Rodriguez* (1966) 242 Cal.App.2nd 744.)

The same rule applies to any off-base military housing, at least when the case is a state case being investigated by state law enforcement officers for presentation in state court. (*People v. Miller* (1987) 196 Cal.App.3rd 307.)

However, on the base, a commanding officer may authorize a warrantless search of property, including the serviceman’s locker (*People v. Shepard* (1963) 212 Cal.App.2nd 697, 700.) and his room in the barracks. (*People v. Jasmin* (2008) 167 Cal.App.4th 98.)

Evidence properly seized pursuant to a service member’s commanding officer’s (or “competent military authority’s”) oral or written authorization to search a person or an area, for specified property or evidence or for a specific person (see Military Rules of Evidence, Rule 315(a) & (b)), the results may be used in state court. (*People v. Jasmin*, *supra*, at p. 110.)

**Curtilage of the Home:** The **Fourth Amendment** protections against warrantless searches and seizures extend to the *curtilage* around one’s home; i.e., that area around the house normally used for living purposes. (*United States v. Warner* (9th Cir. 1988) 843 F.2nd 401, 405; *United States v. Romero-Bustamente* (9th Cir. 2003) 337 F.3rd 1104, 1109.)

“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,’ [Citation], and therefore has been considered part of the home itself for **Fourth Amendment** purposes. Thus,
courts have extended **Fourth Amendment** protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.” (*Oliver v. United States* (1984) 466 U.S. 170, 180 [80 L.Ed.2nd 214, 225].)

See also *People v. Strider* (2009) 177 Cal.App.4th 1393, 1399, fn. 3; front yard of a residence, enclosed by a fence.

The curtilage of a home extends to those areas immediately proximate to a dwelling, which “harbors those intimate activities associated with domestic life and the privacies of the home.” (*United States v. Dunn* (1987) 480 U.S 294, 301, fn. 4 [94 L.Ed.2nd 326, 334-335].)

See also dissenting opinion to the Court’s denial of an en banc rehearing, at *United States v. Pineda-Moreno* (9th Cir. 2010) 617 F.3rd 1120, 1121, by Kozinski, C.J., discussing the history and meaning behind the term “curtilage:”

“Curtilage comes to us by way of Middle English and traces its roots to the Old French *courtillage*, roughly meaning court or little yard. In modern times it has come to mean those portions of a homeowner’s property so closely associated with the home as to be considered part of it. The walkway leading from the street to the house is probably part of the curtilage, and the stairs from the walkway to the porch almost certainly are, as is the porch where grandma sits and rocks most afternoons and watches strangers pass by. The attached garage on the side of the house is part of the curtilage, and so is the detached shed where dad keeps his shop equipment and mom her gardening tools--so long as it’s not too far from the house itself. The front lawn is part of the curtilage, and the driveway and the backyard—if it’s not too big, and is properly separated from the open fields beyond the house.”

The factors to consider in determining the boundaries of the curtilage include:

- The proximity of the area to the house;
- Whether the area is included within an enclosure around the house;
- The nature of the uses made of the area; and
Steps taken to protect the area from observation by people passing by.


However, even though within the curtilage of a suspect’s home, a hole in the ground which is in a “common area” of an apartment complex does not carry with it the same privacy expectations. Therefore, it was not unlawful for police, observing defendant from a vantage point outside the curtilage, while he was engaged in apparent narcotic transactions, to come onto the property and lift a board covering the hole where defendant keep contraband, despite the lack of a warrant. (People v. Shaw (2002) 97 Cal.App.4th 833.)

Also, the protections afforded the “curtilage” of one’s home do not apply when the alleged home was nothing more than “an empty structure used occasionally as sleeping quarters.” (United States v. Barajas-Avalos (9th Cir. 2004) 377 F.3rd 1040, 1054-1058; a twelve-foot travel trailer on the property without any hookups or other indications that it “harbor(ed) those intimate activities associated with domestic life and the privacies of the home.”)

Observations made into the curtilage of the home from the defendants’ driveway, when the driveway was an area accessible to the neighbors, were properly used to obtain a search warrant. The use of night vision goggles was irrelevant. (People v. Lieng (2010) 190 Cal.App.4th 1213.)

A person’s fenced off back yard is the curtilage of his home. (United States v. Struckman (9th Cir 2010) 603 F.3d 731, 739.)

Temporary or Impermanent Residences: The same rules apply to temporary or impermanent residences, such as a tent in a public campground (United States v. Gooch (9th Cir. 1993) 6 F.3rd 673, 678.) or migrant farm housing on private property. (LaDuke v. Nelson (9th Cir. 1985) 762 F.2nd 1318, 1331-1332.)

“(T)here is no Fourth Amendment rule that provides for protection only for traditionally constructed houses.” (United States v. Barajas-Avalos (9th Cir. 2004) 377 F.3rd 1040, 1055-1056.)

See United States v. Sandoval (9th Cir. 2000) 200 F.3rd 659, where it was held that the defendant’s tent, located on Bureau of Land Management property, exhibited a reasonable expectation of privacy under the circumstances (purposely hidden), and that it was therefore illegal to
search it without a search warrant. (See also United States v. Gooch (9th Cir. 1993) 6 F.3rd 673; and United States v. Basher (9th Cir. 2011) 629 F.3rd 1161, 1168, 1169; but see State v. Cleator (1993) 857 P.2nd 306, 308-309, below.)

But some other types of temporary residences have been held, under the circumstances, not to be protected: For instance:

A cardboard box, located on a public sidewalk, in which defendant lived, did not have the same reasonable expectation of privacy, and therefore could be searched without a search warrant. (People v. Thomas (1995) 38 Cal.App.4th 1331.)

A cave on federal property. (United States v. Ruckman (10th Cir. 1986) 806 F.2nd 1471, 1474.)

In a “squatter’s community” on public property (Amezquita v. Hernandez-Colon (1st Cir. 1975) 518 F.2nd 8, 11-12.) or under a bridge abutment. (State v. Mooney (1991) 588 A.2nd 145, 152, 154.)


The area immediately around a tent, at a campsite which is open to the public and exposed to public view. (United States v. Basher (9th Cir. 2011) 629 F.3rd 1161, 1169.)

**Businesses:** A warrantless arrest in a private area of a business, when the area entered is not exposed or visible to the public and not the subject of any lawful business regulation by law enforcement, and without an exigency excusing the lack of a warrant, violates the occupant’s expectation of privacy. (People v. Lee (1986) 186 Cal.App.3rd 743; citing G.M. Leasing Corp. v. United States (1977) 429 U.S. 338 [50 L.Ed.2nd 530]; see also United States v. Driver (9th Cir. 1985) 776 F.2nd 807, 809-810.)

There is a “plainly . . . reasonable, legitimate, and objective expectation of privacy within the interior of . . . covered buildings, and it is equally clear that expectation is one society is prepared to observe. (Dow Chemical Co. v. United States (1986) 476 U.S. 227, 236 [90 L.Ed.2nd 226, 236].)

This extension of Ramey does not include areas of a business which are “freely accessible to the public.” People v. Lee, supra, at pp. 746-747.)
Lee does not affect the applicability of a regulatory scheme authorizing warrantless inspections of the private areas of some regulated businesses, unless the search is being conducted for the purpose of seeking contraband or evidence of crime under the guise of an administrative warrant. (Id., at p. 749; Donovan v. Dewey (1981) 452 U.S. 594, 598, fn. 6 [69 L.Ed.2nd 262, 268].)

Use of an administrative, or “inspection” warrant, issued by a court for the purpose of regulating building, fire, safety, plumbing, electrical, health, labor or zoning codes, does not justify an entry by police to make an arrest given the lesser proof standards needed to obtain an administrative warrant. If an entry is effected for the purpose of arresting the occupant, an arrest warrant will have to be obtained. (Alexander v. City and County of San Francisco (1994) 29 F.3rd 1355.)

There is no reasonable expectation of privacy in the guest register of a hotel or motel. Police officers, therefore, are not precluded from viewing such a register for the purpose of checking the residents for warrants. (United States v. Cormier (9th Cir. 2000) 220 F.3rd 1103, 1107-1108.)

Workplace Searches of Government Employees:

Rule: “Searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment.” However, “(p)ublic employees’ expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.” (O’Connor v. Ortega (1987) 480 U.S. 709, 715, 717 [94 L.Ed.2nd 714, 721, 723].)

“The workplace includes those areas and items that are related to work and are generally within the employer's control . . . even if the employee has placed personal items in them, . . .” (Id., at pp. 715-716 [94 L.Ed.2nd at p. 722].)

“(R)easonableness rather than probable cause (is) the standard, balancing the ‘employees’ legitimate expectation of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.” (United States v. Gonzalez (9th Cir. 2002) 300 F.3rd 1048, 1049-1050; citing O’Connor v. Ortega, supra, at pp. 719-720 [94 L.Ed.2nd at p. 724].)

In Gonzalez, a warrantless, suspicionless search of a government employee’s backpack was conducted as a part of a program to combat employee theft. Upholding the lawfulness of such a
search, the Court noted that the fact that the defendant had signed a form upon initial employment acknowledging that such random searches would be conducted (lessening the defendant’s expectation of privacy) added to the reasonableness of the search.

See also United States v. Taketa (9th Cir. 1991) 923 F.2nd 665, 673-674, where a search of a D.E.A. agent’s office by his supervisors was tested by the O’Connor standard of “reasonableness” and not probable cause because the search was a part of an internal, employee misconduct investigation.

Public Restrooms, Adult Bookstore Booths and Dressing Rooms: It is considered to be a “general exploratory search,” and thus, a Fourth Amendment violation, to spy on persons using public toilets, but perhaps not in other areas where there is a lesser expectation of privacy. Examples:

Pay toilets in an amusement park, where officers watched from an observation pipe leading from the roof to the individual booths; observations suppressed. (Bielicki v. Superior Court (1962) 57 Cal.2nd 602.)

Men’s restroom in a department store, where the police officers positioned themselves in the crawl space between the ceiling and the next floor, watching through a legitimately installed vent; observations suppressed. (Britt v. Superior Court (1962) 58 Cal.2nd 469.)

Note: There is no reason to believe the same rule wouldn’t apply to the women’s restroom.

Doorless stalls in a public restroom with the police officer in the ceiling, looking down into the stall. Although the officer could have lawfully observed the illegal activity by simply walking into the bathroom, observing that same activity from inside the ceiling above the stall violated the Fourth Amendment. (People v. Triggs (1973) 8 Cal.3rd 884.)

However, looking into a curtained booth where sexually explicit films were shown in an “adult bookstore” was upheld. The curtains were found to be there to exclude light; not to provide the occupant with any reasonable expectation of privacy. Looking into the individual booths, therefore, was lawful. (People v. Freeman (1977) 66 Cal.App.3rd 424, 432-433.)

It was also held to be lawful to look over and under a department store fitting room door where there was a two-foot gap under the three-foot high door, and another two-foot gap between the top of the door and the
ceiling. While the door was intended to provide a minimal protection to modesty, it did not reasonably provide the occupant with an expectation of privacy. (*In re Deborah C.* (1981) 30 Cal.3rd 125, 137-139.)

*Spying Into Bathrooms, Etc. Statutes:*

Note also P.C. § 647(k)(1), which makes it a misdemeanor to look through a hole or opening, or otherwise view, by means of any instrumentality including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, or camcorder, into the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth, or into the interior of any other area in which the occupant has a reasonable expectation of privacy.

P.C. § 647(k)(3) makes it a misdemeanor to “use a concealed camcorder, motion picture camera, or photographic camera of any time to secretly videotape, film, photograph, or record by electronic means,” someone “in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person,” without the victim’s knowledge or consent, while “in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person.”

*Two-Way Mirrors: P.C. § 653n,* makes it a misdemeanor to install or maintain a “two-way mirror” permitting the observation of any restroom, toilet, bathroom, washroom, shower, locker room, fitting room, motel room, or hotel room. The section specifically excludes state or local public penal, correctional, custodial, or medical institutions.

**Problem: When Officers Trespass:** The fact that an officer might be “trespassing” upon the defendant’s property (within the curtilage, without entering the premises) is relatively insignificant when determining whether the Fourth Amendment has been violated. The issue is one of “reasonableness” under the circumstances. The fact that a trespass may be involved is but one factor to consider when determining reasonableness. (*People v. Manderscheid* (2002) 99 Cal.App.4th 355, where walking around to the back of the defendant’s house to knock, while looking for an armed parolee-at-large, held to be lawful, differentiating the rule of *People v. Camacho* (2000) 23 Cal.4th 824 [see below], on the facts and the relative seriousness of the crime involved.)

See also *People v. Chavez* (2008) 161 Cal.App.4th 1493, where walking to the side of the house and climbing over a six foot fence, past a locked
gate, was lawful when the officer observed, in plain sight, a cocked revolver on the ground at the side of the house. The necessity to retrieve the weapon, for safety purposes, allowed for the entry of the side yard.

Securing the Premises pending the obtaining of a search warrant:

**Fourth Amendment:** The securing of a residence by police, pending the obtaining of a warrant, is subject to Fourth Amendment protections. *(United States v. Lindsey* (9th Cir. 1989) 877 F.2nd 777, 780.)*

**General Rule:** Where police officers are already at a residence without a warrant when evidence is lawfully discovered (e.g., by a plain sight observation), the discovery of which provides probable cause to search the rest of the residence, but when any other evidence in the house is likely to disappear or be destroyed while a search warrant is obtained (i.e., an “exigency;” see *People v. Superior Court [Irwin]* (1973) 33 Cal.App.3rd 475.), the officers have three options:

- Seize only that which is in plain sight, and ignore what might be found in the rest of the house.
- Seek consent to search the entire residence from the residents. (See “Consent Searches,” below)
- Secure the residence (i.e., detain its occupants and guard the house) pending the obtaining of a search warrant. (See below)

**Exigency of the Officers’ Own Making:** The old rule was that although a police officer may, with exigent circumstances, enter and secure a residence (or other protected place) pending the obtaining of a warrant or consent to search, the law did not allow a warrantless entry and securing of the premises if the exigency was of the officers’ own making.

E.g.: Officers, with probable cause which would have justified the obtaining of a search warrant, but hoping to obtain an oral consent to search instead, knock on the front door only to be told by the occupants that admission is being denied. The fact that evidence may now be destroyed, etc., while a warrant is obtained is not an excuse to make a warrantless entry to secure the house. *(People v. Shuey* (1973) 13 Cal.App.3rd 835; see also *United States v. Driver* (9th Cir. 1985) 776 F.2nd 807.)

The continuing validity of Shuey and Driver is questionable in light of the new United States Supreme Court decision in *Kentucky v. King* (May 16, 2011) ___ U.S. __ [131 S.Ct. 1849; 179 L.Ed.2nd 865]. See below.
However, assuming the continuing validity of *Shuey* and *Driver*, when a house *is* illegally entered and secured by law enforcement under these circumstances, and a warrant is thereafter obtained using only that information developed prior to and independent of the illegal entry as the probable cause, a subsequent search of the premises under authority of the warrant will be upheld. (*Segura v. United States* (1984) 468 U.S. 796 [82 L.Ed.2nd 599]; *People v. Angulo* (1988) 199 Cal.App.3rd 370; *People v. Lamas* (1991) 229 Cal.App.3rd 560, 571.)

But, per the Ninth Circuit, even though the “fruit of the poisonous tree” doctrine does not apply to the lawful search of a residence after the house was “detained” for an unreasonable time while a search warrant was obtained, the resulting evidence recovered from the residence when the home was searched with the warrant will be suppressed anyway in that the officers were not acting reasonably in taking 26½ hours to get the warrant, and some punishment must follow such an unreasonable delay. (*United States v. Cha* (9th Cir. 2010) 597 F.3rd 995, 1003-1004.)

Even when observations made during an illegal entry are used in the warrant affidavit, the courts have held that that part may be excised from the affidavit and the remainder then retested for the existence of probable cause. If it is there, the search will be upheld. (*People v. Gesner* (1988) 202 Cal.App.3rd 581.)

If it is not, the evidence must be suppressed. (*People v. Machupa* (1994) 7 Cal.4th 614.)

If the retested warrant is held to be valid, those items illegally observed during the initial illegal entry should still be admissible under the “inevitable discovery rule.” (*People v. Gesner,* supra, at pp. 591-592.)

*With no Probable Cause:* If, however, there was legitimately no opportunity to get a warrant before the exigency develops (i.e., the exigency was *not* of the officers’ own making), the premises may be entered and secured and the status quo maintained while a warrant is obtained. (*People v. Superior Court [Irwin]* (1973) 33 Cal.App.3rd 475.)
New Rule: The United States Supreme Court recently provided considerable clarification on this issue. The new rule is that so long as the officers’ actions in knocking on the door and identifying themselves, and presumably seeking a consensual entry, does not itself constitute a violation or threatened violation of the United States Constitution (i.e., the Fourth Amendment), there is no penalty for doing so. Should the occupants then attempt to destroy or secret evidence, that’s their choice. (Kentucky v. King (May 16, 2011) __ U.S. __ [131 S.Ct. 1849; 179 L.Ed.2nd 865].)

Note: The King case, however, specifically does not decide what is, and what is not, an exigent circumstance allowing for an immediate warrantless entry. In King, the officers were in pursuit of a fleeing felon when they heard noises from inside consistent with evidence being destroyed. The issue whether being denied a consensual entry is itself an exigent circumstance was not discussed.

Securing Cases:

Securing a residence as a crime scene is a “seizure” subject to Fourth Amendment protection. (United States v. Alaimalo (9th Cir. 2002) 313 F.3rd 1188, 1192, fn. 1.)

But, with “probable cause” to believe a residence may contain evidence of a crime, the residence may constitutionally be seized as a “crime scene.” (Dixon v. Wallowa County (9th Cir. 2003) 336 F.3rd 1013.)

A five-hour seizure of the defendant’s residence, pending the obtaining of a search warrant, was justified when the officers had probable cause to believe weapons from a drive-by shooting, which had occurred shortly before, might be in the house. (In re Elizabeth G. (2001) 88 Cal.App.4th 496.)

Where it appears that confederates of a person arrested for selling narcotics will learn of the arrest and destroy or secret contraband still in the house, it is lawful to secure the house pending the obtaining of a search warrant. (Ferdin v. Superior Court (1974) 36 Cal.App.3rd 774, 781; People v. Freeny (1974) 37 Cal.App.3rd 20.)

With probable cause to believe that contraband is contained in a particular residence, and a reasonable belief that if the house is not immediately secured the evidence will be destroyed, officers may
enter to secure the house pending the obtaining of a search warrant or a consent to do a complete search. (United States v. Alaimalo, supra.)

A three-minute sweep of a house to check for persons reasonably believed to be in the house who might destroy evidence, was held to be lawful. (People v. Seaton (2001) 26 Cal.4th 598.)

Detention of a Residence: It is proper for the police to temporarily “detain” a residence, guarding it from the outside and preventing people from entering, when there is a reasonable suspicion that contraband or evidence of a crime is inside, at least until the officers can determine through their investigation whether or not to seek a search warrant. (Illinois v. McArthur (2001) 531 U.S. 326 [148 L.Ed.2nd 838]; People v. Bennett (1998) 17 Cal.4th 373.)

In determining what is reasonable, a court must balance the privacy-related concerns of the resident with the law enforcement-related concerns, considering four factors: (1) Whether the police had probable cause to believe that the defendant’s residence contained evidence of a crime or contraband; (2) whether the police had good cause to fear that, unless restrained, the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy; and (4) whether the police imposed the restraint for a limited period of time; i.e., whether the time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant. (United States v. Cha (9th Cir. 2010) 587 F.3rd 995, 1000; citing Illinois v. McArthur, supra., at p. 331-332.)

In United States v. Cha, supra, detaining the defendant’s residence for 26½ hours while a search warrant was obtained was held to be unreasonable, requiring the suppression of the resulting evidence.

In Segura v. United States (1984) 468 U.S. 796 [82 L.Ed.2nd 599], 19 hours (during which the house was detained from inside) was held to be reasonable in that the officers did not exploit the delay, only eight of the 19 hours was when a judge was available, and the defendants were both in custody anyway.

A thirteen hour seizure of a hotel room held to be reasonable in that the seizure occurred at midnight with the warrant obtained by the following afternoon, at 1:00 p.m., and the defendants were in
custody during this time period.  *(United States v. Holzman* (9th Cir. 1989) 871 F.2nd 1496, 1507-1508.)

*Detention of the Residents Outside*: Also, with probable cause justifying the obtaining of a search warrant, the residents may be lawfully detained outside pending the arrival of the search warrant. *(Illinois v. McArthur*, supra.)

**Knock and Talk**: Where the officer does not have probable cause prior to the contact (thus, he is not able to obtain a search warrant), there is no constitutional impediment to conducting what is known as a “knock and talk;” making contact with the occupants of a residence for the purpose of asking for a consent to enter. *(United States v. Cormier* (9th Cir. 2000) 220 F.3rd 1103, 1108-1109.)

“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.” *(Davis v. United States* (9th Cir. 1964) 327 F.3rd 301. 303.)

Knocking at the defendant’s motel room door and asking (as opposed to demanding) the occupants to open the door to speak with them is, when the defendant comes outside, no more than a lawful consensual encounter when nothing is said or done which would have indicated to defendant that he was not free to leave or return to his room. *(United States v. Crapser* (9th Cir. 2007) 472 F.3rd 1141, 1145-1147.)


See also *People v. Michael* (1955) 45 Cal.2nd 751, at page 754, where the California Supreme Court noted that: “It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority.”

The key to conducting a lawful “knock and talk,” when there is no articulable suspicion that can be used to justify an “investigative detention,” is whether “a reasonable person would feel free ‘to disregard
the police and go about his business.”” [Citation] If so, no articulable suspicion is required to merely knock on the defendant’s door and inquire of him who he is and/or to ask for consent to search. (People v. Jenkins (2004) 119 Cal.App.4th 368.)

The information motivating an officer to conduct a knock and talk may be from an anonymous tipster. There is no requirement that officers corroborate anonymous information before conducting a knock and talk. (People v. Rivera (2007) 41 Cal.4th 304.)

But see Orhorhaghe v. INS (9th Cir. 1994) 38 F.3rd 488, where officers positioned themselves so as to be certain the defendant could not escape or leave, they deliberately revealed their previously concealed firearms, the contact occurred in a non-public place, the officers acted in an aggressive manner suggesting that compliance was not optional, and the officers outnumbered defendant four-to-one. The contact was held to be an unlawful detention.

And see United States v. Jerez (7th Cir. 1997) 108 F.3rd 684, where a similar situation was held to constitute an “investigative detention,” thus requiring an “articulable reasonable suspicion” to be lawful, because the officers knocked on the motel room door in the middle of the night continually for a full three minutes, while commanding the occupants to open the door.

An otherwise lawful “knock and talk,” where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, converted the contact into an unlawfully “extended” detention, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (United States v. Washington (9th Cir. 2004) 387 F.3rd 1060.)

An anonymous 911-hangup call, traceable to a particular motel, but without sufficient information to determine which room the call may have come from, did not allow for the non-consensual entry into the defendant’s room merely because of the suspicious attempts by the person who answered the door to keep the officers from looking inside, and her apparent lies concerning no one else being there. (United States v. Deemer (9th Cir. 2004) 354 F.3rd 1130.)

**The Doctrine of “Consent Once Removed”:**

In the situation where an undercover police officer, or even a paid informant, has already been invited into a criminal suspect’s home where, through observations while there, probable cause is established resulting in the undercover officer or informant signaling other officers, the backup
officers may then lawfully make a warrantless entry. (United States v Bramble (9th Cir. 1966) 103 F.3rd 1475, 1478-1479; United States v. Yoon (6th Cir. 2005) 398 F.3rd 802.)

“Once consent has been obtained from one with authority to give it, any expectation of privacy has been lost. We seriously doubt that the entry of additional officers would further diminish the consenter's expectation of privacy, and, in the instant case, any remaining expectation of privacy was outweighed by the legitimate concern for the safety of [the officers inside]. (Citations omitted.)” (United States v Bramble, supra, at p. 1478.)

Observing Contraband from Outside a Residence: When a law enforcement officer observes contraband in plain sight from outside the house, such as through an open window or door, the officer may not make a warrantless entry to seize that evidence absent an exigent circumstance. (Horton v. California (1990) 496 US. 128, 137 fn. 7 (and cases cited therein) [110 L.Ed.2nd 112, 123].)

Note: Exigent circumstances might be present when occupants of the house observe the police officer observing the contraband, thus creating the circumstance where it is reasonable to believe the evidence will be destroyed before a warrant can be obtained. In such a case, it might be appropriate to make an immediate entry for purposes of “securing” the residence pending the obtaining of a search warrant. (See “Securing the Premises,” above.)

Exigent circumstances allowing an immediate entry were found where the suspect was observed through the open door near the contraband under circumstances where it appeared he might have been the victim of an overdose. (People v. Zabelle (1996) 50 Cal.App.4th 1282.)

Observing what appeared to be a cocked revolver at the side of a house (i.e., in the cartilage) behind a six foot fence with a locked gate, allowed for the officer to scale the fence to recover the weapons for officer safety purposes, and because it was believed that a child might be present in the house. (People v. Chavez (2008) 161 Cal.App.4th 1493.)

And, before exigent circumstances, or a resulting search warrant, can be used as a basis for entering a residence, it must be first determined whether the police officer’s initial observations were in fact lawful; i.e., made from a position or location the officer had a legal right to be. (United States v. Garcia (9th Cir. 1993) 997 F.2nd 1273, 1279; People v. Ortiz (1994) 32 Cal.App.4th 286, 291; see also People v. Camacho (2000) 23 Cal.4th 824; where observations from the side of defendant’s house held to be illegal.)
Using a Ruse to Cause a Suspect to Open his Door:

Split of Authority: While “knock and talks” are legal (see above), there is a split of authority on the issue of whether an officer, without probable cause, may use a ruse or subterfuge to make warrantless observations inside a residence.

Held to be Illegal:

Causing a suspect to open his door for the purpose of allowing the officer the opportunity to make a “plain sight observation” of contraband within the residence is illegal. (*People v. Reeves* (1964) 61 Cal.2nd 268.)

In order to lawfully gain an intentional visual access to the inside of a residence, one or more of three circumstances must be present:

- The occupant voluntarily and knowingly opens the door in response to a request, but not a threat or command, such as in a “knock and talk” (see above);
- The officers have a search warrant; or
- The officers have probable cause and exigent circumstances justifying the lack of a warrant.

(*United States v. Washington* (9th Cir. 2004) 387 F.3rd 1060, 1070-1071; officers refused to allow defendant to shut the door during an otherwise lawful “knock and talk,” making the inside of defendant’s apartment clearly visible.)

Using a ruse to trick people outside during a narcotics investigation at an apartment complex, for the purpose of confronting as many people as they could lure outside, resulted in the defendant’s illegal detention when he was surrounded by a team of officers all dressed in raid gear. “A deception used to gain entry into a home and a ruse that lures a suspect out of a residence is a distinction without much difference. . . .” (*People v. Reyes* (2000) 83 Cal.App.4th 12-13.)

Use of an administrative, or “inspection” warrant, issued by a court for the purpose of regulating building, fire, safety, plumbing, electrical, health, labor or zoning codes, does not justify a concurrent entry (i.e., entering with the inspectors) by police to make an arrest when the police attempt to use the lower standard of proof needed to obtain an administrative warrant as their justification for entering. If an entry is effected for the purpose of arresting the occupant, an arrest warrant will have to be obtained.
Posing as a potential buyer of a residence, thus gaining entry for the purpose of making observations of illegal activity, is an illegal ruse. *(People v. De Caro* (1981) 123 Cal.App.3
d 454.)*

But see *People v. Lucatero* (2008) 166 Cal.App.4
d 1110, below.

A real estate agent who, upon showing a house to potential buyers, observed an abnormal amount of electronic equipment and suspected that the items were stolen. She called police who made a warrantless entry with the agent and, after an extensive search, seized stolen property. Although criticizing *De Caro* to some extent, the Court still held the warrantless entry to be illegal. The Court held that the agent, while authorized to show prospective buyers the house, was not authorized to allow the police in for the purpose of conducting a criminal investigation. The authority of a real estate agent, “is limited, as is all consensual authority, by the terms of the consent and the purpose for which it was given. [Citations] A real estate agent is authorized to consent to the entry of persons the agent believes in good faith to be potential purchasers of the property.” *(People v. Jaquez* (1985) 163 Cal.App.3
d 918)

**Held to be Legal:**

Merely knocking on the defendant’s door and then stepping to the side for purposes of insuring the safety of the officers (a common police practice) *is not* an illegal ruse merely because the defendant (who was under the influence of methamphetamine at the time) came out about 20 feet looking for the source of the knocking and got himself arrested. *(People v. Colt* (2004) 118, Cal.App.4
d 1404; *United States v. Crapser* (9th Cir. 2007) 472 F.3
d 1141, 1145-1147.)

When police officers who knock at the door are invited in by the occupants who did not know it was the police at the door when they made the invitation, there is no subterfuge requiring the suppression of any observations made by the officers as they enter. *(Mann v. Superior Court* (1970) 3 Cal.3
d 1.)

Making an anonymous phone call to the occupant of a residence, warning him that “the police are coming; get rid of the stuff,” causing defendant to leave the house with his contraband in hand,
is not illegal.  *(People v. Rand* (1972) 23 Cal.App.3rd 579; “Where the ruse does no more than to cause a defendant, activated by his own decision, to do an incriminating act—whether that act be a sale to an undercover agent or a jettisoning of incriminating material—no illegality exists.” *(Id., at p. 583; see also People v. Martino* (1985) 166 Cal.App.3rd 777, 789; phone call to cocaine dealer.)

An undercover narcotics agent, misrepresenting his identity by claiming to be a potential buyer of narcotics, acts lawfully when invited into the defendant’s home for the purpose of purchasing narcotics despite the lack of a warrant. *(Lewis v. United States* (1966) 385 U.S. 206, 208-209 [17 L.Ed.2nd 312].)

A police officer who, with information from an untested informant that drugs were in a house that was for sale, posed as a potential buyer and was shown the house by the real estate agent, during which entry the officer made corroborating observations with which he later obtained a search warrant. The entry was held to be lawful where the officer did no more than could any prospective buyer. *(People v. Lucatero* (2008) 166 Cal.App.4th 1110)

The *Lucatero* Court differentiated its facts from *People v. De Caro, supra*, noting that the prior ruling’s conclusion that the entry was illegal was “dicta” only (i.e., not necessary to its decision) and incorrectly decided.

The *Lucatero* Court also differentiated its facts from those of *People v. Jaquez, supra*, where the officers entered with the real estate agent’s permission for the known purpose of conducting a warrantless police investigation. In *Jaquez*, the real estate agent was not authorized to allow police into the house to conduct a criminal investigation. In *Lucatero*, where the officer posed as a potential buyer, the real estate agent was authorized to allow in potential buyers.

The *Lucatero* Court also differentiated this case from others were ruses were held to be illegal, the Court noting that “(t)his is not a ruse in which the officer is invited in under the ruse that he is a meter reader and then does not read the meter, or that he is a friend of the repairman, but then engages in investigatory behavior inconsistent with a friend’s visit.” *(Citing State v. Nedergard* (Wash. Ct.App. 1988) 753 P.2nd 526.)
**Possible Resolution:** The issue has possibly been resolved by the Supreme Court in the recent decision of *Kentucky v. King* (May 16, 2011) ___ U.S. ___ [131 S.Ct. 1849; 179 L.Ed.2nd 865]:

So long as the officers’ actions in knocking on the door and identifying themselves, and presumably seeking a consensual entry, does not itself constitute a violation or threatened violation of the *United States Constitution* (i.e., the *Fourth Amendment*), there is thus no penalty for doing so. Arguably, therefore, any observations in made in the process of doing so should be lawful.

**Searches Incident to Arrest:** Whenever a person is arrested, officers may (depending upon the circumstances) search the person and the area within that person’s immediate reach. (*Chimel v. California* (1969) 395 U.S. 752 [23 L.Ed.2nd 685].)

*In a Residence:* This includes within a house, and may involve, as a part of a “protective sweep” (see below), looking “in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” (*Maryland v. Buie* (1990) 494 U.S. 325, 334 [108 L.Ed.2nd 276, 286].)

However, looking any further than the adjoining rooms require “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” (*Maryland v. Buie*, supra, at pp. 327, 334 [108 L.Ed.2nd at pp. 282, 286]; *United States v. Lemus* (9th Cir. 2009) 582 F.3rd 958, 962.)

See “*Protective Sweeps,*” below.

Arresting a subject in his home justifies a search of the *Chimel* “lunging area” incident to arrest, at least where there are still unsecured people and possibly unaccounted for third parties in the residence. (*People v. Summers* (1999) 73 Cal.App.4th 288.)

*However,* the U.S. Supreme Court recently restricted searches incident to arrest when searching a vehicle in *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485]. In *Gant,* it was held that a warrantless search of a vehicle incident to arrest is lawful *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. This same rule is likely to apply to searches incident to arrest in a residence, or anywhere else.

© 2012 Robert C. Phillips. All rights reserved
The theory of *Gant* is not restricted to vehicle searches. The same theory, disallowing a search incident to arrest when the suspect has already been secured, is applicable as well to an arrest within one’s residence. (*People v. Leal* (2009) 178 Cal.App.4th 1051.)

But, the *Leal* court, citing *Summers* and *Gant*, noted that there are limitations to this rule: “A different rule of reasonableness applies when the police have a degree of control over the suspect but do not have control of the entire situation. In such circumstances—e.g., in which third parties known to be nearby are unaccounted for, or in which a suspect has not yet been fully secured and retains a degree of ability to overpower police or destroy evidence—the *Fourth Amendment* does not bar the police from searching the immediate area of the suspect’s arrest as a search incident to an arrest.” (*Id.*, at p. 1060.)

Citing *United States v. Fleming* (7th Cir. 1982) 667 F.2nd 602, 605-608, the *Leal* Court noted that handcuffing alone is probably not enough to fully secure the suspect. (*Id.*, at p. 1062.)

*Is Gant Retroactive?*

It was also noted in *Leal* that the law was sufficiently settled prior to *Gant*, at least under California authority as it applied to searches of residences, that “good faith” reliance upon prior authority did not allow for the admissibility of the evidence recovered in this case. (*Id.*, at pp. 1065-1066.)

Following *Gant*, a gun found during the search of a vehicle in which the defendant was a passenger, searched incident to the arrest of another passenger and after defendant himself had been handcuffed and secured in a patrol car, should have been suppressed. (*United States v. Gonzalez* (9th Cir. 2009) 578 F.3rd 1130; also noting that the decision in *Gant* applies retroactively to any case not yet final (i.e., still on appeal) despite the officer’s good faith in following the old rule that was valid at the time of the search.)

However, the issue of retroactivity is now before the United States Supreme Court in *Davis v. United States*, 09-11328, reviewing a decision out of the federal Eleventh Circuit ruling that the officer’s good faith belief in the rule of *Belton*, which was the law at the time of the search in issue.
here, allowed for the search of the defendant’s car in violation of the later decision in *Gant*.

But see *People v. Diaz* (2011) 51 Cal.4th 84, where the California Supreme Court held that a warrantless search of an arrestee’s person, and of personal property “immediately associated with the person,” and an inspection of the contents of any container found on the subject’s person, is lawful, even though the search of the container is delayed for a substantial time period of time. Thus, the warrantless search of the defendant’s cell phone 90 minutes after his arrest, taken from him and impounded with his other property, was lawful.

Contrary case law from another jurisdiction (*State v. Smith* (Ohio 2009) 920 N.E. 949), makes this issue ripe for United States Supreme Court review. However, the US Supreme Court has denied certiorari. (*Diaz v. California* (Oct. 3, 2011) 132 S.Ct. 94; 181 L.Ed.2nd 23].)

*The “Protective Sweep”:*

*Defined:* A quick, limited premises search incident to a *lawful arrest* in a residence has been upheld by the U.S. Supreme Court if the arresting officers have a “reasonable belief” that there is another person on the premises who poses a danger to those on the arrest scene. (*Maryland v. Buie, supra*; *People v. Dyke* (1990) 224 Cal.App.3rd 648, 661; *People v. Block* (1971) 6 Cal.3rd 239.)

“A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others.” (*People v. Ormonde* (2006) 143 Cal.App.4th 282, 292.)

A protective sweep of a trailer upheld when a suspect in a narcotics trafficking case, upon seeing the officers’ approach, ducked back out of sight, attempted to close the door, and closed the blinds. (*United States v. Arellano-Ochoa* (9th Cir. 2006) 461 F.3rd 1142; protective sweep made after an immediate warrantless entry was made, defendant was arrested, and a gun was observed on the floor near the front door.)

A protective sweep (although not referred to it as such) during the execution of a search warrant, where the officers had knowledge that a suspect had a firearm registered to him, is also reasonable at least when that suspect had not...
yet been found. (See *Los Angeles County v. Rettele* (2007) 550 U.S. 609 [167 L.Ed.2nd 974].)

*Limitation:* Protective sweeps of the areas of the home beyond the immediate area (i.e., any adjoining rooms) of the arrest will not be upheld absent an *articulable reason* for believing someone in the home is present who constitutes a potential danger to the officers. (*United States v. Furrow* (9th Cir. 2000) 229 F.3rd 805; see also *People v. Sanders* (2003) 31 Cal.4th 318; *United States v. Lemus* (9th Cir. 2009) 582 F.3rd 958, 962.)

Areas immediately adjacent to the location of the arrest, such as closets and other spaces immediately adjoining the place of arrest from which an attack could be launched, may be searched without any cause to believe there may be people there. (See *Maryland v. Buie*, *supra*, at p. 334 [108 L.Ed.2nd 276, 286]; and see “Searches Incident to Arrest,” above.)

To search beyond the areas immediately adjacent to the location of an arrest, the courts have been lenient on the reasons, so long as it can be argued that the officer was reasonably in fear for his safety. (E.g., See *People v. Ledesma* (2003) 106 Cal.App.4th 857; A Fourth Wavier search of a probationer’s room, on probation for narcotics related offenses, when a resident appeared to be under the influence of drugs and others were known to be in the house during a prior contact.)

But the courts will not uphold a protective sweep where there are no specific articulable facts indicating the presence of someone who might be a danger to the officers. (E.g., see *United States v. Chaves* (11th Cir. 1999) 169 F.3rd 687, 692; *United States v. Colbert* (6th Cir. 1996) 76 F.3rd 773, 777-778.)

An exception to the probable cause requirement for entering and searching a residence is when an officer has a “reasonable belief” (or “reasonable suspicion”) to believe that other people might be inside who constitute a danger to the officers or others at the scene. In such a case, the law allows a limited “protective sweep” to insure that no one might be there who constitutes such a danger. (*People v. Ormonde*, *supra*; entry into a residence following an arrest out front held to be illegal when the officer only wanted to
check to see if anyone might be there, with no reason to believe that there was.)

Further, protective sweeps “may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete [the police action] and depart the premises. [fn. omitted]” (Maryland v. Buie, supra., at pp. 335-336 [108 L.Ed.2nd at p. 287].)

However, a protective sweep of a residence, where the resident is a parolee, is lawful with or without a suspicion that others might be present in that the whole house was subject to search anyway under the parolee’s Fourth waiver conditions. (United States v. Lopez (2007) 474 F.3rd 1208.)

A protective sweep is not justified by the fact that the defendant is arrested at the door holding a weapon absent evidence to believe that there is someone else inside who might constitute a threat to the officers. (United States v. Murphy (9th Cir. 2008) 516 F.3rd 1117, 1120-1121; protective sweep upheld, however, because there was a second outstanding suspect who might have been inside.)

But a cursory check of the immediately adjoining living room was upheld where defendant was arrested at the threshold. The plain sight observation of a firearm under the couch cushion upheld. (United States v. Lemus (9th Cir. 2009) 582 F.3rd 958.)

See dissenting opinion to the Court’s denial of an en banc rehearing, at (9th Cir. 2010) 596 F.3rd 512, by Kozinski, C.J.

Arresting a person immediately outside of the house, with cause to believe that there may be others inside who could constitute a danger to the officers, warrants a protective sweep of the house. (People v. Maier (1991) 226 Cal.App.3rd 1670, 1675; People v. Ledesma, supra, at p. 864, fn. 3; United States v. Hoyos (9th Cir. 1989) 892 F.2nd 1387 [reversed on other ground]; United States v. Wilson (5th Cir. 2001) 306 F.3rd 231, 238-239; United States v. Watson (5th Cir. 2001) 273 F.3rd 599, 603; Sharrar v. Felsing (3rd Cir. 1997) 128 F.3rd 823; United States v. Colbert (6th Cir. 1996) 76 F.3rd 773; United States v. Henry (D.C. Cir. 1995) 48 F.3rd 566.
However, merely knowing that the defendant’s wife and son live with him, but having no reason to believe they were dangerous or that they were even home at the time, is insufficient cause to do a protective sweep of the home after detaining the defendant immediately outside. (People v. Celis (2004) 33 Cal.4th 667, 676-680.)

Celis also raises, but does not answer the question whether to make entry into the house to conduct the protective sweep after an arrest that occurs outside requires only a “reasonable suspicion” that persons are inside who constitute a threat to the officers, or whether full-blown “probable cause” is needed. (Id., at p. 678.)

Detentions Outside the House: The California Supreme Court left open the question of whether merely “detaining” someone outside the home will allow for a “protective sweep” of the home for dangerous suspects, absent “probable cause” to believe someone is in fact inside who constitutes a danger to the officers. (People v. Celis, supra, at p. 680.)

At least one other state has upheld such a protective sweep upon detaining a suspect outside on the front porch. (State v. Revenaugh (1999) 173 Idaho 774, 776-777.)

A protective sweep of a commercial establishment (i.e., a gambling house) when an arrest is made outside has also been upheld and the officers had a “reasonable suspicion” that a second robbery suspect might be inside. (United States v. Paopao (9th Cir. 2006) 469 F.2rd 760, 765-767.)

Other Situations: Protective sweeps have also been upheld in situations other than with an arrest. For instance:

In conducting a Fourth Waiver search where the suspect was on probation for narcotics-related offenses, a resident appeared to be under the influence of drugs, and others were known to be in the house during a prior contact. (People v. Ledesma (2003) 106 Cal.App.4th 857.)

Officers lawfully inside the house with consent. (United States v. Gould (5th Cir. 2004) 364 F.3rd 578.)
By an officer left behind to secure a residence while a search warrant is obtained. (*United States v. Taylor* (6th Cir. 2001) 248 F.3rd 506, 513.)

While executing a search warrant. (*Drohan v. Vaughn* (1st Cir. 1999) 176 F.3rd 17, 22.)

Protective sweep of a bedroom after lessee had given consent to search other parts of an apartment. (*United States v. Patrick* (D.C. Cir. 1992) 959 F.2nd 991, 996-997.)

Some cases, however, have indicated that to be lawful, a protective sweep must follow a lawful arrest within the home. (See *United States v. Davis* (10th Cir. 2002) 290 F.3rd 1239, 1242, fn. 4; *United States v. Reid* (9th Cir. 2000) 226 F.3rd 1020, 1027.)

The legality of making a protective sweep of a house where officers are lawfully in the house for some purpose other than to make an arrest was specifically left unanswered by the California Supreme Court. (*People v. Celis*, supra, at pp. 678-679.)

A protective sweep of a residence, where the resident is a parolee, is lawful with or without a suspicion that others might be present in that the whole house was subject to search anyway under the parolee’s Fourth waiver conditions. (*United States v. Lopez* (2007) 474 F.3rd 1208.)

**Plain Sight Observations**, from a location the police officer has a legal right to be, are lawful, and not considered to be a search. (*People v. Block* (1971) 6 Cal.3rd 239, 243; *North v. Superior Court* (1972) 8 Cal.3rd 301, 306.) Thus, evidence so observed when an officer is already lawfully inside, or otherwise may lawfully enter a residence or its curtilage, is subject to seizure. For instance:

Contraband observed through the open door of a motel room while arresting the defendant just outside, may be seized. But a search warrant must be used, or probable cause and exigent circumstances must be found, or the suspect’s consent must be obtained, in order to lawfully search of the rest of the room. (*People v. LeBlanc* (1998) 60 Cal.App.4th 157.)

Observations of contraband located within the curtilage of the defendant’s home from a lawful position outside that curtilage are lawful. (*People v. Channing* (2000) 81 Cal.App.4th 985.)
Observation of defendant’s growing marijuana plants from a neighbor’s property, without the neighbor’s knowledge or permission, looking into defendant’s adjacent backyard, held to be lawful. Defendant did not have standing to challenge the trespass into the neighbor’s yard, and did not have a reasonable expectation of privacy in what was growing in his own yard, in that his marijuana plants were plainly visible. (*People v. Claeys* (2002) 97 Cal.App.4th 55.)

Observations of defendant retrieving contraband from a hole in the ground in the common area of an apartment complex, while the observing officers were standing on adjacent private property with the permission of the property’s owner, were lawful. (*People v. Shaw* (2002) 97 Cal.App.4th 833.)

The observations of contraband within the “curtilage” of the defendant’s home, while the officers were walking around the house in an attempt to find an occupant, was upheld. (*United States v. Hammett* (9th Cir. 2001) 236 F.3rd 1054.)

*But see People v. Camacho* (2000) 23 Cal.4th 824, where the California Supreme Court held that observations from the side of the residence, 40 feet from the sidewalk, with nothing there to indicate that the public was inferably invited to that side, were unlawful, at least when the officers were checking nothing more than a complaint of loud music, it was late at night, and they failed to first try knocking at the front door.

See also the dissent, at pp. 832 et seq., listing numerous federal circuit court decisions seemingly in disagreement with the rule of *Camacho*.

Observation of contraband in plain sight by police officers who made a warrantless entry into a residence, responding to an emergency call from someone in apparent distress, was lawful, and justified the obtaining of a search warrant to search the residence. (*United States v. Snipe* (9th Cir. 2008) 515 F.3rd 947.)

An officer standing on his tiptoes, adding about three inches to his height, in order to see over a six foot fence, was lawful. Observation of a firearm behind the fence by so doing was a “plain sight observation.” (*People v. Chavez* (2008) 161 Cal.App.4th 1493, 1499-1502.)

When evidence of a different crime is discovered during a lawful warrant search, even if the officers are participating in the search hoping to find evidence of a different crime for which there is not yet probable cause, such “plain sight” observations are lawful and may therefore be used to obtain a second search warrant and/or in the interrogation of the in-
custody suspect. (People v. Carrington (2009) 47 Cal.4th 145, 160, 164-168, impliedly overruling People v. Albritton (1982) 138 Cal.App.3rd 79, which previously held such plain sight observations, unless totally “inadvertent,” were unlawful.)

In People v. Carrington, supra., officers from agency #2 accompanied officers from agency #1 who were executing a lawful search warrant in their own case. The officers from agency #2 were there for the purpose of making “plain sight” observations of evidence related to their agency’s own investigation. Upon making such observations, this information was used to obtain a second warrant directed specifically at agency #2’s investigation. This procedure was approved by the California Supreme Court.

“Even assuming the officers (from the agency #2) . . . hoped to find evidence of other offenses, their subjective state of mind would not render their conduct unlawful. . . . The existence of an ulterior motivation does not invalidate an officer’s legal justification to conduct a search.” (Id., at p. 168; citing Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89], for the argument that an officer’s subjective motivations for being on the search party are irrelevant so long as the search, viewed “objectively,” is lawful.)

Observations made into the curtilage of the home from the defendants’ driveway, when the driveway was an area accessible to the neighbors, were properly used to obtain a search warrant. The use of night vision goggles was irrelevant. (People v. Lieng (2010) 190 Cal.App.4th 1213.)

Preserving the Peace:

A warrantless entry into a residence when necessary to “preserve the peace” in the execution of a restraining order, allowing the defendant’s daughter to retrieve certain property, was held to be lawful. Reasonable force was also properly used when necessary to effectively preserve the peace. (Henderson v. City of Simi Valley (9th Cir. 2002) 305 F.3rd 1052.)

The lawfulness of a warrantless entry into a residence was upheld by the United States Supreme Court, at least when there was a fight going on inside the residence and the officers reasonably believed that immediate action was necessary in order to prevent someone from being seriously injured. (Brigham City v. Stuart (2006) 547 U.S. 398 [164 L.Ed.2nd 650], a case appealed from a decision of the Utah Supreme Court finding the entry to be a violation of the Fourth Amendment.)
Officers responding to a call of a disturbance, finding a pickup truck in the driveway which had apparently been in an accident, blood on the truck and on clothes in the truck, broken windows in the house, and defendant, barricaded inside, screaming and throwing things. Defendant had a visible cut on his hand. One officer forced his way in and defendant pointed a rifle at him. Noting that, “(i)t requires only ‘an objective reasonable basis for believing’ that ‘a person within [the house] is in need of immediate aid,’” and that the officer was acting reasonably when he made the warrantless entry into defendant’s home, the Court found the entry to be lawful.  (Cites Omitted; *Michigan v. Fisher* (Dec. 7, 2009) 558 U.S. __ [130 S.Ct. 546; 175 L.Ed.2nd 410]

“Officers do not need ironclad proof of ‘a likely serious, life-threatening’ injury to invoke the emergency aid exception (to the warrant requirement.  Also, the officer’s subjective motivations for entering were irrelevant, the test being an objection one.  (*Id.*, at p. __.)

Also, the Court noted the reality of such a situation when a police officer is forced to decide what to do: “It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But ‘[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.’ (citing *Brigham City*, supra, at p. 406.)” (*Id.*, at p. __.)

*Preventing the destruction of evidence*: A warrantless entry into a residence for the purpose of preventing the destruction of evidence may be lawful, depending upon what the evidence is.  (*People v. Huber* (1965) 232 Cal.App.2nd 663.)

*“Probable cause”* to believe that evidence will “imminent(ly)” be destroyed (or a suspect will escape) will justify a warrantless entry into a residence.  (*People v. Strider* (2009) 177 Cal.App.4th 1393; entry into a residence while chasing a subject with a firearm in his pocket, a potential violation of *P.C. § 12031(a)(1)* (loaded firearm in public), held to be illegal in that the front yard defendant was in was not a “public place” under the circumstances, as required by the statute.)

A three-minute sweep of a house to check for persons reasonably believed to be in the house who might destroy evidence in a homicide case was held to be lawful.  (*People v. Seaton* (2001) 26 Cal.4th 598.)
Where it appears that confederates of a person arrested for selling narcotics will learn of the arrest and destroy or secret contraband still in the house, it is lawful to secure the house pending the obtaining of a search warrant. (*Ferdin v. Superior Court* (1974) 36 Cal.App.3rd 774, 781; *People v. Freeny* (1974) 37 Cal.App.3rd 20.)

With “probable cause” to believe that contraband is contained in a particular residence, and a “reasonable belief” that if the house is not immediately secured the evidence will be destroyed, officers may enter to secure the house pending the obtaining of a search warrant or a consent to do a complete search. (*United States v. Alaimalo* (9th Cir. 2002) 313 F.3rd 1188.)

Entering a house without consent to take a suspected DUI driver into custody and to remove him from the house for identification and arrest by a private citizen who saw defendant’s driving, and to preserve evidence of his blood/alcohol level, has been held to be legal. (*People v. Thompson* (2006) 38 Cal.4th 811.)

*Note*: The Court differentiated on its facts *Welsh v Wisconsin* (1984) 466 U.S. 740 [80 L.Ed.2nd 732], where it was held that a first time DUI, being no more than a civil offense with a $200 fine under Wisconsin law, was not aggravated enough to allow for a warrantless entry into a residence to arrest the perpetrator. The cut off between a minor and a serious offense seems to be whether or not the offense is one for which incarceration is a potential punishment. (*People v. Thompson*, *supra*, at pp. 821-824 , citing *Illinois v. McArthur* (2001) 531 U.S. 326, 336, 337 [148 L.Ed.2nd 838].)

But the Ninth Circuit Court of Appeal, arguing the continuing validity of, *Welsh*, has held that California’s interpretation under *Thompson* is wrong, and that a warrantless entry into a home to arrest a misdemeanor driving–while-under-the-influence suspect is a Fourth Amendment violation. (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3rd 752, 768-769; finding that warrantless entries into residences in misdemeanor cases “will seldom, if ever, justify a warrantless entry into the home.”)

Officers entering a home on a loud music complaint upheld despite the Supreme Court’s holding in *Welsh*, ruling that the situation was more akin to a “community caretaking” issue than the one where it was necessary to find an exigent circumstance. (*United States v. Rohrig* (6th Cir. 1996) 98 F.3rd 1506.)
A warrantless entry was upheld to prevent the destruction of evidence (the blood/alcohol level) and there was reason to believe defendant intended to resume driving. *Welsh* can be distinguished by the simple fact that California treats DUI cases as serious misdemeanors. (*People v. Hampton* (1985) 164 Cal.App.3d 27, 34.)

Entering a residence with probable cause to believe only that the non-bookable offense of possession of less than an ounce of marijuana is occurring (H&S § 11357(b)), is closer to the *Welsh* situation, and a violation of the Fourth Amendment when entry is made without consent. (*People v. Hua* (2008) 158 Cal.App.4th 1027.)

**Welfare Checks, the “Emergency Aid” Doctrine, and the “Community Caretaking Function”:** Checking for victims in a residence upon a “reasonable belief” that someone inside a residence is in need of aid, or that there is an imminent threat to the life or welfare of someone inside, an immediate, justifies a warrantless entry. (*People v. Ray* (1999) 21 Cal.4th 464; *Tamborino v. Superior Court* (1986) 41 Cal.3d 919; *People v. Ammons* (1980) 103 Cal.App.3d 20.)

In *Ray*, supra, a “plurality” of the California Supreme Court ruled that under the so-called “emergency aid doctrine,” which is a subcategory of a law enforcement officer’s “community caretaking” duties, a warrantless entry into a residence may be allowed whenever police officers “reasonably believe” someone inside is in need of assistance or action must be taken to preserve the occupant’s property.

“The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?” (*Id.* at pp. 476-477.)

Three justices in *Ray* found this “emergency aid doctrine” to be a subcategory of the “community caretaking” rationale, and not a form of “exigent circumstance.” (*People v. Ray*, supra, at p. 471.) Three concurring justices found such a situation to come within the standard “exigent circumstance” rationale. (*Id.*, at p. 480.)

The “community caretaking” theory was found to be inapplicable when officers entered the defendant’s locked-off property based upon little more than a neighbor’s unsubstantiated belief that the defendants might have been the victims of a “drug rip-off” the night before. Finding a small amount of marijuana debris at the edge of the defendants’ property and a small depression leading under the fence was not legally sufficient. Also, the officers appeared more concerned with investigating allegations that the defendants were cultivating marijuana. The community caretaking
theory is inapplicable when the police act to solve crime as opposed to coming to the aid of persons. (*People v. Morton* (2003) 114 Cal.App.4th 1039.)

The “community caretaking function” was also held to be inapplicable to the situation where police officers make a warrantless entry into a mental patient’s home after his detention for a mental evaluation per *W&I § 5150*, despite the fact that *W&I § 8102(a)* commands a peace officer to confiscate firearms and other deadly weapons in such a situation. (*People v. Sweig* (2008) 167 Cal.App.4th 1145.)

The *Sweig* Court also found, however, that a search warrant is not permitted under *P.C. § 1524* (see “Statutory Grounds for Issuance (P.C. § 1524(a)(1) through (8)),” under “Search Warrants,” above) when the defendant is detained pursuant to *H&S § 5150* only. The Court suggested that the Legislature should fix the problem with a legislative amendment to Section 1524.

The California Supreme Court has granted a petition in *Sweig*, making it unavailable for citation pending the Court’s decision.

Also, the California Legislature has amended *P.C. § 1524*, effective 1/1/10, adding a number of additional grounds for obtaining a search warrant, including to recover firearms and other deadly weapons where a person has been committed for observation pursuant to *H&S § 5150*.

In earlier cases, the Ninth Circuit Court of Appeal applied a three-point standard in order to employ the “emergency aid” exception to the Fourth Amendment as a function of law enforcement’s “community caretaking function,” and required a finding of three circumstances to be applicable:

- The police must have “reasonable grounds” to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; and

- The search must not be primarily motivated by an intent to arrest and seize evidence; and

- There must be some reasonable basis, “approximating probable cause,” to associate the emergency with the area or place to be searched.

* (United States v. Cervantes* (9th Cir. 2000) 219 F.3rd 882, 888-890; *Martin v. City of Oceanside* (9th Cir. 2004) 360 F.3rd 1078, 1081-574
However, in *United States v. Snipe* (9th Cir. 2008) 515 F.3rd 947, 951-952, the Ninth Circuit modified these rules in light of *Brigham City v. Stuart* (2006) 547 U.S. 398 [164 L.Ed.2nd 650] and *Whren v. United States* (1996) 517 U.S. 806 [135 L.Ed.2nd 89], deleting altogether the second factor (the officers’ subjective motivations being irrelevant) and finding the third factor to be a part of the necessary “objectively reasonable basis for concluding that an emergency is unfolding in the place to be entered.” (See below.)

Now, the Ninth Circuit finds the following factors to be necessary: Whether (1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm, and (2) the search’s scope and manner were reasonable to meet the need. (*United States v Snipe*, *supra*, at p. 952; see also *Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3rd 752, 763, fn. 5.)

*Brigham City v. Stuart* (2006) 547 U.S. 398 [164 L.Ed.2nd 650]: The Supreme Court ignored efforts by the lower courts to categorize the entry into a house upon viewing an altercation through the window as coming within the “emergency aid doctrine,” and merely noted the exigency of protecting the occupants from being hurt. In so doing, the Court held that a warrantless entry into a residence is lawful when police have “an objectively reasonable basis for believing” that an occupant is seriously injured or imminently threatened with such injury, and then the manner of the officers’ entry was also reasonable.

Officers responding to a call of a disturbance, finding a pickup truck in the driveway which had apparently been in an accident, blood on the truck and on clothes in the truck, broken windows in the house, and defendant, barricaded inside, screaming and throwing things. Defendant had a visible cut on his hand. One officer forced his way in only to have defendant point a rifle at him. Noting that “(i)t requires only ‘an objective reasonable basis for believing’ that ‘a person within [the house] is in need of immediate aid,’ and that the officer was acting reasonably when he made the warrantless entry into defendant’s home, the Court found the entry to be lawful. (*Cites Omitted; Michigan v. Fisher* (Dec. 7, 2009) 558 U.S. ___ [130 S.Ct. 546; 175 L.Ed.2nd 410].)

“Officers do not need ironclad proof of ‘a likely serious, life-threatening’ injury to invoke the emergency aid exception (to the
warrant requirement. Also, the officer’s subjective motivations for entering were irrelevant, the test being an objection one. (*Id.*, at p. __). Also, the Court noted the reality of such a situation when a police officer is forced to decide what to do: “It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But ‘[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties.’ (citing *Brigham City*, supra, at p. 406.)” (*Id.*, at p. __).

Responding to a radio call concerning a male being shot several times, and finding a wounded female and an injured male on the front porch, with blood on the front entrance indicating someone with injuries either entered or exited the residence, without any other way to determine whether the reported male with a gunshot wound might be in the house requiring aid, forcing entry into the residence (conceded by the parties) and then into a locked upstairs bedroom (the issue in the case) was lawful under the “emergency aid doctrine.” Also, for the protection of the police, not knowing where the shooter(s) might be, forcing entry into the bedroom to make sure the suspects weren’t there was also reasonable for the officers’ protection as they conducted an investigation. (*People v. Troyer* (2011) 51 Cal.4th 599.)

The Court further rejected defendant’s argument that the officers needed “probable cause” to believe someone inside needed aid. The test, citing *Brigham City v. Stuart*, supra, at p. 400, is merely having an “objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with injury.” (*Id.* at pp. 606-607.)

The Court rejected the dissenting justices’ conclusion that there were other reasonable, innocent explanations for what the police first found. It is not the officers’ responsibility to eliminate the possibility of other reasonable explanations, but rather to act on the reasonable belief that additional victims who need immediate assistance may be somewhere in that house. (*Id.* at p. 613.)

A police officer’s entry into a residence, motivated out of a concern for the welfare of a nine-year-old child who the officers suspected had been left home alone at night, was lawful under the so-called “emergency doctrine,” which is derived from the officers’ “community caretaking function.” The
“emergency doctrine” is an exception to the Fourth Amendment’s restrictions on warrantless residential entries, and “may be justified by the need to protect life or avoid serious injury.” (United States v. Bradley (9th Cir. 2003) 321 F.3rd 1212.)

Two warrantless entries to look for a missing eight-year-old girl based upon probable cause to believe that she, or her body, might be in the apartment. (People v. Panah (2005) 35 Cal.4th 395, 464-469.)

Information that “suspicious activity” was taking place at a home, finding a rear sliding door slightly ajar, with the lights and a television on inside, but with no one responding to the officers’ attempts to get the attention of the occupants, was sufficient “probable cause” to believe that a resident in the house might have been in danger or injured. (Murdock v. Stout (9th Cir. 1995) 54 F.3rd 1437.)

Sheriff’s Deputies responding to a shooting call, not knowing whether the defendant had shot himself or whether there was a second victim or a possible shooter in the house, were justified in making a warrantless entry to look for more victims and/or a possible shooter. (United States v. Russell (9th Cir. 2006) 436 F.3rd 1086.)

The warrantless entry of the defendant’s trailer, based upon “probable cause” to believe a kidnap victims were inside, was justified. (People v. Coddington (2000) 23 Cal.4th 529, 580.)

Whether or not the FBI agents in Coddington actually needed full-blown “probable cause” to believe the victims were in inside and in immediate need of rescue was not discussed. Arguably, a simple “reasonable suspicion” would have been sufficient.

An emergency 911 call reporting an accidental stabbing justified a warrantless entry of a hotel room for the limited purpose of ensuring the safety of those inside. (People v. Snead (1991) 1 Cal.App.4th 380, 386.)

Responding to a domestic violence call, officers contacted a woman who, although denying there was a problem, appeared to be frightened and apparently had been struck. The warrantless entry was upheld based upon what the Court determined to be sufficient “probable cause.” (People v. Higgins (1994) 26 Cal.App.4th 247, 252-255.)

Responding to a call concerning a “shooting,” a bullet hole was found in a patio door and blood on the patio floor. Entry was justified for the purpose of checking for possible shooting victims. (People v. Soldoff (1980) 112 Cal.App.3rd 1.)
And see *United States v. Martinez* (9th Cir. 2005) 406 F.3rd 1160, a questionable legal analysis attempting to differentiate the differences between “exigent circumstance” and the “emergency doctrine” as it relates to a domestic violence situation. The Court found that checking a residence for a potential domestic violence victim fell under the later.

Entry into a residence to check for the possible presence of a domestic violence victim who had telephoned police minutes earlier to ask for assistance in returning to the apartment to retrieve her belongings, but who couldn’t be found upon the officers’ arrival, was held to be lawful under the circumstances. (*United States v. Black* (9th Cir. 2007) 482 F.3rd 1035.)

While the case was analyzed as a “welfare check” and “exigent circumstances,” the Court noted in a footnote (fn. 1) that the same result would be applicable if analyzed under the “emergency aid doctrine.”

See dissenting opinion to the Court’s denial of an en banc rehearing, at (9th Cir. 2007) 482 F.3rd 1044, by Kozinski, C.J.

Entry into a motel room to check the welfare of the occupant whose four-year old son and an employee of the motel told officers that the occupant was unconscious and could not be woken up, held to be sufficient of an “exigent circumstance,” supported by “probable cause,” to justify a warrantless entry. (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 528-530.)

Observation of contraband in plain sight by police officers who made a warrantless entry into a residence, responding to an emergency call from someone in apparent distress (“Get the cops here now,” followed by the caller being disconnected), was lawful, and justified the obtaining of a search warrant to search the residence. (*United States v. Snipe* (9th Cir. 2008) 515 F.3rd 947.)

The Third District Court of Appeal (Shasta County) found that although, under the “emergency aid” doctrine, an officer must have “an objectively reasonable basis” (i.e., probable cause) to believe someone inside is seriously injured or imminently threatened with such injury in order to justify a warrantless entry (citing *Brigham City v. Stuart*, supra.), the officer may look through the defendant’s side window (which the Court found to be at a location, at the side of the house, that the implicated the *Fourth Amendment*), an admittedly lesser intrusion than making entry, with no more than a “reasonable suspicion” to believe that someone inside might need their assistance. (*People v. Gemmill* (2008) 162 Cal.App.4th 958.)
Also see *Calabretta v. Floyd* (9th Cir. 1999) 189 F.3rd 808, where it was held that an entry of a residence for the purpose of investigating a possible child abuse, where there were no exigent circumstances requiring an immediate entry, requires "probable cause" and a search warrant.

And see *United States v. Deemer* (9th Cir. 2004) 354 F.3rd 1130; where it was held that an anonymous 911-hangup call, traceable to a particular motel, but without sufficient information to determine which room the call may have come from, did not allow for the non-consensual entry into the defendant’s room to see is anyone needed help merely because of the suspicious attempts by the person who answered the door to keep the officers from looking inside, and her apparent lies concerning no one else being there.

With a citizen’s report that plaintiff had been in a minor traffic accident and had the odor of alcohol on his breath, officers forced entry into his home under the supposition that a layperson might misinterpret the fruity smell of a person’s breath who is on the brink of a diabetic coma as being under the influence of alcohol. Absent any other evidence that plaintiff was in fact about to suffer a diabetic coma, the Court rejected this argument as “both simple and audacious.” The Court also rejected the officers’ claim that they felt plaintiff might have been injured given the fact that the traffic accident was so minor that there was no damage to either car. (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3rd 752, 759, 763-766.)

With a missing victim, and sufficient suspicious circumstances causing an officer to reasonably believe that the victim may die if immediate action is not taken, a warrantless entry into a private area may be lawful. No warrant is required “when an emergency situation requires swift action to prevent imminent danger to life.” “(I)f the facts available to the officer at the moment of the entry would cause a person of reasonable caution to believe that the action taken was appropriate,” the officer may lawfully make a warrantless entry into a residence or other private area. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1144-1145, 1153-1161; with prior information that defendant may have secreted a missing victim in a storage room, and the defendant’s nervousness and lack of cooperation, the immediate, warrantless entry into the storage area was held to be lawful.)

Following the reasoning in *Rogers*, the Court held that officers were justified in making entry into a darkened apartment when no one would answer their knocking to check the welfare of a woman and her child who hadn’t been heard from all day following a violent “domestic violence” incident with her live-in boyfriend the night before, when no one could locate her and it was known that it was uncharacteristic of her not to
answer her home or cell phone for the whole day. (People v. Hockstraser (2009) 178 Cal.App.4th 883, 895-901.)

Plain sight observations made while lawfully inside the apartment provided probable cause to search the defendant’s vehicle parked outside the apartment, where the victim’s dismembered body was then found. (Id., at pp. 901-905.)

The warrantless entry and search of a residence is lawful so long as there is an objectively reasonable basis for believing that someone inside or the officer is in serious danger, the manner of entry is reasonable, and the scope of the subsequent search is reasonable. (United States v. Reyes-Bosque (9th Cir. 2010) 596 F.3rd 1017, 1029-1030.)

Under the “emergency exception,” an officer may enter a home without a warrant to investigate an emergency that threatens life or limb so long as there is “objectively reasonable grounds to believe that an emergency exists and that his immediate response is needed.” This exception derives from a police officer’s community caretaking function. The other possible exception to the warrant requirement is known as the “exigency exception,” which stems from the officer’s investigatory function. Under this theory, an officer may enter a residence without a warrant if he has “probable cause to believe that a crime has been or is being committed and a reasonable belief that his entry is needed to stop the destruction of evidence or a suspect’s escape or to carry out other crime prevention or law enforcement efforts.” Both exceptions require that the officer have an objectively reasonable belief that the circumstances justify an immediate entry. (Espinosa v. City and County of San Francisco (9th Cir. 2010) 598 F.3rd 528, 534-536.)

Police officers may make a warrantless entry into a residence whenever they have an objectively reasonable basis for believing that an occupant or the officers are imminently threatened with serious injury. (Ryburn v. Huff (Jan. 23, 2012) __ U.S. __ [132 S.Ct. 987; 181 L.Ed.2nd 966]; reversing the Ninth Circuit Court of Appeal’s decision that had held that unverified rumors that the plaintiffs’ son had threatened to “shoot up” a high school, along with the son’s mother, who was generally uncooperative, running back into the house when asked about firearms in the house, was insufficient to justify an immediate entry.

**Exigent Circumstances and Officer Safety:**

A possible trafficker in narcotics, ducking back into his residence upon the approach of peace officers, while attempting to shut the door and close the blinds, is an exigent circumstance justifying an immediate, warrantless entry. United States v. Arellano-Ochoa (9th Cir. 2006) 461 F.3rd 1142.)
With probable cause to believe a burglary is in progress, a warrantless forced entry into a residence would be appropriate. However, under circumstances where the officers should have known that the occupant of a house was not a burglar (e.g., the ex-wife of the person believed to be the resident, with the ex-wife having been given the residence in the divorce, and under circumstances where it was not reasonable to believe that she was burglarizing the house), a forced entry and confronting the occupant at gunpoint is a **Fourth Amendment** violation subjecting the officers to civil liability. (*Frunz v. City of Tacoma* (9th Cir. 2006) 468 F.3rd 1141.)

Scaling a six foot fence past a locked gate, and thus entering defendant’s side yard, was lawful when necessary to retrieve a firearm observed on the ground where the officer feared for his own safety and the safety of a seven year old minor who was suspected of being in the house. (*People v. Chavez* (2008) 161 Cal.App.4th 1493, 1503.)

The warrantless entry and search of a residence is lawful so long as there is an objectively reasonable basis for believing that someone inside or the officer is in serious danger, the manner of entry is reasonable, and the scope of the subsequent search is reasonable. (*United States v. Reyes-Bosque* (9th Cir. 2010) 596 F.3rd 1017, 1029-1030.)

Responding to a 911 call concerning a person climbing over a fence into a residential backyard, and finding defendant who matched the description, where defendant did not resist or attempt to flee and without any indication of the presence of burglar tools or that the house was being broken into, is insufficient cause to enter the curtilage of defendant’s home (i.e., his fenced-off backyard) nor probable cause to arrest him for attempted burglary or even trespass. A gun found on him in a search incident to arrest should have been suppressed. (*United States v. Struckman* (9th Cir 2010) 603 F.3d 731, 739-747; suggesting that the officers should asked him more questions and check his claims that he was in his own backyard before arresting him.)

Police officers may make a warrantless entry into a residence whenever they have an objectively reasonable basis for believing that an occupant or the officers are imminently threatened with serious injury. (*Ryburn v. Huff* (Jan. 23, 2012) __ U.S. __ [132 S.Ct. 987; 181 L.Ed.2nd 966]; reversing the Ninth Circuit Court of Appeal’s decision that had held that unverified rumors that the plaintiffs’ son had threatened to “shoot up” a high school, along with the son’s mother, who was generally uncooperative, running back into the house when asked about firearms in the house, was insufficient to justify an immediate entry.
Kicking open an upstairs locked bedroom while checking for possibly wounded victims at a shooting scene, and for officers’ safety while they conducted an investigation, when it is unknown whether the shooting suspect(s) might be in the house, was reasonable. \textit{(People v. Troyer} (2011) 51 Cal.4th 599, 613.\textit{)}

\textit{Emergency Exception and the Odor of Ether:}

In cases where the odor of ether is apparent, coming from a particular location indicating the presence of an illicit drug lab and creating a hazardous, potentially explosive, situation, the Ninth Circuit Court of Appeal has held that although the odor by itself is \textit{not} probable cause, it is a dangerous situation needing immediate action. Therefore, so long as (1) the police have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, (2) their assistance is not primarily motivated by the intent to arrest a person or seize evidence, \textit{and} (3) there is some reasonable basis, “\textit{approximating probable cause},” to associate the emergency with the area or place to be entered, then the “\textit{emergency doctrine}” will allow for a warrantless entry to neutralize the emergency. \textit{(United States v. Cervantes} (9th Cir. 2000) 219 F.3rd 882.\textit{)}

\textit{Note:} Observations made during the entry will likely supply the necessary probable cause to secure the scene and obtain a search warrant.

State authority is in apparent agreement: The odor of ether \textit{is} an exigent circumstance, given the potential volatility of ether, to justify an immediate warrantless entry to “\textit{neutralize}” the dangerous situation. \textit{(People v. Messina} (1985) 165 Cal.App.3rd 931; \textit{People v. Osuna} (1987) 187 Cal.App.3rd 845.\textit{)}

\textit{Executing an Arrest Warrant:}

An arrest warrant constitutes legal authority to enter the suspect’s residence and search for him. \textit{(People v. LeBlanc} (1997) 60 Cal.App.4th 157, 164.\textit{)}

Similarly, police are authorized to enter a house without a warrant where the suspect is a parolee who had no legitimate expectation of privacy against warrantless arrests. \textit{(People v. Lewis} (1999) 74 Cal.App.4th 662, 671; \textit{In re Frank S.} (2006) 142 Cal.App.4th 145, 151.\textit{)}

Surrounding a barricaded suspect in his home is in effect a warrantless arrest, justified by the exigent circumstances. The passage of time during the
ensuing standoff does not dissipate that exigency to where officers are expected to seek the authorization of a judge to take the suspect into physical custody. (*Fisher v. City of San Jose* (9th Cir. 2009) 558 F.3rd 1069; overruling its prior holding (at 509 F.3rd 952) where it was ruled that failure to obtain an arrest warrant during a 12 hour standoff resulted in an illegal arrest of the barricaded suspect.)

Entry of a residence to execute a bench warrant, issued by a neutral magistrate upon a defendant’s failure to appear in court, is lawful despite the fact that the bench warrant was issued without a finding of probable cause. (*United States v. Gooch* (9th Cir. 2007) 506 F.3rd 1156.)

*But*, before a police officer may enter a home, absent consent to enter, the officer must have a *reasonable belief*, falling short of probable cause to believe, the suspect lives there and is present at the time. (*People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.)

But see prior decisions finding that “probable cause” to believe the person who is the subject of the arrest warrant is actually inside at the time is the correct standard. (*People v. Jacobs* (1987) 43 Cal.3rd 472; *United States v. Gorman* (9th Cir. 2002) 314 F.3rd 1105; *People v. Phillips* (9th Cir. 1974) 497 F.2nd 1131; *United States v. Diaz* (9th Cir. 2007) 491 F.3rd 1074; *United States v. Gooch*, supra, at p. 1159, fn. 2; *Cuevas v. De Roco* (9th Cir. 2008) 531 F.3rd 726; *United States v. Mayer* (9th Cir. 2008) 530 F.3rd 1099, 1103-1104.)

See “Sufficiency of Evidence to Believe the Suspect is Inside,” below.

“Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home.” (*Steagald v. United States* (1981) 451 U.S. 204, 214-215, fn. 7 [68 L.Ed.2nd 38, 46].)

“Thus, for *Fourth Amendment* purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” (Italics added; *Payton v. New York* (1980) 445 U.S. 573, 603 [63 L.Ed.2nd 639, 661].)

“It is not disputed that until 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, . . .” \textit{(Maryland v. Buie} (1990) 494 U.S. 325, 330 [108 L.Ed.2\textsuperscript{nd} 276, 283].

If the person is in a \textit{third party’s home}, absent consent to enter, a \textit{search warrant} for the residence must be obtained in addition to the arrest warrant. \textit{(Steagald v. United States, supra}, at pp. 211-222 [68 L.Ed.2\textsuperscript{nd} at pp. 45-52]; \textit{People v. Codinha} (1982) 138 Cal.App.3\textsuperscript{rd} 167; see \textbf{P.C. § 1524(a)(6)}

\textbf{Sufficiency of Evidence to Believe the Suspect is Inside:} The amount of evidence a law enforcement officer must have indicating that a criminal suspect is in fact presently inside his own residence in order to justify a non-consensual entry, with or without an arrest warrant, has been debated over the years:

The United States Supreme Court, in \textit{Peyton v. New York} (1980) 445 U.S. 573 [63 L.Ed.2\textsuperscript{nd} 639], merely states that a police officer must have a “\textit{reason to believe}” the suspect is inside his residence, without defining the phrase.

An early California lower appellate court found that the officers needed only a “\textit{reasonable belief},” or “\textit{strong reason to believe},” the suspect was home. \textit{(People v. White} (1986) 183 Cal.App.3\textsuperscript{rd} 1199, 1204-1209; rejecting the defense argument that full “\textit{probable cause}” to believe the subject was inside is required; see also \textit{United States v. Magluta} (11\textsuperscript{th} Cir. 1995) 44 F.3\textsuperscript{rd} 1530, 1535, using a “\textit{reasonable belief}” standard.)

Other authority indicates that a full measure of “\textit{probable cause}” is required. (See \textit{Dorman v. United States} (D.C. Cir. 1970) 435 F.2\textsuperscript{nd} 385, 393; see also \textit{People v. Phillips} (9\textsuperscript{th} Cir. 1974) 497 F.2\textsuperscript{nd} 1131; a locked commercial establishment, at night; and \textit{United States v. Gorman} (9\textsuperscript{th} Cir. 2002) 314 F.3\textsuperscript{rd} 1105; defendant in his girlfriend’s house with whom he was living.)

The California Supreme Court, interpreting the language of \textbf{P.C. § 844} (i.e., “\textit{reasonable grounds for believing him to be (inside)}”), has found that any arrest, with or without an arrest warrant, requires \textit{probable cause} to believe the subject is inside in order to justify a non-consensual entry into a residence. \textit{(People v. Jacobs} (1987) 43 Cal.3\textsuperscript{rd} 472, 478-479; \textit{but}, see below.)

In order to conduct a \textbf{Fourth} Waiver search of a residence, an officer must have probable cause to believe that the residence to be searched is in fact the parolee’s (or probationer’s) residence. \textit{Motley v. Parks} (9\textsuperscript{th} Cir. 2005) 432 F.3\textsuperscript{rd} 1072, 1080-1082; \textit{United States v. Franklin} (9\textsuperscript{th} Cir. 2010) 603 F.3\textsuperscript{rd} 652.)
However, noting that five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a minority opinion (see United States v. Gorman, supra.), the Fourth District Court of Appeal (Div. 2) found instead that an 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. Employing that standard, the entry into defendant’s apartment to conduct a probation search was lawful based on all of the information known to the officers. Accordingly, the court upheld the trial court’s conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment and was present at the time, and therefore the officers had the right to enter the apartment to conduct a warrantless probation search. (People v. Downey (2011) 198 Cal.App.4th 652, 657-662.)

Also arguing that the California Supreme Court, in People v. Jacobs, supra, did not find that probable cause was required, contrary to popular belief. (Id., at p. 662; see above.)

Officers knew defendant had lived at the suspect residence at one time but also had newer information that he had moved elsewhere, although there was still some indication that he was maybe visiting the prior residence or that the occupants knew where he could be located; insufficient to establish probable cause. (Cuevas v. De Roco (9th Cir. 2008) 531 F.3rd 726.)

Information from a neighbors and, separately, an anonymous informant, all indicating that defendant had returned to his reported address and was selling marijuana at that residence, established probable cause to believe he was living there again. (United States v. Mayer (9th Cir. 2008) 530 F.3rd 1099, 1103-1104.)

Third Parties Entering with Police: It is a Fourth Amendment violation to allow third parties (e.g.; the news media) into a constitutionally protected area, such as the defendant’s home, without the occupant’s permission, even when the officers themselves are entering legally (e.g.; serving a search warrant). (Wilson v. Layne (1999) 526 U.S. 603 [143 L.Ed.2nd 818]; creating federal civil liability.)

“Knock and Notice:” Any time a police officer makes entry into the residence of another to arrest (P.C. § 844) or to serve a search warrant (P.C. § 1531), the officer must first comply with the statutory “knock and notice” rules. (See above.)
The same rule applies to entries for “investigative purposes” as well, although arguably not coming within the provisions of P.C. §§ 844 or 1531. (People v. Miller (1999) 69 Cal.App.4th 190, 201.)


However, recent authority has noted that violating knock and notice rules should not result in the suppression of any resulting evidence, at least absent aggravating circumstances. (Hudson v. Michigan (2006) 547 U.S. 586 [165 L.Ed.2nd 56].) This rule applies whether executing a search warrant (i.e., Hudson) or to make an arrest. (In re Frank S. (2006) 142 Cal.App.4th 145.)

See “Knock and Notice,” under “Searches With a Search Warrant.” above.
Chapter 11

New Law Enforcement Technology:

The Problem: The United States Supreme Court (in *Kyllo v. United States* (2001) 533 U.S. 27 [150 L.Ed.2nd 94].), as well as the federal Congress and California’s Legislature, has indicated a concern with developing surveillance technology which may be used to eavesdrop upon and decipher activities in constitutionally protected areas.

See also *United States v. Hill* (9th Cir. 2006) 459 F.3rd 966, 979, where it was noted that: “Technology is rapidly evolving and the concept of what is reasonable for Fourth Amendment purposes will likewise have to evolve.”

The Supreme Court has pointed out that a physical trespassory intrusion (physically entering a protected area or property) is not always required to create a Fourth Amendment search issue. Per the Court; “(s)ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis” (referring to *Katz v. United States* (1967) 389 U.S. 347, 3612 [19 L.Ed.2nd 576, 588].); i.e., whether a “reasonable expectation of privacy” was violated. (*United States v. Jones* (Jan. 23, 2012) __ U.S. __, __ [132 S.Ct. 945; 181 L.Ed.2nd 911].)

Thermal Imaging Device: The use of a “thermal imaging device” (also known as a “FLIR,” for “Forward Looking Infra Red.”) to read the amount of heat coming from a person’s home, without prior judicial authorization, is an unconstitutional invasion of one’s right to privacy in the home. (*Kyllo v. United States* (2001) 533 U.S. 27 [150 L.Ed.2nd 94].)

“To withdraw protection of this minimum expectation (of privacy in one’s home) would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ [Citation] constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search. [footnote omitted]” (*Id.*, at p. 34 [150 L.Ed.2nd at p. 102].)

As a “search,” a search warrant is necessary before a thermal imagining device can be used to deduce the heat coming from a person’s home. (*Ibid.*)
California’s limited authority also holds that use of such a device is an unreasonable invasion of one’s expectation of privacy, at least when used to measure heat from a person’s private dwelling. *(People v. Deutsch* (1996) 44 Cal.App.4th 1224.)*

*But*, evidence from the use of a thermal imaging device, when lawfully obtained with judicial authorization (i.e., a search warrant), may be used as a part of the probable cause for a second search warrant. *(United States v. Huggins* (9th Cir. 2002) 299 F.3rd 1039.)*

*However*, a search warrant authorizing the use of a thermal imaging device must be supported by probable cause, or such a warrant will be held to be invalid. *(People v. Gottfried* (2003) 107 Cal.App.4th 254.)*

**A Buster:** Use of a “Buster” on a vehicle at the Mexico/U.S. border, given the lack of any proof that the defendant was exposed to any danger from the radioactivity in the device, does not require any suspicion in a border search. *(United States v. Camacho* (9th Cir. 2004) 368 F.3rd 1182.)*

A “Buster” is “a handheld portable density gauge. . . . It contains a tiny bead of radioactive material called barium 133 that’s inside a sealed container. . . . (W)hen the actuating trigger is pushed, the container rolls to an open slot and exposes the radiation in a forward direction (providing a reading on the density of an object.” A higher reading than normal indicates that something not normally there is hidden in the object being evaluated, such as in the spare tire in this case. *(Id., at p. 1184.)*

*Note* that the Court in Camacho differentiated the Buster from x-rays of a person which, per the court, *does* require a “heightened level of suspicion” (i.e., a “reasonable suspicion.” See United States v. Camacho, *supra*, p. 1186, fn. 1) to use in a border search situation given the potential personal health issues of exposing a person’s body to x-rays. (See also United States v. Ik (9th Cir. 1982) 676 F.2nd 379, 382.)

*Also note* that using the Buster on a vehicle or other container in other than a border search situation would likely require full-blown “probable cause” under the theory of *Kyllo, supra*, and the fact that it is in fact inspecting items contained within the vehicle or container itself and not just heat emanating from the vehicle or other container. However, there is no case law on this issue as of yet.

**Spike Mike:** The warrantless use of a “spike mike,” which, though contact with a heating duct, was able to pick up defendant’s conversations while inside his home, was held to be a *Fourth Amendment* violation. *(Silverman v. United States* (1961) 365 U.S. 505 [5 L.Ed.2nd 734].)*
Aerial Surveillance: Overflights over a suspect’s backyard (i.e., within the “curtilage” of the home), so long as the observers are in the legal (“navigable”) airspace, when naked-eye observations of illegal activity below are made, are legal, whether the observers are on routine patrol or are responding to a specific tip and/or otherwise purposely looking into the defendant’s yard. (California v. Ciraolo (1986) 476 U.S. 207 [90 L.Ed.2nd 210].)

California’s previous rule that observations of contraband within the curtilage of one’s home (i.e., the yard) under such circumstances should be suppressed (see People v. Cook (1985) 41 Cal.3rd 373; People v. Ciraolo (1984) 161 Cal.App.3rd 1081.) was overruled in California v. Ciraolo, supra. Passage of Proposition 8 in June, 1982, dictates that California follow the federal rule.

The federal Environmental Protection Agency’s use of aerial photography, flying at the legal “navigable altitude,” was held to be within its statutory authority, as a regulatory and enforcement agency requires no explicit authorization to employ methods of observation available to the public. Additionally, the taking of photographs of petitioner's complex from navigable airspace was not a search prohibited by the Fourth Amendment. (Dow Chemical Co. v. United States (1986) 476 U.S. 227 [90 L.Ed.2nd 226].)

Overflights conducted by officers of a greenhouse situated 125 yards from a two-story residence did not constitute a search requiring a warrant under the Fourth Amendment. (United States v. Broadhurst (9th Cir. 1986) 805 F.2nd 849, 849-850, 856-857.)

Electronic Tracking Devices (Transmitters):

General Rule: Electronic tracking devices are lawful to use in tracking, so long as the route used is otherwise open to view and so long as the installation of the tracking device itself was not accomplished in violation of the Fourth Amendment. (United States v. Knotts (1983) 460 U.S. 276 [75 L.Ed.2nd 55]; but see United States v. Jones, infra.)

However, the act of putting a tracking device (e.g., a “Global Positioning System,” or “GPS”) onto a vehicle, even the exterior or undercarriage, is a Fourth Amendment search. (United States v. Jones (Jan. 23, 2012) __ U.S. __ [132 S.Ct. 945; 181 L.Ed.2nd 911].)

The Court in Jones did not indicate, however, whether a search warrant would be necessary, declining to rule on whether such a search, even if warrantless, was “reasonable” under the circumstances because that argument had been “forfeited” when
not raised at the trial court level. (United States v. Jones, supra, at p. __.)

Note: The inference is that a lawful exception to the search warrant requirement might apply, depending upon the circumstances.

In Knotts, supra, the tracking device (i.e., a “beeper”) was already contained in a five-gallon drum when given to the defendant who put it in his car. There being no installation of the device onto or into defendant’s car by law enforcement, there was no “search” involved.

Also, leaving the tracking device on after it disappears into a house (at least when done without a search warrant) is an invasion of privacy, and unlawful. (United States v. Karo (1984) 468 U.S. 705 [82 L.Ed.2nd 530].)

When the transmitter is contained inside property which has been stolen, defendant’s possession of the stolen property in his vehicle (United States v. Jones (4th Cir. 1994) 31 F.3rd 1304, in a stolen mail bag.) or in a motel room (People v. Erwin (1997) 55 Cal.App.4th 15, in a stolen bank bag.) does not made the warrantless “search” unlawful.

Note: In Karo, the transmitter was followed while it was moved about inside a private residence, then to two different storage facilities, and into a second residence; a circumstance not present in the Fourth Circuit’s Jones or in Erwin.

In following stolen stereo speakers containing tracking devices into a home, exigent circumstances of a fresh crime and the possibility that the speakers would be destroyed if officers waited for a warrant, justified an immediate entry to secure the house. (See People v. Hull (1995) 34 Cal.App.4th 1448, 1452, 1455-1457.)

Cases prior to United States v. Jones, supra, have upheld the warrantless attachment of a tracking device on a vehicle under certain circumstances:

Placing an electronic transmitter onto the undercarriage of defendant’s vehicle while the vehicle is in his driveway, but outside the curtilage of the home (United States v. McIver (9th Cir. 1999) 186 F.3rd 1119.), or any time the vehicle is found in a place open to the public (People v. Zichwic (2001) 94 Cal.App.4th 944), is lawful, and does not require a search warrant.

Similarly, placing an electronic transmitter onto the undercarriage of defendant’s vehicle while the vehicle is in his driveway, within
the curtilage of the home, where the driveway is not gated, there were no “No Trespassing” signs, the area is exposed to view from the street, and no other features that would prevent anyone from walking up the driveway to the house, is also lawful.  (*United States v. Pineda-Moreno* (9th Cir. 2010) 591 F.3rd 1212.)

The Court further rejected defendant’s arguments that such transmitting devices used without a warrant are illegal when the car is parked in a public place when the transmitter is attached, that attaching the device to the car during the early morning hours is a Fourth Amendment violation, because they are not generally used by the public and/or that *Kyllo v. United States* (2001) 533 U.S. 27 [150 L.Ed.2nd 94]), has modified the analysis applicable to such technological devices.  (*Id.*, at pp. 1215-1216.)

And see the dissenting opinion to the Court’s denial of an en banc rehearing, at *United States v. Pineda-Moreno* (9th Cir. 2010) 617 F.3rd 1120, by Kozinski, C.J., arguing that (1) the warrantless entry into the curtilage of a person’s home is a Fourth Amendment violation, and (2), differentiating “beepers” (as used in *Knotts*) from a more sophisticated “GPS” as used in the instant case, that recording and downloading a vehicle’s movements was a search also requiring a search warrant.

The Fifth Circuit Court of Appeal has held that the use of a GPS attached to the outside of a suspect’s vehicle, monitoring his movements as the vehicle moved across the country, was not a search within the meaning of the Fourth Amendment.  (*United States v. Hernandez* (5th Cir. 2011) 647 F.3rd 216.)

*United States v. Jones*, supra, casts doubt on the continuing validity of the above cases.  However, in that *Jones* never ruled that such a search (i.e., placing a tracking device on a vehicle) requires the use of a search warrant, it is still arguable that the above cases continue to be valid.

Note: Wiring a tracking device into the vehicle's electrical system, requiring the entry into the vehicle and/or taping into the vehicle's wiring, would likely require a search warrant.

Flashlights:

The use of flashlights to illuminate the interior of a handbag held to be of no constitutional significance. (*People v. Capps* (1989) 215 Cal.App.3rd 1112, 1123.)

Officers standing in an open field, using a flashlight to look inside a barn, held to be lawful. (*United States v. Vela* (W.D. Tex. 2005) 486 F.Supp.2nd 587, 590.)

Binoculars:

Using binoculars from 50 yards away to watch defendant load boxes into his car upheld. (*United States v. Grimes* (5th Cir. 426 F.2nd 706, 708.)

Using binoculars during surveillance of a chicken house from a pasture was lawful. (*Hodges v. United States* (5th Cir. 1957) 243 F.2nd 281, 282.)

Night Vision Goggles:

The use of night vision goggles to observe areas within the curtilage of defendants’ residence was held to be irrelevant. (*People v. Lieng* (2010) 190 Cal.App.4th 1213, 1227-1228.)

*A Controlled Tire Deflation Device (“CTDD”)*

The use of a “controlled tire deflation device” to stop a vehicle suspected of being used to smuggle controlled substances over the US/Mexico border held to be a detention only (thus requiring only a reasonable suspicion) and not excessive force under the circumstances. (*United States v. Guzman-Padilla* (9th Cir. 2009) 573 F.3rd 865.)

Use of this device by Border Patrol agents to stop a vehicle for which there was a reasonable suspicion to believe that it was involved in smuggling people or contraband across the border was held to be lawful, and, under the circumstances, not an excessive use of force. (*Ibid.*)

Note: The “controlled tire deflation device,” or “CTDD,” is an accordion-like tray containing small, hollow steel tubes that puncture the tires of a passing vehicle and cause a gradual release of air, bringing the vehicle to a halt within a quarter to half a mile.
**Videotaping and Photographing:**

“Video surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the Fourth Amendment; the police may record what they normally may view with the naked eye. (Citation)” (*United States v. Taketa* (9th Cir, 1991) 923 F.2nd 665, 667.)

However, in a place where a person has a reasonable expectation of privacy, to videotape him without a court’s authorization (i.e., a search warrant) is illegal. (*Id.*, at pp. 675-677.)

See P.C. § 632: Illegal eavesdropping on confidential communications. However, a hidden security video camera that takes pictures, but with no sound, is not a violation of section 632, but only because of the lack of a sound-recording capability. (*People v. Dremmam* (2000) 84 Cal.App.4th 1349.)

A warrantless videotape surveillance in the mailroom of a hospital, open to some 800 hospital employees but not of the defendant’s private workspace, did not violate the defendant’s expectation of privacy and was therefore lawful. (*United States v. Gonzalez* (9th Cir. 2003) 328 F.3rd 543.)

In a homicide investigation where defendant was the primary suspect, “the police surveillance and photographing of defendant entering and exiting the drop-off point is not a subject of Fourth Amendment protection since defendant knowingly exposed his whereabouts in public.” *People v. Maury* (2003) 30 Cal.4th 342, 384-385.)

A person who exposes his facial features, and/or body in general, to the public, in a public place, has no reasonable expectation of privacy in his appearance. (*People v. Benedict* (1969) 2 Cal.App.3rd 400.) It is not, therefore, a constitutional violation to photograph him, so long as he is not detained for that purpose.

*But*, see *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 239; stopping and detaining gang members for the purpose of photographing them is illegal without reasonable suspicion of criminal activity. Merely being a member of a gang, by itself, is not cause to detain.

**Metal Detectors:** The use of metal detectors (or “magnetometers”) constitute a search, but are lawful without a search warrant or individualized suspicion when:
On School Campuses: Random metal detector searches of students, without any individualized suspicion, are justified by the “special needs” of keeping weapons off campuses. The Fourth Amendment is not violated by such searches where the government need is great, the intrusion on the individual is limited, and a more rigorous standard of suspicion is unworkable. (In re Latasha W. (1998) 60 Cal.App.4th 1524.)

At Airports: As an “administrative search,” not intended to be a part of a criminal investigation to secure evidence, but to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board, pre-departure screening procedures, including the use of a magnetometer, is lawful despite the lack of any particularized suspicion or a warrant. (People v. Hyde (1974) 12 Cal.3rd 158.)

The legality of such searches depends upon the balancing of society’s interest in safe air travel with the right of the individual passenger to be free from unnecessary government intrusions. Airport searches are reasonable when: (1) They are no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) they are confined in good faith to that purpose; and (3) passengers are given the opportunity to avoid the search by electing not to fly. (United States v. Marquez (9th Cir. 2005) 410 F.3rd 612; A second, more intense, yet random screening of passengers as a part of airline boarding security procedures, held to be constitutional.)

Dogs:

Dogs Used to Search:

General Rule: When properly trained, dogs may be used to sniff packages, cars, etc. As a general rule (depending upon its location), there is no reasonable expectation of privacy around a container sniffed by a dog. (People v. Mayberry (1982) 31 Cal.3rd 335; United States v. Diaz (6th Cir. 1994) 25 F.3rd 392, 296.)

A sniff by a trained drug detection dog in a public place is not a “search” within the meaning of the Fourth Amendment. (United States v. Place (1983) 462 U.S. 696, 707 [77 L.Ed.2nd 110, 121]; People v. $48,715 (1997) 58 Cal.App.4th 1507, 1515-1516.)

Use of a dog to sniff a motel room was lawful where the officers and the dog were voluntarily admitted by the defendant into the room and the dog was held on a six-foot
leash. The dog was where it had a lawful right to be. *(United States v. Esquilin* (1st Cir. 2000) 208 F.3rd 315.)

“(A) canine sniff is not a ‘search’ under the Fourth Amendment and thus ‘neither a warrant, nor probable cause, nor reasonable suspicion’ is required for its use. *(United States v. Lingenfelter* 997 F.2d 632, 639 (9th Cir. 1993).)” *(United States v. Todhunter* (9th Cir. 2002) 297 F.3rd 886, 891.)

The Fourth Amendment is not implicated when only the external features of a package, like the address label, are examined. *(United States v. Hoang* (9th Cir. 2007) 486 F.3rd 1156, 1160.)


Only when the police conduct a canine sniff in a private place, or in a manner which otherwise violates a reasonable expectation of privacy, is the resulting intrusion a search. *(Romo v. Champion* (10th Cir. 1995) 46 F.3rd 1013, 1016-1017.)

Running a properly trained narcotics-sniffing dog around a vehicle that is otherwise lawfully stopped for a traffic infraction does not implicate the Fourth Amendment, and is therefore not a search. As such, the defendant’s expectation of privacy is not violated. Assuming the dog is properly trained and that the traffic stop is not unlawfully prolonged, probable cause is lawfully established, justifying a warrantless search, when the dog alerts on a part of the car. *(Illinois v Caballes* (2005) 543 U.S. 405 [160 L.Ed.2nd 842], rejecting the argument that to do so “unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation.”)

And should a dog “instinctively” jump into the car, without assistance, facilitation, or other intentional act by the dog’s handler, alerting once inside the car, no search or Fourth Amendment violation has occurred. *(United States v. Pierce* (3rd Cir. 2010) 622 F.3rd 209.)
“The postal-inspector’s ‘use of a well-trained narcotics detection dog . . . [did] not implicate legitimate privacy interests.’”  
(United States v. Jefferson (9th Cir. 2009) 566 F.3rd 928, 933.)

Threatening to use a drug-sniffing dog, when such use does not require the suspect’s consent and is otherwise lawful, will also not invalidate the resulting consent to search.  
(United States v. Todhunter (9th Cir. 2002) 297 F.3rd 886, 891.)

A properly certified drug-detection dog’s alert on a container in a vehicle establishes probable cause (as opposed to merely a reasonable suspicion) to search that container even though it is never verified that the item actually contains something the dog is trained to detect.  
The fact that the dog sniffed into the open bed of a pickup truck does not make the dog’s acts a search.  And even if it is, a dog’s instinctive acts done without an officer’s instigation does not violate the Fourth Amendment.  
(People v. Stillwell et al. (2011) 197 Cal.App.4th 996.)

Sniffs of a person, being more intrusive, is considered, at least by the Federal Ninth Circuit Court of Appeal, to be a search controlled by the Fourth Amendment, and therefore require probable cause.  
(B.C. v. Plumas (9th Cir. 1999) 192 F.3rd 1260.)

In a school setting, however, with students having a diminished right to privacy, only a “reasonable suspicion” is required to justify the sniff of the student’s person.  
(Ibid.)

And it is the opinion of the California Attorney General that a policy of unannounced, random, neutral dog sniffing of students’ personal belongings, such as backpacks, purses, jackets, and outer garments, after ordering students to leave these items in a classroom and remain in another area, would be unconstitutional absent some suspicion or probable cause to support the search.  

Movement of containers to be sniffed, without taking the containers from the defendant (United States v. Harvey (8th Cir. 1992) 961 F.2nd 1361, 1363-1364.), or otherwise interfering with the defendant’s possessory interests (United States v. Johnson (9th
Cir. 1993) 990 F.2nd 1129, 1132-1133.), does not implicate the Fourth Amendment.

A consent to search, unless specifically limited, does not preclude the use of a drug detection dog, at least where the defendant should have been aware that the dog may be used and failed to object when it was. (People v. Bell (1996) 43 Cal.App.4th 754; United States v. Perez (9th Cir. 1994) 37 F.3rd 510, 516.)

An “alert” by “a certified, reliable narcotics detector dog,” with nothing more, is sufficient to establish probable cause to arrest. (United States v. Cedano-Arellano (9th Cir. 2003) 332 F.3rd 568.)

**Dogs Used to Track:**

**General Rule:** The use of a properly trained dog to track a suspect is lawful, and the evidence of canine tracking is admissible in court. (People v. Craig (1978) 86 Cal.App.3rd 905; “(W)e choose to require each particular dog’s ability and reliability to be shown on a case-by-case basis.” (Id., at pp. 916-917.)

See also People v. Malgren (1983) 139 Cal.App.3rd 234; dog tracked suspect for 35 minutes over about seven-tenths of a mile.

Per Malgren, the following must be shown before dog trailing evidence is admissible:

- The dog’s handler was qualified by training and experience in the use of the dog;
- The dog was adequately trained in tracking humans;
- The dog has been found to be reliable in tracking humans;
- The dog was placed on the track where circumstances indicted the guilty party to have been; and
- The trail had not become stale or contaminated.

Use of a dog to track defendant’s scent from a stolen vehicle to where defendant was being detained held to supply the necessary “fair probability” which, with other evidence, justified the defendant’s search and subsequent arrest for the theft of the vehicle. (In re Lennies H. (2005) 126 Cal.App.4th 1232, 1239.)
There is some authority requiring the corroboration of dog-tracking evidence, but the corroborative evidence need not necessarily independently link the accused to the crime. “The corroborative evidence need only support the accuracy of the tracking itself.”  

Use of a “scent transfer unit,” which extracts scents from an object, transferring the scents to a sterile gauze pad from which a dog may obtain the suspect’s scent, requires proof of the unit’s reliability and acceptability in the scientific community, per “*Kelly/Frye,*” and that it was properly used by the handler, to be admissible in court. (*People v. Mitchell* (2003) 110 Cal.App.4th 772; *People v. Willis* (2004) 115 Cal.App.4th 379.)

Referring to the standards for the admission into evidence of new scientific techniques, per *People v. Kelly* (1976) 17 Cal.3rd 24; and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.)

**Use of Dogs in Making Arrests:**

The Ninth Circuit Court of Appeal had previously held that “deadly force,” when evaluating the use of force by a law enforcement agency through the use of a police dog, should be defined as: “Force which is reasonably likely to cause (or which ‘had a reasonable probability of causing’) death.” (*Vera Cruz v. City of Escondido* (9th Cir. 1997) 139 F.3rd 659, 663; use of a police dog is not deadly force.)

E.g.: Use of a police dog to bite and hold a potentially dangerous fleeing felon for up to a minute, until the arresting officer could insure that the situation was safe, did not constitute the use of “deadly force,” and was therefore not a violation of the Fourth Amendment (seizure), despite the fact that the suspect’s arm was severely injured by the dog. (*Miller v. Clark County* (9th Cir. 2003) 340 F.3rd 959.)

The above, however, was a minority opinion. As a result, the Ninth Circuit has recently changed its mind, adopting the majority rule, agreeing that even in the use of a police dog, “deadly force” should be defined as “force that creates a substantial risk of death or serious bodily injury.” (*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3rd 689.)
“Deadly Force as Defined by the Model Penal Code § 3.11(2) (1962): “Force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury.” (Emphasis added.)

Note: The Ninth Circuit Court of Appeal further held in Smith that the defendant pleading guilty to resisting arrest, per P.C. § 148(a)(1), does not preclude him from suing the officers for using unreasonable force so long as the officer’s legal actions can be separated from his use of unreasonable force. The California Supreme Court later ruled in Yount v. City of Sacramento (2008) 43 Cal.4th 885, that it is not necessary to find the officers’ lawful actions divisible from their use of unreasonable use of force in order for the criminal defendant to be guilty of resisting arrest and still sue. Based upon this theory, the Ninth Circuit found that a criminal defendant, even after pleading guilty to resisting arrest per P.C. § 148(a)(1), may sue the officer for using unreasonable force in a continuous course of action so long as at least part of the officer’s actions were lawful. (Hooper v. County of San Diego (9th Cir. 2011) 629 F.3rd 1127.) Both Smith and Hooper are dog bite cases.

However, the use of a police dog does not necessarily constitute the use of deadly force. It depends upon the circumstances of the case in question. In such a case, the issue for a civil jury is to merely determine whether the force used was reasonable under the circumstances. (Thompson v. County of Los Angeles (2006) 142 Cal.App.4th 154.)
Chapter 12

Open Fields:

**General Rule**: The constitutional protections relating to homes do not apply to open fields beyond the curtilage of the home. (*Oliver v. United States* (1984) 466 U.S. 170 [80 L.Ed.2\textsuperscript{nd} 214].)

The **Fourth Amendment**, by its terms, protects only “persons, houses, papers and effects.” Open fields do not come within these four protected categories. (*United States v. Dunn* (1987) 480 U. S. 294, 300 [94 L. Ed. 2d 326]; see also *United States v. Jones* (Jan. 23, 2012) __ U.S. __ [132 S.Ct. 945; 181 L.Ed.2\textsuperscript{nd} 911].)

Therefore, trespassing onto defendant’s open land does not implicate the Constitution, and any observations made while doing so are admissible. (*Ibid; Hester v. United States* (1924) 265 U.S. 57 [68 L.Ed. 898].)

Narcotics officers entered the defendant’s land, past “No Trespassing” signs and barbed wire fencing. Entry into such an area, not part of the curtilage of any home, was not contested. (*United States v. Barajas-Avalos* (9th Cir, 2004) 359 F.3\textsuperscript{rd} 1204.)

A warrantless airplane search, acting on a tip, at altitudes of between 300 to 700 feet, resulting in observation of defendant’s half-football-field-sized marijuana grow, was lawful. (*Dean v. Superior Court* (1973) 35 Cal.App.3\textsuperscript{rd} 112.)

Similarly, observation of a marijuana patch from 1,500 to 2,000 feet, visible to the naked eye (and then enhanced through the use of binoculars), did not violate the defendant’s privacy rights. (*Burkholder v. Superior Court* (1979) 96 Cal.App.3\textsuperscript{rd} 421; see also *People v. St. Amour* (1980) 104 Cal.App.3\textsuperscript{rd} 886, observations made from 1,000 to 1,500 feet, again enhanced through the use of binoculars, held to be lawful; and *People v. Joubert* (1981) 118 Cal.App.3\textsuperscript{rd} 637.)

**Observations made into private areas from an “open field”** beyond the curtilage of the home are lawful. (*United States v. Dunn* (1987) 480 U.S. 294 [94 L.Ed.2\textsuperscript{nd} 326].)

California expressly follows the federal rule. (*People v. Channing* (2000) 81 Cal.App.4\textsuperscript{th} 985.)

Observations made from a common driveway used by other residents and the public into the curtilage of defendant’s home (i.e., his garage) were
lawful, and properly used in the affidavit for a search warrant. *(People v. Lieng (2010) 190 Cal.App.4th 1213, 1221-1227.)*

Use of night vision goggles didn’t change the result. *(Id., at pp. 1227-1228.)*
Chapter 13

Searches of Containers:

**General Rule:** As a general rule, a search warrant will be required in order to search a container of any type. “The Fourth Amendment of the United States Constitution prohibits the government from engaging in unreasonable searches and seizures of a person’s ‘effects.’” (*People v. Pereira* (2007) 150 Cal.App.4th 1106, 1111; see also *United States v. Monghur* (9th Cir. 2009) 588 F.3rd 975.)

Although there is some authority for the proposition that; “(t)he rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance” (*United States v. Ross* (1982) 456 U.S. 798, 809 [72 L.Ed.2nd 572, 584.], the courts have not yet specifically extended this rationale to objects in containers other than in vehicles or seized incident to a suspect’s arrest. (See Justice Stevens’ dissent in *California v. Acevedo* (1991) 500 U.S. 565, 598 [114 L.Ed.2nd 619, 646], pointing out that this is the next step.)

Also, property in the possession or under the control of a subject who is booked into custody is subject to search: “Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. (*People v. Robertson* 240 Cal.App.2d 99 (1966) 105-106 . . . .) During their period of police custody an arrested person’s personal effects, like his person itself, are subject to reasonable inspection, examination, and test. (*People v. Chaigles* 237 N.Y. 193 [142 N.E. 583, 32 A.L.R. 676], Cardozo, J.)” (*People v. Rogers* (1966) 241 Cal.App.2nd 384, 389; see also (*People v. Xinos* (2011) 192 Cal.App.4th 637, 662-663; search of a vehicle’s sensing and diagnostic module (SDM).)

But note that the warrantless downloading of the digital data of a vehicle’s SDM depends upon the continuing existence of probable cause justifying the search. (*Ibid.*)

As the law stands today, however, a search warrant will still generally be required under these circumstances. (*Smith v. Ohio* (1990) 494 U.S. 541, 542 [108 L.Ed.2nd 464, 467].)

A person has an expectation of privacy in his or her private closed containers. (*United States v. Welch* (9th Cir. 1993) 4 F.3rd 761, 764; a woman’s purse.)
Cardboard boxes belonging to a homeless person, being a place where the homeless person stores his or her most private belongings, may not be searched without a warrant or consent. (*United States v. Fultz* (9th Cir. 1998) 146 F.3rd 1102.)

If, however, the container is stolen property, or property obtained by fraud, then the defendant has no reasonable expectation of privacy in that property and will not have standing to object to the warrantless search of that property. (E.g.; *United States v. Wong* (9th Cir. 2003) 334 F.3rd 831; stolen computer; *United States v. Caymen* (9th Cir. 2005) 404 F.3rd 1196, 1200; computer obtained by fraud.)

While *seizure* of a package from which the odor of marijuana is emanating may be lawful, a warrantless *search* of that package absent exigent circumstances is not lawful. (*Robey v. Superior Court [Superior Court]* (2011) 200 Cal.App.4th 1; container not searched until taken to a police station.)

**Exceptions to the Warrant Requirement:** There are a number of legal theories justifying a warrantless search of containers. For instance:

**Incident to Arrest:** When a person is lawfully arrested, the police have a right to make a contemporaneous warrantless search (i.e., a search “incident to arrest”) of the defendant’s person (*Weeks v. United States* (1914) 232 U.S. 383 [58 L.Ed. 652].) and things under his immediate control. (*Carroll v. United States* (1925) 267 U.S. 132 [69 L.Ed.2nd 543].)

**Transportation Required:** This rule, however, only applies when the defendant is to be transported somewhere. If cited and released at the scene, no search, absent probable cause to believe the container contains some seizable contraband or evidence, is allowed. (See “Searches Incident to Arrest,” “Transportation Requirement,” above; and *People v. Brisendine* (1975) 13 Cal.3rd 528; and *United States v. Robinson* (1973) 414 U.S. 218 [38 L.Ed.2nd 427].)

The U.S. Supreme Court decided in *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485], that a warrantless search of a vehicle incident to arrest is lawful only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Property in the possession of a subject who is booked into custody is subject to search:
A person who is to be booked, and who has objects in his possession, may be subjected to an inventory search despite the lack of probable cause. (*Illinois v. Lafayette* (1983) 462 U.S. 640 [77 L.Ed.2nd 65].)

The right to conduct a warrantless booking search includes the right to search containers (e.g., purse, wallet, etc.) in the possession of the person to be booked. (*Illinois v. Lafayette*, *supra*; *People v. Hamilton* (1988) 46 Cal.3rd 123, 137.)

*Incident to Arrest, In a Vehicle:* When arresting an occupant of a motor vehicle, the officer may search the person arrested and the passenger areas of the vehicle, and any containers within the passenger area of the vehicle. (*New York v. Belton* (1981) 395 U.S. 752 [69 L.Ed.2nd 775].)

This includes containers belonging to passengers other than, and in addition to, the person arrested. (*People v. Mitchell* (1995) 36 Cal.App.4th 672; *People v. Prance* (1991) 226 Cal.App.3rd 1525; see also *Wyoming v. Houghton* (1999) 526 U.S. 295 [143 L.Ed.2nd 408], making containers left in a vehicle by passengers subject to search when searching a vehicle with probable cause to believe the vehicle contains contraband.)

If, however, the passenger takes the container (such as a purse) with him or her upon being ordered out of a vehicle, is that container subject to search? *Probably not* (see *United States v. Vaughan* (9th Cir. 1983) 718 F.2nd 332.), absent some reason to believe it may contain a weapon, in which case a “patddown” of the container may be appropriate.


Severely limiting the rule of *Belton*, the U.S. Supreme Court decided in *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2nd 485], that a warrantless search of a vehicle incident to arrest is lawful only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. As an alternate theory, likely to be applicable only to searches incident to arrest in a vehicle, the officer may search for evidence
relevant to the charge of arrest whenever it is “reasonable to believe” that such evidence is present in the car.

**People v. Diaz** (2011) 51 Cal.4th 84, creates an exception to **Gant**, finding that containers “immediately associated with the person” are still subject to a search incident to arrest, even though the suspect has been arrested and secured, and even if the container, removed from the defendant’s person, is not searched until later.


The old rule (see *United States v. Chadwick* (1977) 433 U.S. 1 [53 L.Ed.2nd 538].), that with probable cause to search a particular container located in a vehicle, a search warrant would be required, is no longer a valid rule. (*California v. Acevedo*, supra.)

And see *Wyoming v. Houghton* (1999) 526 U.S. 295 [143 L.Ed.2nd 408], holding that the searching of a passenger’s personal property left in a vehicle, with probable cause to believe there is seizable contraband somewhere in the vehicle, is lawful.

Also note that probable cause to believe there are controlled substances somewhere in the vehicle, even if the amount suspected is only enough for one’s personal use, justifies a search of the entire vehicle including the trunk and engine compartment. (*People v. Hunter* (2005) 133 Cal.App.4th 371; *People v. Dey* (2000) 84 Cal.App.4th 1318; finding the *United States v. Ross*, supra, has, in effect, overruled prior cases to the contrary. (E.g.; see *Wimberly v. Superior Court* (1976) 16 Cal. 3d 557; *People v. Gregg* (1974) 43 Cal. App. 3d 137.)

*When One Person in a Vehicle is Subject to a Fourth Waiver:*

A search of the female defendant’s purse left in the car when an officer is conducting a parole search of a male parolee, is illegal absent a reasonable suspicion to believe that the parolee had joint access, possession or control over the purse. (*People v. Baker* (2008) 164 Cal.App.4th 1152.)
With Defendant’s Admission as to the Contents:

When a suspect makes “an unequivocal, contemporaneous, and voluntary disclosure (to a law enforcement officer) that a package or container contains contraband,” he waives any reasonable expectation of privacy as to the contents of that container, eliminating the need to obtain a search warrant. (*United States v. Monghur* (9th Cir. 2009) 588 F.3rd 975, 978-981; citing *United States v. Cardona Rivera* (7th Cir. 1990) 904 F.2nd 1149.)

A jail inmate talking over a jail telephone, where he is warned that his conversations were subject to monitoring, asking a friend to retrieve what officers understood to be a gun (although defendant only referred to it as “the thing”) from a container (also described in vague, generic terms) in the closet of his girlfriend’s home, does not waive any expectation of privacy defendant had in the container that was later retrieved by law enforcement and illegally searched without a search warrant. (*United States v. Monghur*, supra.)

**Abandoned Property:** Any containers (or any other property) abandoned by a suspect, thus relinquishing at least an objectively reasonable expectation of privacy, if not also the subject’s subjective expectation of privacy, may be seized and searched without probable cause and without a search warrant. (*In re Baraka H.* (1992) 6 Cal.App.4th 1039.)

E.g.: A minor, who appeared to officers to be conducting narcotics transactions with passing motorists, retrieved controlled substances from a paper bag discarded on the ground some distance beyond the minor’s reach. When detained, the bag was retrieved by the officers and searched and marijuana was recovered. By distancing himself from the bag, the minor gave up any reasonable expectation of privacy in the bag’s contents. (*In re Baraka H.*, supra.)

Observations of defendant retrieving contraband from a hole in the ground, covered by a piece of wood, in the common area of an apartment complex, while the observing officers are standing on adjacent private property with the permission of the property’s owner, were lawful, as was the warrantless retrieval of the contraband found in the hole. (*People v. Shaw* (2002) 97 Cal.App.4th 833.)

There is no expectation of privacy in a duffle bag left in an apartment laundry room open to anyone, even though placed out of
the way on a high shelf.  (*United States v. Fay* (9th Cir. 2005) 410 F.3rd 589.)

*Trash cans:* There is no reasonable expectation of privacy in the trash containers one places out on the curb for pick up.  (*California v. Greenwood* (1988) 486 U.S. 35 [100 L.Ed.2nd 30].)

Leaving a cell phone at the scene of a crime negates the suspect’s expectation of privacy in the contents of that phone, and is therefore abandoned property despite the suspect’s subjective wish to retrieve it, which he fails to act on.  “Abandonment . . . is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.”  (*People v. Daggs* (2005) 133 Cal.App.4th 361.)

However, the abandonment must be voluntary.  Property abandoned as a result (i.e., the “direct product”) of an unlawful detention (or unlawful arrest) may *not* be lawfully searched.  (*United States v. Stephens* (9th Cir. 2000) 206 F.3rd 914.)

However, shipping a package while using a fictitious name and return address *does not* necessarily mean that the defendant has abandoned the property shipped.  Abandonment is a question of fact, and depends upon the totality of the circumstances.  The test is whether defendant’s words or actions would cause a reasonable person in the searching officer’s position to believe that the property was abandoned.  Where defendant asked for a routing number and made a number of telephone inquiries concerning the status of the package he had shipped, he was properly found to have *not* abandoned the package despite the use of a phony name and return address.  (*People v. Pereira* (2007) 150 Cal.App.4th 1106.)

There is no privacy right in the mouthpiece of the PAS device, which was provided by the police and where defendant abandoned any expectation of privacy in the saliva he deposited on the device when he failed to wipe it off.  Whether defendant subjectively expected that the genetic material contained in his saliva would become known to the police was irrelevant because he deposited it on a police device and thus made it accessible to the police.  The officer who administered the PAS test testified that used mouthpieces were normally discarded in the trash.  Thus, any
subjective expectation defendant may have had that his right to privacy would be preserved was unreasonable. *(People v. Thomas*(2011) 200 Cal.App.4th 338.)*

Special Needs:

*Search of Luggage in a Subway Facility:* Implemented in response to terrorist attacks on subways in other cities, a program was designed to deter terrorists from carrying concealed explosives onto the New York’s subway. The city program established daily inspection checkpoints at selected subway facilities where officers searched bags that met size criteria for containing explosives. Subway riders wishing to avoid a search were required to leave the station. In a bench trial, the district court found that the program comported with the *Fourth Amendment* under the “*special needs doctrine.*” On appeal, the court affirmed, finding that the program was reasonable and therefore constitutional. In particular, the court found that preventing a terrorist attack on the subway was a special need, which was weighty in light of recent terrorist attacks on subway systems in other cities. In addition, the court found that the disputed program was a reasonably effective deterrent. Although the searches intruded on a full privacy interest, the court further found that such intrusion was minimal, particularly as inspections involved only certain size containers and riders could decline inspection by leaving the station. *(MacWade v. Kelly*(2nd Cir. 2006) 460 F.3rd 260.)*

*Other “Expectation of Privacy” Issues:*

A jail inmate talking over a jail telephone, where he is warned that his conversations were subject to monitoring, asking a friend to retrieve what officers understood to be a gun (although defendant only referred to it as “the thing”) from a container (also described in vague, generic terms) in the closet of his girlfriend’s home, does not waive any expectation of privacy defendant had in the container that was later retrieved by law enforcement and illegally searched without a search warrant. *(United States v. Monghur* (2009) 588 F.3rd 975, 978-981.)*

*Monghur* differentiated these facts from a similar circumstance where defendant told law enforcement officers, clearly and unequivocally, that a particular container contained contraband. The Court in the case found that such a concession waived any expectation of privacy defendant might have had in the container, thus
allowing for a warrantless search of that container. (*United States v. Cardona-Rivera* (7th Cir. 1990) 904 F.2nd 1149.)

**Searches of Cell Phones, Disks, Computers and Other High Tech “Containers:”**

**Issue:** The legality of searching and retrieving information from cell phones, computer disks, thumb drives, computers, and other such high tech “containers” of information, seized from suspects or found during the search of a residence, etc., when done without a search warrant, can be an issue.

As a rule, however, it should be assumed that the general law on “containers” will be applicable, and that a search warrant will be required. (See *Smith v. Ohio* (1990) 494 U.S. 541, 542 [108 L.Ed.2nd 464].)

Arguably, exceptions to the warrant requirement *might* be found when the high tech device is:


  Contrary case law from another jurisdiction (*State v. Smith* (Ohio 2009) 920 N.E. 949), makes this issue ripe for United States Supreme Court review. However, the US Supreme Court has denied certiorari. (*Diaz v. California* (Oct. 3, 2011) 132 S.Ct. 94; 181 L.Ed.2nd 23.)

- In a car for which there is already probable cause to search. (*California v. Acevedo* (1991) 500 U.S. 565, 580 [114 L.Ed.2nd 619].)

- In the person’s possession when that person is booked into jail. (*People v. Rogers* (1966) 241 Cal.App.2nd 384, 389.)

- When the container is seized under authorization of a search warrant and to inspect its contents, using “technological aids,” requires further expert assistance. E.g., seizing an undeveloped roll of film, as authorized by a warrant, does not require a second warrant to develop
that film. (See People v. Superior Court [Nasmehl] (2007) 151 Cal.App.4th 85, 98, fn. 4; citing out-of-state authority for this theory; State v. Petrone (Wis. 1991) 161 Wis.2nd 530.)

A suspect’s “standing” should also be considered; i.e., is it a device in which the suspect has a reasonable expectation of privacy? (United States v. Caymen (9th Cir. 2005) 404 F.3rd 1196; People v. Daggs (2005) 133 Cal.App.4th 361; cell phone abandoned at the scene of the crime deprives the defendant of standing to contest its search.)

Proof that defendant had been receiving child pornography on his computer from two traffickers in such material, despite the lack of any evidence that the defendant himself solicited such material, was held to be sufficient probable cause to justify a finding that defendant knowingly, and illegally, possessed such material, justifying the issuance of a search warrant for defendant’s residence and his computer. (United States v. Kelley (9th Cir. 2007) 482 F.3rd 1047.)

The same rule is applicable a “mirror port,” which is similar to a pen register, but which allows the government to collect the “to” and “from” addresses of a person’s e-mail messages, the IP addresses of the websites the person visits, and notes the total volume of information sent to or from the person’s account. (United States v. Forrester (9th Cir. 2008) 512 F.3rd 500.)

A search warrant authorizing the search for specific documents, during which a computer was found under circumstances where it was reasonable to believe that the computer was a container of those documents, allowed for the seizure of (and probably search of) the computer, even though the computer was not specifically listed in the warrant. Also, a computer is not entitled to a heightened level of proof. (United States v. Giberson (9th Cir. 2008) 527 F.3rd 886-889.)

Downloading and installing onto one’s computer “LimeWire,” a file-sharing program which allows users to search for and share with one another various types of files, compromises a participant’s expectation of privacy in the contents of the affected files, thus allowing for a warrantless search of those files via LimeWire by law enforcement. (United States v. Ganoe (9th Cir. 2008) 538 F.3rd 1117.)
It is irrelevant that the defendant attempted unsuccessfully to install a program included with LimeWire that if installed properly, prevents others from accessing his files. It is also irrelevant that the investigator discovered defendant’s child pornography through the use of a program unavailable to the general public. Neither circumstance means that defendant had a reasonable expectation of privacy in his files when he used a file-sharing program such as LimeWire. (United States v. Borowy (9th Cir. 2010) 595 F.3d 1045, 1048.)

The Court in Borowy further held that the investigator had probable cause to open up his files based upon discovering files with names that were explicitly suggestive of child pornography and that they were discovered using a search term known to be associated with child pornography, resulting with two such files being “red-flagged” by the program, indicating that they contained child pornography. (Id., at p. 1049.)

A properly qualified expert officer’s opinion, connecting common characteristics of a child molester with known facts related to a child molest and the molester’s act of hiding his computer, establishes probable cause supporting a search warrant for that computer. (People v. Nicholls (2008) 159 Cal.App.4th 703.)

Customs Officers at an international border, or the “functional equivalent” of a border (e.g., an international airport) may search a person’s computer without any reasonable suspicion. (United States v. Arnold (9th Cir. 2008) 533 F.3d 1003.)

The Court further held that a high-tech container, such as a computer, does not require a higher standard of probable cause for a warrant application, even when “expressive (i.e., First Amendment) material” is involved. (Id., at p. 1010.)

California is in accord with Arnold, holding that, “(a) computer is entitled to no more protection than any other container.” (People v. Endacott (2008) 164 Cal.App.4th 1346; suspicionless search of defendant’s laptop computers upon his arrival at Los Angeles International Airport from Thailand upheld.)

Endacott further held that the fact that the computer is further searched at some time after the initial border crossing is irrelevant. The right to do a warrantless,
suspicionless search continues indefinitely. *(Id.*, at p. 1350.)*

The seizure of defendant’s computer and all computer related items (e.g., compact disks, floppy disks, hard drives, memory cards, DVDs, videotapes, and other portable digital devices), based upon no more than the discovery of one printed-out photo of child pornography, was lawful in that it was reasonable to conclude that the picture had come from his computer and that similar pictures were likely to be stored in it. *(United States v. Brobst* (9th Cir. 2009) 558 F.3rd 982, 994.)*

Failure to include the magistrate’s authorization to search defendant’s computer, even though in the statement of probable cause the affiant indicated a desire to search any possible computers found in defendant’s house, was a fatal omission. Searching defendant’s computer, therefore, went beyond the scope of the warrant’s authorization. *(United States v. Payton* (9th Cir. 2009) 573 F.3rd 859, 861-864.)*

The fact that the issuing magistrate testified to an intent to allow for the search of defendant’s computers, and that the warrant included authorization to search for certain listed records which might be found in a computer, was held to be irrelevant. *(Id. at pp. 862-863.)*

But see *United States v. Giberson* (9th Cir. 2008) 527 F.3rd 882, where it was held that some circumstances might lead searching officers to a reasonable conclusion that documentary evidence they are seeking would be contained in computers found at the location, authorizing the search of those containers despite the failure of the warrant to list computers as things that may be searched. It was recommended, however, that the computer be seized and a second warrant be obtained.

A city did not violate an employee’s (a police officer) Fourth Amendment rights and right to privacy under the Federal Stored Communications Act (18 U.S.C. §§ 2701 et seq.) by obtaining and reviewing transcripts of the employee’s text messages sent via a city pager where there were reasonable grounds for suspecting that the search was necessary for a non-investigatory work-related purpose because the search was done in order to determine whether the character limit on the city's contract was sufficient to meet the city's needs. Also, the city and a police department had a legitimate interest in ensuring that employees were not being
forced to pay out of their own pockets for work-related expenses, or on the other hand, that the city was not paying for extensive personal communications. The search was permissible in its scope because reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether the employee's overages were the result of work-related messaging or personal use. (*Ontario v. Quan* (June 17, 2010) 560 U.S. __ [130 S.Ct. 2619; 177 L.Ed.2nd 216].)

Declining to rule on the application of an employee’s privacy rights in the workplace, as they relate to the use of high-tech devices, the Court assumed for the sake of argument, without deciding, that the plaintiff/respondent had a right to privacy in the contents of text messages made via an employer-issued pager. However, the “special needs” of the workplace allow for this intrusion into plaintiff/respondent’s privacy rights when conducted for a “noninvestigatory, work-related purpose.” (*Id.*, at p. __ [130 S.Ct. at pp. 2629-2630]; i.e., to determine whether the allotted number of messages was insufficient, requiring employees to pay for office-related messages, or whether employees were using the pagers for non-work related purposes.)

A signal photograph of a nude minor (female child who is between 8 and 10 years old), by itself, is insufficient to establish probably cause for a search warrant. But a second such photo, under the “totality of the circumstances,” is enough. (*United States v. Battershell* (9th Cir. 2006) 457 F.3rd 1048.)

However, a single photograph of a nude minor (female of about 15 to 17 years of age), when combined with other suspicious circumstances (e.g., 15 computers in house found in complete disarray, with two minors not belonging to the defendant, where the defendant a civilian, is staying in military housing), may be enough to justify the issuance of a search warrant. (*United States v. Krupa* (9th Cir. 2011) 658 F.3rd 1174, 1177-1179; but see dissent, pp. 1180-1185.).

*Note:* It is likely that a whole new set of rules, unique to the searching of such high-tech devices, will eventually evolve. (See *Kyllo v. United States* (2001) 533 U.S. 27 [150 L.Ed.2nd 94].) This includes the use of high-tech devices in the workplace. (*Ontario v. Quan* (June 17, 2010) 560 U.S. __, ___ [130 S.Ct. 2619, 2629-2630; 177 L.Ed.2nd 216].) But as of now, the law in the area of
searching high-tech devices is still in its infancy and yet to be specifically analyzed by the Supreme Court.

Allowing another person unrestricted access to a mutually owned computer negates any expectation of privacy the first person might have had. A co-owner has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search. (United States v. Stanley (9th Cir. 2011) 653 F.3rd 946, 950-952.)

Search of Unauthorized Cell Phone Recovered at CDCR:

P.C. § 4576: CDCR (California Department of Corrections and Rehabilitation) shall not access data or communications that have been captured using available technology from the unauthorized use of a wireless communication device except after obtaining a search warrant.

With Consent of a Third Person having Common Authority:

Paper bags left by defendant in an acquaintance’s garage, where the acquaintance had free access to the bags, may be lawfully searched with consent from the acquaintance. By leaving the bags with the acquaintance, knowing and not objecting to the fact that she (the acquaintance) would go into the bags, defendant “assumed the risk” that she would allow others to look into the bags. (People v. Schmeck (2005) 37 Cal.4th 240, 280-282.)

A business that owns the company’s computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no reasonable expectation of privacy in the contents of the computer he is using. (United States v. Ziegler (9th Cir. 2006) 474 F.3rd 1184.)

Allowing another person unrestricted access to a mutually owned computer negates any expectation of privacy the first person might have had. A co-owner has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search. (United States v. Stanley (9th Cir. 2011) 653 F.3rd 946, 950-952.)

The “Single Purpose Container” Theory:

Where “some containers . . . by their very nature cannot support any reasonable expectation of privacy because their contents can
be inferred from their outward appearance,” a warrant is not needed to open the container and inspect its contents. In such a case, it is as if the item in the container was in “plain sight.” (Arkansas v. Sanders (1979) 442 U.S. 753, 764, fn. 13 [61 L.Ed.2nd 235]; overruled on other grounds in California v. Acevedo (1991) 500 U.S. 565 [114 L.Ed.2nd 619].)

“(I)f the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from the searching officer’s view,” just as “if the container were transparent.” (Robbins v. California (1981) 453 U.S. 420, 427 [69 L.Ed.2nd 744]; overruled on other grounds in United States v. Ross (1982) 456 U.S. 798 [72 L.Ed.2nd 572].)

Plastic wrapped green blocks found not to be within this exception, in Robbins.

Per the plurality, for this rule to apply; “(A) container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer.” (Robbins v. California, supra, at p. 428.)

It’s a question of whether a defendant has a “reasonable expectation of privacy” in the contents of a container. There is none if the contents are within a container that meets the requirements of this rule. (United States v. Gust (9th Cir. 2005) 405 F.3rd 797; a gun case that just as easily could have contained a musical instrument.

The Ninth Circuit Court of Appeal in Gust limited the applicability of this rule by holding that the nature of the container must be evaluated in light of “the objective viewpoint of a layperson, rather than the subjective viewpoint of a trained law enforcement officer, and without sole reliance on the specific circumstances in which the containers were discovered.” In other words, the officers’ expertise, and the circumstances under which the container is found, must be ignored. (Citing United States v. Miller (9th Cir. 1985) 769 F.2nd 554.)

An Internet subscriber has no expectation of privacy in the subscriber information he supplies to his Internet provider. (People v. Stipo (2011) 195 Cal.App.4th 664, 668-669.)
Containers Searched by Non-Law Enforcement: Contraband found by a civilian in a container, such as when a United Parcel Service ("UPS") or Federal Express employee opens and inspects the contents of a package being shipped through their respective businesses, is not subject to suppression. When law enforcement is subsequently notified after such an inspection, the contents of the package may be field tested by a law enforcement officer, seized, and submitted to a law enforcement lab for further testing; all without a warrant. (*People v. Warren* (1990) 219 Cal.App.3rd 619; see also *United States v. Jacobsen* (1984) 466 U.S. 109 [80 L.Ed.2nd 85]; *United States v. Young* (9th Cir. 1998) 153 F.3rd 1079.)

*Why?* Once a private party (i.e., non-law enforcement) has made a search and revealed his findings to the police, the defendant’s expectation of privacy has been destroyed to the extent of the private search. Thus, where employees of a private freight carrier found apparent narcotics during the search of a package, then returned the substance to the package and informed narcotics agents, the agents’ removal of the substance from the package did not constitute a search, because it did not exceed the scope of the earlier private search. (*United States v. Jacobsen*, supra, at p. 116, 119 [80 L.Ed.2nd at p. 96, 98] see also *People v. Yackee* (1984) 161 Cal.App.3rd 843; cocaine found by airline agent.)

The *Fourth Amendment* was not implicated by a police officer’s view of property found in defendant’s vehicle and inventoried by a private repossessor. (*People v. Shegog* (1986) 184 Cal.App.3rd 899, 902.)

A government agent may test suspicious substances discovered during a search by a private person without having to obtain a search warrant. (*People v. Warren*, supra, at p. 623.)

A private citizen viewing discs taken by the citizen from the defendant’s bedroom, and then showing the same discs to a police officer, is not an illegal search. Also, the fact that the officer may view images on those discs not previously seen by the citizen is irrelevant “if the police knew with substantial certainty” that the same type of images would be found. But looking at other unmarked discs not previously viewed by the private citizen, not knowing for sure what might be on them, requires a search warrant. (*People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1569-1574.)

*Note:* The argument that a container, not already opened and viewed by the private citizen, can be opened by the police officer “if the police knew with substantial certainty”
that it contains more of the same, comes from *United States v. Runyan* (5th Cir. 2001) 275 F.3\textsuperscript{rd} 449, 463.

If, however, the civilian is acting according to a governmental directive (e.g.; FAA guidelines for searching packages at an airport), the civilian *may* be held to the same standard as a law enforcement officer. (*United States v Ross* (9th Cir. 1994) 32 F.3\textsuperscript{rd} 1141; *United States v. Young* (9th Cir. 1998) 153 F.3\textsuperscript{rd} 1079.)

Indeed, even a “tacit agreement” between a law enforcement officer and a civilian that the civilian will conduct a particular search which the officer could not lawfully perform will result in the civilian being considered to be the officer’s agent, and suppression of the evidence found by the civilian. (*People v. North* (1981) 29 Cal.3\textsuperscript{rd} 509.)

Also, an airline employee who had in the past been a paid informant for the Drug Enforcement Administration (“DEA”), who opened a package after being encouraged by the DEA to do so on a routine basis, expecting a probable reward from DEA because of having received rewards for opening similar packages before, was held to be a government agent even though he had not been directed to open this particular package. (*United States v. Walther* (9th Cir. 1981) 652 F.2\textsuperscript{nd} 788.)

Note, however, it is doubtful whether merely having been informed by law enforcement of the power to open and inspect packages automatically turns a civilian into a police agent. (See *People v. Wachter* (1976) 58 Cal.App.3\textsuperscript{rd} 311, 920-923, finding that even a police officer, when off duty and acting out of mere curiosity, may *not* be acting as a law enforcement officer in conducting a search.)

See also *People v. Peterson* (1972) 23 Cal.App.3\textsuperscript{rd} 883, 893; off-duty police trainee searching a container in his apartment house garage out of concern for his own safety.

The Ninth Circuit Court of Appeal declined to extend this rule to a hotel room and to a backpack in the hotel room, both of which had been looked into previously by non-law enforcement hotel employees. While the package in *United States v. Jacobsen* (1984) 466 U.S. 109 [80 L.Ed.2\textsuperscript{nd} 85], contained nothing but contraband (i.e., cocaine), defendant’s hotel room and his backpack in this case contained other items that were not illegal.
and to which the defendant maintained a reasonable expectation of privacy.  (*United States v. Young* (9th Cir. 2009) 573 F.3rd 711, 720-721.)

**Exterior of a Container:**

There is no expectation of privacy in the outside of a piece of mail sent to the defendant. “(B)ecause the information is foreseeably visible to countless people in the course of a letter reaching its destination, ‘an addressee or addressee generally has no expectation of privacy as to the outside of mail.’” (*People v. Reyes* (2009) 178 Cal.App.4th 1183, 1189-1192; quoting *United States v. Osunegbu* (1987 5th Cir.) 822 F.2nd 472, 380, fn. 3; see also *United States v. Jefferson* (9th Cir. 2009) 566 F.3rd 928, 933.)

In *Reyes*, an employee of a private postbox company spontaneously handed officers defendant’s mail when the officers inquired as to whether defendant had rented a box at that facility even though the employees didn’t “normally” hand over a clients’ mail absent a court order. Defendant was never told that his mail would be kept private.

**Customs Inspections:** Similarly, the United States Supreme Court has held that evidence lawfully observed by a customs inspector, during a warrantless border search and resealed in its container, may later be seized from that container without a warrant by law enforcement officers after a controlled delivery to the defendant. “(O)nce a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. Consequently, the subsequent reopening of the container is not a ‘search’ within the intendment of the Fourth Amendment.” (*Illinois v. Andreas* (1983) 463 U.S. 765 [77 L.Ed.2nd 1003].)

The Court did note, however, that at some point after an interruption of control or surveillance of a container, such as when the defendant changes the contents of the container, the defendant may regain a legitimate privacy right. (*Id.*, at p. 772 [77 L.Ed.2nd at p. 1011].)

See “Border Searches,” below.

“Manipulating,” “Squeezing” or “Poofing” Containers: Whether or not a container can be “manipulated,” “squeezed,” or “poofed” without implicating the Fourth Amendment is subject to a difference of opinion, and depends upon the circumstances. For instance:
At an Airport: At least where there is some need for heightened security, such as when dealing with airline luggage, squeezing a package and noting the odor of the expended air has been held to be lawful. (*People v. Santana* (1998) 63 Cal.App.4th 543; *United States v. Lovell* (5th Cir. 1988) 849 F.2nd 910.)

However, the Ninth Circuit Court of Appeal disagrees. Squeezing a bag checked with an airline to facilitate smelling its contents is an unconstitutional search. (*Hernandez v. United States* (9th Cir. 1965) 353 F.2nd 624.)

At a Bus Station: Although a lower federal appellate court has held that squeezing one’s luggage in a bus is such a minor intrusion that it could not reasonably be considered a search for purposes of the Fourth Amendment (*United States v. Viera* (5th Cir. 1981) 644 F.2nd 509.), the United States Supreme Court apparently disagrees, and has held that the squeezing of a soft-sided suitcase on a bus, thus noting the feel of a “brick” of contraband, is a search and illegal if done without probable cause. (*Bond v. United States* (2000) 529 U.S. 334 [146 L.Ed.2nd 365].)

During a Detention and Patdown: If a police officer feels what might be a controlled substance in the pocket of a suspect during a patdown for weapons, and “manipulates” (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 378 [124 L.Ed.2nd 334, 345]; *People v. Dickey* (1994) 21 Cal.App.4th 952, 957.) or “shakes” it (*United States v. Miles* (9th Cir. 2001) 224 F.3rd 1009.) in an attempt to confirm or verify his suspicions, the manipulation or shaking of the object is a search for contraband, done without probable cause, and illegal.

But, feeling a bulge that is believed to be a weapon, and manipulating it in an attempt to verify that it is a weapon, which requires no more than a reasonable suspicion, is lawful. (*United States v. Mattarolo* (9th Cir. 1999) 209 F.3rd 1153.)


Detention of a Container: A container, with a “reasonable and articulable suspicion” that it may have contraband or other evidence of illegal activity inside, may be detained for a reasonable period of time to allow for an investigation concerning its possible contents. (*United States v. Hernandez* (9th Cir. 2002) 313 F.3rd 1206; package mailed to the defendant detained by postal inspectors.)
“(W)e conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.” (United States v. Place (1983) 462 U.S. 696, 706 [77 L.Ed.2nd 110, 120].)

Although the sender of a package through the U.S. mails retains little if any interests after the package is sent (United States v. Place, supra, at p. 718, fn. 5 [77 L.Ed.2nd at p. 128].), the intended recipient retains possessory and privacy rights in the package’s contents. (Walter v. United States (1980) 447 U.S. 649, 654 [65 L.Ed.2nd 410. 416]; United States v. Gill (9th Cir. 2002) 280 F.3rd 923, 929.) However, the recipient of a mailed package has only a reasonable expectation that delivery will not be delayed. So long as the package is delivered on time, the Fourth Amendment is not implicated merely by a temporary diversion of that package. (United States v. Demoss (8th Cir. 2002) 279 F.3rd 632, 639; United States v. England (9th Cir. 1992) 971 F.2nd 419, 420-421.)

An addressee has both a possessory and a privacy interest in a mailed package. (United States v. Hernandez, supra, at p. 1209; United States v. Hoang (9th Cir. 2007) 486 F.3rd 1156, 1159; United States v. Jefferson (9th Cir. 2009) 566 F.3rd 928, 933-935.)

The “possessory interest” in a mailed package, however, is “solely in the package’s timely delivery. (United States v. Hoang, supra, at p. 1160, citing United States v. England, supra, at pp. 420-421; United States v. Jefferson, supra.)

A postal inspector in Alaska had sufficient reasonable suspicion to detain defendant’s package when he was told that defendant was behaving suspiciously by asking about Postal Service drug detection practices, and the package listed a fictitious sender and addressee and an incomplete California return address, was shipped with delivery confirmation service, had a handwritten label, and was heavily taped. Marijuana and excessive money had also been found in defendant’s home some months earlier. The court was satisfied that the length of detention between initial seizure and the development of probable cause, 22 hours, was not unreasonable, particularly given the
difficulty of travel in Alaska with a drug-sniffing dog.  
*United States v. Lozano* (9th Cir. 2010) 623 F.3rd 1055. 

*How long* a container may be detained (i.e., a “reasonable time”) depends upon the circumstances.  

*United States v. Hernandez* (9th Cir. 2002) 313 F.3rd 1206; twenty-two hours held to be justifiable.  

*United States v. Dass* (9th Cir. 1988) 849 F.2nd 414; packages held from seven to twenty-three days found to be excessive.  

*United States v. Aldaz* (9th Cir. 1990) 921 F.2nd 227; three to five day detention found to be reasonable under the circumstances.  

*United States v. Gill* (9th Cir. 2002) 280 F.3rd 923, 926-929; six-day delay, over a weekend, okay.  

*United States v. Lozano* (9th Cir. 2010) 623 F.3rd 1055; 22 hours, particularly given the difficulty of travel in Alaska with a drug-sniffing dog.  

*United States v. Mayomi* (7th Cir. 1989) 873 F.2nd 1049, 1053-1054: A two-day detention of two letters was acceptable because it was supported by probable cause.  

*Also note:*  

A ten-minute delay does not significantly interfere with the timely delivery of a package in the normal course of business, and therefore does not even need a reasonable suspicion to justify. The package would have been delivered at the same time even without this delay.  
*United States v. Hoang* (9th Cir. 2007) 486 F.3rd 1156.  

*But see United States v. Place* (1983) 462 U.S. 696 [77 L.Ed.2nd 110]: The detention of a suspect's luggage at an airport for exposure to a trained narcotics dog was held to exceed the bounds of a permissible investigative detention and was unreasonable under the *Fourth Amendment*. The evidence obtained from the subsequent search of the
luggage was held to be inadmissible where the luggage was detained for 90 minutes and where the officers failed to accurately inform the suspect of the place to which they were transporting his luggage, the length of time he might be dispossessed, and what arrangements would be made for the return of the luggage if the investigation dispelled the suspicion.

A key factor in Place was that the containers (the defendant’s suitcases) were seized from his person as opposed to the mail.

Detention of a package mailed via the United States postal service during that time period up to when delivery has been guaranteed is reasonable and therefore lawful despite the lack of any suspicion to believe it contains contraband. (United States v. Jefferson (9th Cir. 2009) 566 F.3rd 928, 933-935; during which time a narcotics-sniffing dog was used to alert on the package and a search warrant was obtained.)

Holding onto the package beyond this time period, to be lawful, requires an “articulable (reasonable) suspicion that the package contains contraband or evidence of illegal activity.” (Id., at p. 935.)
Chapter 14

Border Searches:

**General Rule:** The United States has an interest in keeping drugs and undocumented aliens, etc., out of the country. Therefore, the search and seizure standards are relaxed a bit at the International Borders. (*Carroll v. United States* (1925) 267 U.S. 132, 154 [69 L. Ed. 543, 551-552].)

“(B)order searches ...[are] considered to be ‘reasonable’ by the single fact that the person or item in question has entered into our country from outside.” (*United States v. Ramsey* (1977) 431 U.S. 606, 619 [52 L.Ed.2nd 617, 628].)

“(A)t least with respect to the Fourth Amendment’s suspicion requirements, a routine border search ‘is by its very nature reasonable.’” (*United States v. Guzman-Padilla* (9th Cir. 2009) 573 F.3rd 865, 877; quoting *United States v. Dobson* (9th Cir. 1986) 781 F.2nd 1374, 1376.)

“‘The task of guarding our country’s border is one laden with immense responsibility.’ *United States v. Bravo*, 295 F.3rd 1002, 1005 (9th Cir. 2002). Border agents serve as our first line of defense in preventing people intent on violating our laws from coming into our country.” (*United States v. Hernandez* (9th Cir. 2002) 314 F.3rd 430, 433-434.)

However, while Border Patrol agents may conduct routine searches “without any articulable level of suspicion,” they still need “probable cause” to make a warrantless arrest. (*Id.,* at p. 434.)

“The government has more latitude to detain people in a border-crossing context [Citation], but such detentions are acceptable only during the time of extended border searches [Citations].” (*United States v. Juvenile [RRA-A]* (9th Cir. 2000) 229 F.3rd 737, 743.)

**The statutory arrest and search authority** for officers and employees of the Immigration and Nationalization Service (i.e., Border Patrol) is contained in 8 U.S.C. § 1357(a): “Powers without a warrant. Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without a warrant:”

- To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States. (*Subd. (1))

- To arrest aliens entering, or who have already entered, the United States illegally. (*Subd. (2))
• To conduct warrantless searches of private lands within 25 miles of the border. (Subd. (3).)

However, private dwellings within this 25-mile area are excluded under the terms of this statute from those areas subject to a warrantless search. Although not specifically stated in the statute, the curtilage of a home (which would typically include the back and side yards of a residence), by case law, is included within this exclusion. (*United States v. Romero-Bustamente* (9th Cir. 2003) 337 F.3rd 1104.)

• To arrest for felony violations of the immigration laws. (Subd. (4))

• To arrest for (A) any offense against the United States, committed in the officer’s or employee’s presence; or (B) any federal felony. (Subd. (5))

*8 U.S.C. § 1357(c)* provides for the power to search the person and personal effects in the possession of any person seeking admission to the United States, with “reasonable cause” to suspect that grounds for denial of admission would be disclosed by such search.

Because the United States has many miles of shoreline, the Government must have authority to stop and search boats off the coast in order to effectively guard our borders:

The statutory authority for Customs Agents to conduct boat and vehicle searches is contained in *19 U.S.C. § 1581(a)*: “Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States . . . or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers, and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.”

It has been stated that this statute “reflects the ‘impressive historical pedigree’ of the Government’s power and interest, [citation]. It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity.” (*United States v. Flores-Montano* (2004) 541 U.S. 149, 153 [158 L.Ed.2nd 311, 317].)
The statutory authority for the Coast Guard to search vessels is contained in 14 U.S.C. § 89(a): “The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.”

Interdiction Authority: 31 U.S.C. § 5317 provides Customs officials with the authority to conduct interdiction inspections:

Subd. (b): “(A) customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.” (See United States v. Seljan (9th Cir 2008) 547 F.3rd 993, 1001; a currency interdiction inspection, resulting in the recovery of evidence that defendant was traveling to the Philippines to have sex with underage minors; no suspicion required.)

“(S)earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.” (United States v. Flores-Montano (2004) 541 U.S. 149, 152-153 [158 L.Ed.2nd 311].)

Customs Officers at an international border, or the “functional equivalent” of a border (e.g., an international airport), may search a person’s computer without any reasonable suspicion. (United States v. Arnold (9th Cir. 2008) 533 F.3rd 1003.)
The Court further held that a high-tech container, such as a computer, does not require a higher standard of probable cause for a warrant application, even when “expressive (i.e., First Amendment) material” is involved. (Id., at p. 1010.)

California is in accord with Arnold. (People v. Endacott (2008) 164 Cal.App.4th 1346.)

Endacott further held that the fact that the computer is further searched at some time after the initial border crossing is irrelevant. The right to do a warrantless, suspicionless search continues indefinitely. (Id., at p. 1350.)

Endacott also agrees with United States v. Arnold, supra, in holding that, “(a) computer is entitled to no more protection than any other container.” (Ibid.)

Routine vs. Non-Routine Searches: In determining what level of suspicion of criminal activity is required to justify any particular search, courts, at one time, would break down the searches into “routine” and “non-routine,” which in turn would be determined by the “level of intrusiveness” involved. (United States v. Flores-Montano (2004) 541 U.S. 149 [158 L.Ed.2nd 311].)

Routine Searches may be performed with no specific particularized suspicion, under authority of 19 U.S.C. § 1581(a), as described above. Such searches have been held to include searches of handbags, luggage, shoes, pockets and the passenger compartments of cars. (United States v. Montoya De Hernandez (1985) 473 U.S. 531 [87 L.Ed.2nd 381]; United States v. Ramos-Saenz (9th Cir. 1994) 36 F.3rd 59; United States v. Sandoval Vargas (9th Cir. 1988) 854 F.2nd 1132; United States v. Palmer (9th Cir. 1978) 575 F.2nd 721; United States v. Cotterman (9th Cir. 2011) 637 F.3rd 1068, 1074-1075.)

See also United States v. Flores-Montano (9th Cir. 2005) 424 F.3rd 1044, applying section 1581(a), rejecting the defendant’s argument that 19 U.S.C. § 482 (which does talk in terms of a necessary reasonable suspicion) applied to the border searches of vehicles.

In-coming international mail, including packages, are included within this category. “Border searches of international mail are per se ‘reasonable’ under the Fourth Amendment, without any need to show probable cause.” (People v. Blardony (1998) 66

The requirement under 19 U.S.C. § 1582 that there be a “reasonable suspicion” justifying the search of in-coming mail is not constitutionally required, and a violation of this requirement will not result in suppression of any evidence. (People v. Blardony, supra, at p. 794; United States v. Ani, supra.)

X-ray examination of luggage, bags, and other containers at a border is routine and requires neither a warrant nor individualized suspicion. (United States v. Okafor (9th Cir. 2002) 285 F.3rd 842.)

The taking of a gas tank out of a vehicle to inspect its contents, given the minimal intrusiveness of such an act, is considered by the United States Supreme Court to be a “routine” search, not requiring any articulable suspicion to justify. (United States v. Flores-Montano (2004) 541 U.S. 149 [158 L.Ed.2nd 311]; overruling the Ninth Circuit’s conclusion to the contrary in United States v. Molina-Tarazon (2002) 279 F.3rd 709.)

Use of a “Buster” on a vehicle, given the lack of any proof that the defendant was exposed to any danger from the radioactivity in the device, does not require any suspicion in a search at the border. (United States v. Camacho (9th Cir. 2004) 368 F.3rd 1182.)

A “Buster” is “a handheld portable density gauge. . . . It contains a tiny bead of radioactive material called barium 133 that’s inside a sealed container. . . . (W)hen the actuating trigger is pushed, the container rolls to an open slot and exposes the radiation in a forward direction (providing a reading on the density of an object).” A higher reading than normal indicates that something not normally there is hidden in the object being evaluated, such as the spare tire in this case. (Ibid.)

The search of a passenger’s cabin on a cruise ship, upon returning from a foreign port, is a “routine border search” and does not require any suspicion. (People v. Laborde (2008) 163 Cal.App.4th 870.)

Non-Routine Searches require a “reasonable suspicion” the person or thing to be searched contains something illegal, and have been held to include body cavity searches, strip searches, patdowns and involuntary x-

The Ninth Circuit Court of Appeal, in *United States v. Molina-Tarazon*, *supra*, found three factors which, when present, warrant the finding that a particular search is non-routine; i.e., (1) the use of force, (2) danger, and (3) fear. The Court, perhaps stretching its credibility a bit, found evidence of each in the removal of a vehicle’s gas tank.

The United States Supreme Court overruled *Molina-Tarazon*, so far as it related to the intrusiveness of taking a gas tank out of a vehicle, finding instead that to do so does not require any articulable suspicion. (*United States v. Flores-Montano* (2004) 541 U.S. 149 [158 L.Ed.2nd 311].)

See also *United States v. Cedano-Arellano* (9th Cir. 2003) 332 F.3rd 568; a certified detection dog’s alert on defendant’s gas tank, plus defendant’s nervousness, evasiveness and suspicious responses, sufficient “reasonable suspicion” to justify the removal of his gas tank.

*X-Rays of the Person:* An x-ray search requires a “heightened level” of suspicion because it is potentially harmful to the health of the suspect. (*United States v. Ek* (9th Cir. 1982) 672 F.2nd 379, 382.)

The United States Supreme Court in *United States v. Montoya De Hernandez*, *supra*, at pp. 540-541, criticized the use of the phrase “heightened level of suspicion,” preferring to use the standard “reasonable suspicion” requirement.

Use of a “Buster,” however, on a vehicle, given the lack of any proof that the defendant was exposed to any danger from the radioactivity in the device, does not require any suspicion in a search at the border. (*United States v. Camacho* (9th Cir. 2004) 368 F.3rd 1182.)

*Extended detentions* at the border, and all stops or detentions away from the border, are also non-routine. (*United States v. Montoya De Hernandez*, *supra*, and *People v. Superior Court* (1973) 33 Cal.App.3rd 523.)
Cutting open luggage, if permanent damage is caused, is likely to be held to be a non-routine search, depending upon the extent of the damage. (*United States v. Okafor* (9th Cir. 2002) 285 F.3rd 842.)

**Destructiveness of the Search:** More recent authority has criticized the practice of classifying border searches as routine or non-routine. Rather, the “destructiveness” of the search is the more important factor to consider. (*United States v. Cortez-Rocha* (9th Cir. 2004) 383 F.3rd 1093, citing *United States v. Flores-Montano*, supra.)

In *Cortez-Rocha*, supra, the Ninth Circuit Court of Appeal, in a split, two-to-one decision, held that cutting open a spare tire of a vehicle is not so destructive as to require a finding of a reasonable suspicion in order to justify.

Removal of a gas tank is not so destructive as to require a reasonable suspicion to justify. (*United States v. Flores-Montano* (2004) 541 U.S. 149 [158 L.Ed.2nd 311]; overruling the Ninth Circuit Court’s opinion to the contrary.

Drilling a 5/16-inch hole into the bed of a pickup truck, the damage being minimal and not affecting the security and safety of its passengers, does not require a reasonable suspicion to justify. (*United States v. Chaudhry* (9th Cir. 2005) 424 F.2nd 1051.)

Unscrewing and pulling apart the inside door panels to a vehicle, where the panels could be reinstalled without any damage to the vehicle, does not require a reasonable suspicion. (*United States v. Hernandez* (9th Cir. 2005) 424 F.3rd 1056.)

**Reasonableness of the Search:** Even a border search which may be conducted with no suspicion must be reasonable in its manner and scope. (*United States v. Seljan* (9th Cir. 2007) 497 F.3rd 1037, 1042-1045; a currency interdiction search, as authorized by 31 U.S.C. § 5317(b), of an out-bound envelope resulting in discovery of evidence that defendant traveled to the Philippines for illicit purposes, where letters were initially merely scanned and not read.)

A two-day detention of defendant’s laptop computers and camera, transporting them some 170 miles from the border for a forensic examination, was reasonable given the complexity of the technology involved, and thus still a border search requiring no suspicion. (*United States v. Cotterman* (9th Cir. 2011) 637 F.3rd 1068, 1076-1083; finding that a “heightened suspicion” is not necessary merely to transport the computers.)
The “Functional Equivalent of a Border;” “Border searches need not occur at an actual border, but may take place at the ‘functional equivalent’ of a border, or at an ‘extended border’ (see below).” (United States v. Guzman-Padilla (9th Cir. 2009) 573 F.3rd 865, 877; citing United States v. Cardona (9th Cir. 1985) 769 F.2nd 625, 628.)

An International Airport, receiving flights from a foreign country, is the “functional equivalent of a border.” Opening luggage therefore requires no suspicion, while cutting open the luggage, damaging it, requires a reasonable suspicion, to be lawful. (United States v. Okafor (9th Cir. 2002) 285 F.3rd 842.)

The first port where a vessel docks on arrival from a foreign country is the functional equivalent of an international border. (People v. Laborde (2008) 163 Cal.App.4th 870, 874.)

Similarly, a regional sorting hub for express consignment services, like those offered by UPS, is the “functional equivalent of a border” and not an “extended border.” (See below). The test for determining the difference is whether the facility (at Louisville, Kentucky, in this case) is where packages are searched “at the last practicable opportunity before its passage over the international border.” (United States v. Abbouchi (9th Cir. 2007) 502 F.3rd 850.)

See also United States v. Seljan (9th Cir. 2008) 547 F.3rd 993, where the Court held the same for a FedEx regional sorting facility in Oakland, California, where defendant’s mail, bound for the Philippines, was lawfully subjected to warrantless inspections by U.S. Customs Service inspectors.

The “Extended Border Search Doctrine;”

While a search at the International border or the “functional equivalent of a border” (see above), done under authority of 19 U.S.C. § 1582, does not require any suspicion to justify, a search under the “extended border search doctrine,” done upon containers that have already been imported and are searched “wherever found,” are authorized by 19 U.S.C. § 482, and require the presence of a “reasonable cause to suspect” (i.e., a “reasonable suspicion”), to be lawful. (United States v. Ramsey (1977) 431 U.S. 606, 612-613 [52 L.Ed.2nd 617]; United States v. Taghizadeh (9th Cir. 1994) 41 F.3rd 1263, 1265; United States v. Cardona (9th Cir. 1985) 769 F.2nd 625, 627; United States v. Sahanaja (9th Cir. 2005) 430 F.3rd 1049.)
Extended border searches based upon less than probable cause are lawful so long as:

(1) The totality of the circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, convince the fact finder with reasonable certainty that any contraband in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the United States; and

(2) The government agents conducing the search have a reasonable suspicion that the search may uncover contraband or evidence of criminal activity.

(*United States v. Villasenor* (9th Cir. 2010) 608 F.3rd 467, 471-472.)

This rule applies to packages that are being sent from the United States to a foreign country, even though it has not yet left the country, at least where it has been put into the hands of the mail service and is “all but certain” that it will be leaving the country. (*Alexander v. United States* (9th Cir. 1966) 362 F.2nd 379, 382.)

An extended border search, which occurs after the actual entry into the United States has been made, tend to intrude more on an individual’s normal expectation of privacy. It must therefore be justified by a “reasonable suspicion” that the subject of the search was involved in criminal activity. (*United States v. Guzman-Padilla* (9th Cir. 2009) 573 F.3rd 865, 877.)

An extended border search requires that law enforcement possess a “reasonable certainty” that a border has been crossed, either by the vehicle in question or by contraband suspected to be within the vehicle. (*Id.,* at p. 878, 879-881.)

Use of a “controlled tire deflation device” (or “CTDD”) by Border Patrol agents to stop a vehicle for which there was a reasonable suspicion that it was involved in smuggling people or contraband across the border was held to be lawful and, under the circumstances, not an excessive use of force. (*United States v. Guzman-Padilla* (9th Cir. 2009) 573 F.3rd 865.)

Following defendant after seeing his car on the United States side but near the border, after which a municipal police officer was told to stop defendant, and where a drug sniffing dog alerted on defendant’s vehicle, was a valid extended border search supported by a reasonable suspicion, based upon informant information and defendant’s unusual behavior after
crossing the border. *(United States v. Villasenor* (9th Cir. 2010) 608 F.3rd 467.)

The search was upheld in *Villasenor* despite a 45 minute detention while awaiting the arrival of a drug-sniffing dog, after a 20 minute surveillance, and where defendant was not seen crossing the border but where it was apparent that he’d just come from Mexico.

A two-day detention of defendant’s laptop computers and camera, transporting them some 170 miles from the border for a forensic examination, was reasonable given the complexity of the technology involved, and thus still a border search (thus not an “extended border search”) requiring no suspicion. *(United States v. Cotterman* (9th Cir. 2011) 637 F.3rd 1068, 1076-1083; finding that a “heightened suspicion” is not necessary merely to transport the computers.)

Suppression was not warranted because (1) the border search doctrine applied and the Government did not need to categorically demonstrate some heightened suspicion to transport property to a secondary site for inspection, (2) the reasonableness of the search was better analyzed on a case-by-case basis to determine whether the scope or duration of the intrusion was constitutionally unreasonable, and (3) the Government's conduct was not so egregious as to render the search unreasonable since the property was sufficiently complex to permit its relocation, and the two-day seizure of the property was reasonable. *(Ibid.)*

**Immigration Checkpoints, Away from the Border:**

Established checkpoints located away from the border, such as at San Clemente, on Interstate 5, and Fallbrook, on Interstate 15, were, at one time, considered to be the “functional equivalent” of a border, and therefore subject to the same rules, even though these two points are miles from the U.S./Mexican border. *(See United States v. Martinez-Fuerte* (1976) 428 U.S. 543 [49 L.Ed.2nd 1116].)

At the time, a checkpoint was thought to be the “functional equivalent of the border” only when the government has proven to a “reasonable certainty that the traffic passing through the checkpoint is international in character. [Citation] In practical terms, this test means that border equivalent checkpoints intercept no more than a negligible number of domestic travelers.” *(United States v. Jackson* (5th Cir. 1987) 825 F.2nd 853, 860.)

Actual “border checkpoints” implicate the broader powers of the federal government to conduct searches and seizures.
of persons for immigration, drug interdiction, or other purposes at the border or its functional equivalent. (See United States v. Montoya de Hernandez (1985) 473 U.S. 531, 541-542 [87 L.Ed.2nd 381, 391-392]; United States v. Ramsey (1977) 431 U.S. 606, 616 [52 L.Ed.2nd 617, 626].)

More recent authority, however, recognizes that such checkpoints are merely “immigration checkpoints,” and not the equivalent of an international border. (United States v. Franzenberg (S.D.Cal. 1990) 937 F.Supp. 1414; United States v. Machuca-Barrera (5th Cir. 2001) 261 F.3rd 425, 432, fn. 15.)

Therefore, it has been held that stops at such points for immigration purposes is lawful despite the lack of “reasonable suspicion,” requiring only that such stops be “selective.” (United States v. Martinez-Fuerte, supra.)

But the search of a vehicle at an immigration checkpoint, away from the border, may require “probable cause” to justify. (United States v. Ortiz (1975) 422 U.S. 891 [45 L.Ed.2nd 623].)

Roving Patrols: Border Patrol vehicle stops, away from the border, are held to the same Fourth Amendment standards as any other domestic law enforcement agency. (Almeida-Sanchez (1973) 413 U.S. 266 [37 L.Ed.2nd 596]; United States v. Brignoni-Ponce (1975) 422 U.S. 873 [45 L.Ed.2nd 607].)

An investigatory stop of a vehicle may be based upon a reasonable suspicion that criminal activity is afoot, based upon an evaluation of the “totality of the circumstances.” The fact that the circumstances, taken individually and in isolation, may all have some reasonable, non-criminal explanation, does not mean that a border patrol agent does not have legal cause to stop and investigate a possible drug smuggler. (United States v. Arvizu (2002) 534 U.S 266 [151 L.Ed.2nd 740].)

The non-exclusive list of factors a court may use in determining whether a stop and detention is lawful include:

- The characteristics of the area in which a vehicle is encountered.
- Proximity to the border.
- Recent illegal border crossings in the area.
- Erratic or evasive driving behavior.
- Aspects of the vehicle.
- The behavior or appearance of the driver.
See also *United States v. Berber-Tinoco* (9th Cir. 2007) 510 F.3rd 1083, adding:

- Usual patterns of smuggling in the area;
- Previous alien or drug smuggling in the area;
- Behavior of the driver, including “obvious attempts to evade officers;”
- Appearance or behavior of passengers;
- Model and appearance of the vehicle; and
- Officer experience.

See *United States v. Diaz-Juarez* (9th Cir. 2002) 299 F.3rd 1138; Driving late at night in a high crime area, near the International Border, apparently looking for something, in a vehicle from another area and with a modified suspension, held in this case sufficient to justify a stop and detention.

Also, state (including local) law enforcement officers have limited statutory authority to detain and question individuals regarding their immigration status if:

- The person is illegally present in the United States;
- The person has previously been convicted of a felony in the United States and since left the country or was deported;
- The state or local law enforcement official obtains “appropriate confirmation” from the INS of the immigration status of the individual;
- The state or local law enforcement official only detains the individual for as long as is reasonably required for the INS to assume federal custody of the individual for the purposes of deportation or removal.

*(8 U.S.C. § 1252c(a); United States v. Vasquez-Alvarez* (10th Cir. 1999) 176 F.3rd 1294, 1296.)*

*Note* the Ninth Circuit’s unsupported conclusion that absent “a particularized reasonable suspicion that an individual is not a citizen,” it is a Fourth Amendment violation to ask him or her about the subject’s citizenship (see *Mena v. City of Semi Valley* (9th Cir. 2003) 332 F.3rd)
1255, 1264-1265.) was reversed by the United States Supreme Court (Certiorari granted, 2004)

The U.S. Supreme Court rejected this reasoning in the *Mena* case, reversing *Mena* while holding that it is not an unconstitutional expansion of the original reasons for the detention merely to make inquiry as to a person’s citizenship status. *Muehler v. Mena* (2005) 544 U.S. 93 [161 L.Ed.2\(^{nd}\) 299]; specifically reversing the Ninth Circuit on this issue.)

*The San Ysidro Port of Entry*, in San Diego, is state land and not federal, although the attached facilities belong to the federal government. A federal Immigration and Naturalization Agent at that location may therefore lawfully make a citizen’s arrest for a state criminal violation (e.g., driving while under the influence) and turn him over to state and local law enforcement officers. (*People v. Crusilla* (1999) 77 Cal.App.4\(^{th}\) 141.)
Chapter 15

Fourth Waiver Searches:

“Prior Consents:” Search & Seizure (“Fourth Waiver”) Conditions:

General Rule: All parolees, and some probationers, are subject to what is commonly referred to as a “Fourth Waiver,” i.e., where the subject has agreed, prior to the fact, to waive any objections to being subjected to searches and seizures without the necessity of the law enforcement officer meeting the standard Fourth Amendment requirements of probable cause and a search warrant. (See Vandenberg v. Superior Court (1970) 8 Cal.App.3rd 1048, 1053.)

The courts and the Legislature may, under certain limited circumstances, condition the freedom of parolees, some probationers, and (in some cases) even pretrial detainees, upon an agreement that law enforcement, probation officers and/or parole agents, be allowed to search and seize a subject’s person and possessions without probable cause and without a search warrant. (People v. Bravo (1987) 43 Cal.3rd 600, 610; In re York (1995) 9 Cal.4th 1133, 1150.)

It is the prosecution’s burden of proving that the defendant was on parole (or probation), and therefore subject to the conditions of a Fourth wavier, at the time of the warrantless search. (People v. Pearl (2009) 172 Cal.App.4th 1280.)

Although imposed as a condition of the subject’s parole or probation, such a waiver, albeit coerced at least to some extent, is often considered by some courts to be a form of “prior consent.” (In re Tyrell J. (1994) 8 Cal.4th 68, 79-80, overruled on other grounds.)

Note: In re Tyrell J., supra, has been specifically overruled by the California Supreme Court in In re Jaime P. (2006) 40 Cal.4th 128, on the issue of whether an officer had to know of the probation condition prior to the search. Tyrell J. is cited in this outline for its other still-valid legal points.

See “Searching While In Ignorance of a Search Condition,” below.
Parole: A condition of all paroles, after the parolee has been released from prison, is that the parolee submit to searches by his or her parole officer, or “other peace officer at any time of the day or night, with or without a search warrant and with or without cause.” (Cal. Code of Regs, Title 15, § 2511; P.C. § 3067(a); People v. Hernandez (1964) 229 Cal.App.2nd 143.)

Statutory Authorization: The Penal Code provides that; “The Legislature finds and declares that the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision and surveillance of parolees . . .” (P.C. § 3000(a)(1))

P.C. § 3067 applies, by its terms (subd. (c)), to any parolee whose offense for which he or she is paroled occurred on or after January 1, 1997, as well as prison inmates released on what is now known as “postrelease community supervision.” Otherwise, the language of Cal. Code of Regs, Title 15, § 2511 controls:

For parolees whose offense for which he or she is on parole occurred before 1/1/1997: “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.” (Cal. Code of Regs, Title 15 § 2511)

For parolees whose offense for which he or she is on parole occurred on or after 1/1/1997 and prison inmates released on “postrelease community supervision.” Any inmate released on parole or postrelease community supervision must agree in writing “to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.” (P.C. § 3067(a))

Most felons released from state prison on and after October 1, 2011 are subject to “postrelease community supervision” (PRCS) instead of state parole. They will be supervised by a county agency designated by the board of supervisors. In most, if not all, counties, this will be the county’s probation department. (See the “Postrelease Community Supervision Act of 2011,” P.C. §§ 3450 et seq.)
Note *United States v. Caseres* (9th Cir. 2008) 533 F.3d 1064, at pp. 1075-1076, which erroneously held that an officer conducting a parole search must have been aware prior to the search that P.C. § 3067(a) was applicable to the defendant, i.e., that the prior conviction leading to his parole status occurred on or after January 1, 1997.

California case law appears to be to the contrary. (See *People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1030-1032; citing *People v. Middleton* (2005) 131 Cal.App.4th 732.; it is not necessary that the searching officer was aware of the existence of a signed parole search agreement, as required by P.C. § 3067, so long as he knew that the subject was on parole.)

*Note:* In that the language of P.C. § 3067(a) is substantially similar to that of Cal. Code of Regs, Title 15 § 2511, the arresting officers’ knowledge of the date of the prior conviction should be irrelevant on the issue of the legality of defendant’s Fourth waiver search.

**Probation:** A condition of some (but not all) probationary terms is that the probationer submit to searches by a probation officer or any law enforcement officer without probable cause or a warrant. (*People v. Mason* (1971) 5 Cal.3rd 759, 763-764.)

*Statutory Authorization:* A court may impose any “reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . (and) for the reformation and rehabilitation of the probationer.” (P.C. § 1203.1(j))

“(A) court when granting probation may impose reasonable conditions as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.” (*People v. Leon* (2010) 181 Cal.App.4th 943, 948-949.)

A *Fourth Wavier* condition of probation will be upheld *unless:*

- The wavier has no relationship to the crime for which the offender was convicted; *and*
The waiver relates to conduct that is not in itself criminal; and

The waiver is not reasonably related to preventing future criminality.


Note: The Supreme Court, in People v. Mason (1971) 5 Cal.3d 759, erroneously listed these criteria in the disjunctive, when in fact they are to be considered in the conjunctive. (People v. Lent, supra, at p. 486, fn. 1.) In other words, all three conditions have to apply before a probation condition is subject to being struck.

Note: Given the above factors, probationary search and seizure conditions are commonly applied to narcotics and theft-related offenses, and sometimes crimes of violence where the use of a weapon was involved.

When the probationer is a juvenile, because the purpose of juvenile law is to rehabilitate (See W&I § 202(b)), the third of the above factors is perhaps the most important. (In re Tyrell J. (1994) 8 Cal.4th 68, 87, overruled on other grounds; see also In re Bonnie P. (1992) 10 Cal.App.4th 1079, 1089.)

“Even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.” (People v. Olguin (2008) 45 Cal.4th 375, 379-380; upholding a probation condition requiring defendant, convicted of DUI-related charges, to notify the probation officer of the presence of any pets in his home.)

Requiring defendant, who was convicted of the illegal possession of a firearm, to surrender his marijuana ID card and to not use marijuana as a condition of his probation, held to be lawful. People v. Moret (2009) 180 Cal.App.4th 839.)
The language of the specific Fourth Waiver condition must be considered. There being no statutorily-required standard language, a court is free to limit the search and seizure conditions as it deems to be appropriate under the circumstances. A judge who wishes to impose some unusual restrictions on law enforcement officers’ powers to conduct Fourth Waiver searches has the legal authority to do so. ([People v. Bravo](1987) 43 Cal.3rd 600, 607, fn. 6.)

Any limitations in the conditions are binding on the searching officers. For instance, a search and seizure condition specifically limited to narcotics cannot be used to justify a search for stolen property. ([People v. Howard](1984) 162 Cal.App.3rd 8.)

However, so long as the area being searched could contain items allowed to be searched for under the terms of the Fourth Waiver, the officer’s subjective intent (e.g., searching for stolen property where only a search for narcotics was authorized) is irrelevant, and the search will be upheld. ([People v. Gomez](2005) 130 Cal.App.4th 1008.)

Some Fourth Waivers include language authorizing a warrantless search only “upon request,” “as requested,” or “whenever requested.” Even though ordinarily the defendant need not be present during the search ([People v Lilienthal](1978) 22 Cal.3rd 891, 900.), courts have interpreted the above language to mean that the probationer must either be present, or at least be notified beforehand about an impending search. If he is not, the resulting evidence will be suppressed. (See [People v. Mason](1971) 5 Cal.3rd 759, 763; [People v. Superior Court [Stevens]](1974) 12 Cal.3rd 858, 861.)

Parole vs. Probation: Although there is some authority for the argument that the rules are the same, whether discussing the issue of a parole search or a probation search, when a Fourth Waiver is the issue (see [People v. Hoeninghaus](2004) 120 Cal.App.4th 1180, 1192-1198.), the United States Supreme Court has indicated that parolees have fewer expectations of privacy than probationers, hinting that they (i.e., parolees) therefore may be subject to stricter controls. ([Samson v. California](2006) 547 U.S. 843 [165 L.Ed.2nd 250].)

A “Special Needs” Search: In either case (i.e., parole or probation), such a condition of parole or probation, commonly referred to as a “Fourth
Waiver,” is an important variance from the normal search and seizure rules.

“(T)he government may dispense with the warrant requirement in situations when “‘special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.’” (In re Tyrell J. (1994) 8 Cal.4th 68, 77, overruled on other grounds, citing Griffin v. Wisconsin (1987) 483 U.S. 868, 873 [97 L.Ed.2nd 709, 717].)

A “Fourth Waiver,” at least when applied to an adult probationer, is in effect a prior consent given by the probationer to submit his or her person, home, vehicle and other possessions to search or seizure by any probation officer or other law enforcement officer, any time, day or night, without requiring the searching probation officer or police officer to obtain a search warrant, or to demonstrate the existence of probable cause. It is a waiver of the subject’s Fourth Amendment rights against unreasonable searches and seizures. (See In re Tyrell J., supra, at pp. 79-80, overruled on other grounds; Vandenbergs v. Superior Court (1970) 8 Cal.App.3rd 1048, 1053; People v. Bravo (1987) 43 Cal.3rd 600, 608-610; In re York (1995) 9 Cal.4th 1133, 1149; People v. Hernandez (1964) 229 Cal.App.2nd 143.)

As a result, considering the important governmental interest in operating probation or parole systems, as well as the need to protect the public, when balanced with the diminished expectation of privacy enjoyed by probationers and parolees, Fourth Waiver searches are now commonly classified as “Special Needs” searches which may be reasonable despite the lack, in some instances, of any particularized suspicion justifying the search. (Griffin v. Wisconsin (1987) 483 U.S. 868, 875 [97 L.Ed.2nd 709, 718]; In re Tyrell J., supra, at pp. 76-77, overruled on other grounds; People v. Reyes, supra, at pp. 748, 751-752.)

See “Special Needs Searches,” under “Warrantless Searches,” above.)

Note: While a probationer is given a choice whether to accept the probation conditions (the alternative being incarceration), parolees and juveniles typically are not. The “prior consent” theory, therefore may be hard to justify with parolees and juveniles. Therefore, in such cases, the theory that one who has validly waived his or her Fourth Amendment rights has a diminished expectation of privacy as a result, as a “special needs” search, is perhaps a
stronger justification.  (*In re Tyrell J.*, *supra*, at p. 86, overruled on other grounds; *People v. Reyes* (1998) 19 Cal.4th 743, 749-750.)

The United States Supreme Court, in *Griffin v. Wisconsin*, *supra*, at p. 876 [97 L.Ed.2nd at p. 719], found three reasons supporting the conclusion that the operation of a probation system presented such “special needs:”

- A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close the supervision the probationer requires.

- The delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct.

- A warrant and probable cause requirement would reduce the deterrent effect that the possibility of expeditious searches would otherwise create.

See also the concurring opinion in *United States v. Crawford* (9th Cir. 2004) 372 F.3rd 1048, at pages 1066-1072, describing a parole Fourth Waiver search as a “special needs” search.

The United States Supreme Court, in (*Samson v. California* (2006) 547 U.S. 843, 852, fn. 3 [165 L.Ed.2nd 250].) declined to decide whether a parole Fourth Waiver involved a “special need.”

*Juvenile probationers* may also be subjected to a Fourth Waiver requirement.  (*In re Tyrell J.* (1994) 8 Cal.4th 68, 87, overruled on other grounds.)

**Wel. & Inst. Code § 730(b):** “The court may impose and require any and all reasonable conditions that it may determine are fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.”

The “special needs” of the juvenile probation system, with its “goal of rehabilitating youngsters who have transgressed the law, a goal that is arguably stronger than in the adult context,” allows for stricter controls.  (*In re Tyrell J.*, *supra*, overruled on other grounds.)
So long as the conditions imposed are tailored specifically to meet
the needs of the juvenile concerned, taking into account not only
the circumstances of the crime but the juvenile’s entire social
history, probationary conditions, even which otherwise infringe
upon the constitutional rights of the juvenile, will be upheld. (In

W&I §§ 790 et seq., which provides for a post-plea diversion
program, mandates a Fourth Amendment waiver as a condition in
every grant of deferred entry of judgment (W&I § 794).

Diversion in a pre-plea situation pursuant to W&I §§ 654 and
654.2, however, placing a juvenile on informal probation, does not
provide for the imposition of a Fourth waiver. Absent statutory
authority to do so, a court, therefore, is prohibited from imposing a
Fourth waiver on a juvenile under such circumstances. (Derick B.

Pre-Trial: Similar Fourth Waivers may also be imposed as a condition of
an “O.R.” (i.e., “Own Recognizance”) release pending trial, and have been
held to be lawful if reasonably related under the circumstances of a
particular case to the prevention and detection of further crime and to the

The Ninth Circuit disagrees, holding that a Fourth Waiver cannot
be imposed on a pretrial defendant as a condition of release.
(United States v. Scott (9th Cir. 2005) 450 F.3rd 863.)

Constitutionality: The advanced waiver of Fourth Amendment rights,
imposed as a condition of accepting probation or parole, has been held to
be constitutional. (Zap v. United States (1946) 328 U.S. 624 [90 L.Ed.
1477]; People v. Mason (1971) 5 Cal.3rd 759, 764-765.)

Expectation of Privacy: While a number of legal theories, including
“prior consent” and “special needs” (see above), have justified the
upholding the legality of Fourth Waiver searches over the years, another
theory espoused by some courts is that persons subject to a Fourth Waiver
have a reduced expectation of privacy, depriving them of any “standing”
to object to the search. (People v. Valasquez (1993) 21 Cal.App.4th 555,
558; People v. Viers (1991) 1 Cal.App.4th 990, 993; People v. Biddinger
(1996) 41 Cal.App.4th 1219; People v. Ramos (2004) 34 Cal.4th 494, 504-
506; Samson v. California (2006) 547 U.S. 843 [165 L.Ed.2nd 260];
Standard of Proof Required:

Probation: A probation search with no warrant, probable cause, or even reasonable suspicion, so long as it does not exceed the scope of the consent given, and is not done for purposes of harassment or some arbitrary or capricious reason, meets, in the opinion of the California Supreme Court, both federal (Fourth Amendment) and state (Art. 1, § 13) constitutional requirements. (People v. Bravo (1987) 43 Cal.3d 600; People v. Brown (1987) 191 Cal.App.3rd 761; see also People v. Reyes (1998) 19 Cal.4th 743.)

This includes juvenile probation. (In re Tyrell J. (1994) 8 Cal.4th 68, overruled on other grounds.)

The Ninth Circuit Court of Appeal has, as a rule, assumed that, at the very least, a “reasonable suspicion” of renewed criminal activity is required for both parole and probation Fourth Waivers. (See United States v. Stokes (9th Cir. 2002) 292 F.3rd 964; “reasonable suspicion” found, so the issue not discussed.)

However, most recently, the Ninth Circuit has conceded that this issue is really not yet settled, at least sufficiently to hold an officer civilly liable. (Motley v. Parks (9th Cir. 2005) 432 F.3rd 1072, 1083-1088; officers entitled to qualified immunity on this issue. See below.)

The Supreme Court has specifically left open the question whether or not a probationer on a Fourth Waiver may be searched on less than a reasonable suspicion. (United States v. Knights (2001) 534 U.S. 112, 120, fn. 6. [151 L.Ed.2nd 497].)

Until the U.S. Supreme Court does rule on this issue, it is acknowledged that the California rule is that no suspicion is needed to conduct a Fourth waiver search on a probationer. (People v. Medina (2007) 158 Cal.App.4th 1571; probationers having “consented” to warrantless, suspicionless searches.)

But in Samson v. California (2006) 547 U.S. 843 [165 L.Ed.2nd 260], the Supreme Court hinted strongly that although a suspicionless search of a parolee is constitutional, probationers probably have more rights than parolees and may require a higher (i.e., a “reasonable suspicion”) standard.

Parole: Older California case authority to the effect that a police officer needs a “reasonable suspicion” of renewed criminal activity before conducting a parole Fourth Waiver search (See People v. Burgener
(1986) 41 Cal.3rd 505, 534-535.) was overruled in People v. Reyes (1998) 19 Cal.4th 743.

In Reyes, the California Supreme Court adopted the reasoning of In re Tyrell J. (1994) 8 Cal.4th 68 (overruled on other grounds), and, overruling Burgener, determined that as with juvenile probationers, parolees do not retain a reasonable expectation of privacy, and may therefore be searched even without even a “reasonable suspicion” of renewed criminal activity or other parole violation.

The Ninth Circuit Court of Appeal avoided deciding the issue in a number of recent cases. (See United States v. Crawford (2004) 372 F.3rd 1048; Moreno v. Baca (9th Cir. 2005) 431 F.3rd 633; and Motley v. Parks (9th Cir. 2005) 432 F.3rd 1072, 1083-1088.) The United States Supreme Court has now unequivocally settled the rule, agreeing with California’s analysis of this issue, at least as it relates to parolees. (Samson v. California (2006) 547 U.S. 843 [165 L.Ed.2nd 260]; search of a parolee’s person.) See also United States v. Lopez (9th Cir. 2007) 474 F.3rd 1208, 1212-1214.) where the Ninth Circuit Court of Appeal followed Samson in finding that a suspicionless parole Fourth Waiver search of a parolee’s residence was valid.

Limitation: Searches Conducted for Purposes of Harassment:

A probationer (or parolee) subject to a search condition retains the right to be free from a search that is arbitrary, capricious or harassing. A search is arbitrary “when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee.” A search is a form of harassment when its motivation is a mere “whim or caprice.” (People v. Reyes (1998) 19 Cal.4th 743, 754; People v. Medina (2007) 158 Cal.App.4th 1571, 1577.)

“It is only when the motivation for the search is wholly arbitrary, when it is based merely on a whim or caprice or when there is no reasonable claim of a legitimate law enforcement purpose, e.g., an officer decides on a whim to stop the next red car he or she sees, that a search based on a probation search condition is unlawful.” (People v. Cervantes (2002) 103 Cal.App.4th 1404, 1408.)

Fourth Waiver searches have been held to be unreasonable if conducted too often, at an unreasonable time, when it is unreasonably prolonged, or
for any other reasons establishing *arbitrary or oppressive conduct* by the searching officers. A search is arbitrary or oppressive when the motivation for the search is *unrelated to a rehabilitative, reformative or legitimate law enforcement purpose*, or when the search is motivated by *personal animosity* toward the parolee or probationer. (*People v. Reyes*, *supra*, at pp. 753–754; see also *People v. Clower* (1993) 16 Cal.App.4th 1737, 1741; *United States v. Follette* (S.D.N.Y. 1968) 282 F.Supp. 10, 13; and *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004.)

The United States Supreme Court found California’s restrictions on arbitrary, capricious or harassing searches as an important ingredient in upholding the constitutionality of a suspicionless Fourth Waiver search of a parolee. (*Samson v. California* (2006) 547 U.S. 843 [165 L.Ed.2nd 260].)

The fact that a particular officer searched defendant twice within a 24-hour period, did not establish by itself that he was harassing the defendant. The legitimate law enforcement purpose of the second search (after having found nothing illegal on defendant, in his vehicle, or in his car, less than 24 hours earlier) was substantiated by the fact that the officer knew defendant was on parole for a narcotics violation, that he associated with drug users, and because he was observed at the time of the second search in a high-narcotics area some 3½ to 4 miles from his home without any real reason for being there. (*People v. Sardinas* (2009) 170 Cal.App.4th 535.)

A public strip search of a probationer or parolee may in fact be unreasonable, and grounds for suppression of the resulting evidence. However, where the parolee is moved to a location where he cannot be seen by members of the general public (behind the patrol car, with police officers blocking anyone’s view), his pants lowered and the band on his underwear pulled back only to the extent necessary to see into his crotch area, such is not a strip search conducted in public. Under the circumstances, such a search was considered to be reasonable. (*People v. Smith* (2009) 172 Cal.App.4th 1354.)

**Who May Conduct a Fourth Waiver Search?**

**California Rule:** California law is clear, as indicated by the terms of the standard Fourth Waiver conditions, probation and parole searches are not limited to probation and parole officers. *Any law enforcement officer* is typically authorized to conduct such searches. (*People v. Mason* (1971) 5 Cal.3rd 759, 766 [probation]; *People v. Reyes* (1998) 19 Cal.4th 743 [parole].)
Federal Rule: The Ninth Circuit Court of Appeal’s theory that Fourth Waiver searches are a rehabilitative tool for use by probation officers only, with local law enforcement’s attempt to use a Fourth Waiver to justify a warrantless search as being no more than a “ruse” for conducting a new criminal investigation and a violation of the Fourth Amendment (e.g., see United States v. Ooley (9th Cir. 1997) 116 F.3rd 370.), has been overruled by the United States Supreme Court. (United States v. Knights (2001) 534 U.S 112 [151 L.Ed.2nd 497]; see also United States v. Stokes (9th Cir. 2002) 292 F.3rd 1164.)

A probation officer confronted with an uncooperative, irate individual who was present in the house of a juvenile probationer during a Fourth wavier search, when the detained visitor appeared to be a gang member and who was overly dressed for the weather, and who attempted to turn away and cover his stomach when ordered not to do so, lawfully patted down the suspect for weapons. (People v. Rios (2011) 193 Cal.App.4th 584, 598-600.)

The Court further determined that a probation officer has the legal authority to detain and patdown a non-probationer pursuant to P.C. § 830.5(a)(4) (i.e.; enforcing “violations of any penal provisions of law which are discovered while performing the usual or authorized duties of his or her employment.”) (Id, at p. 600.)

Need to Seek Permission from the Probation or Parole Officer:

Probation: It has long been the rule, at least in probation searches, that a local law enforcement officer need not even seek the permission of a probation officer. (See People v. Mason (1971) 5 Cal.3rd 759.)

Note federal law is to the contrary, based on the terms of the Federal Probation Act, which is not applicable to state cases. (See United States v. Consuelo-Gonzalez (9th Cir. 1975) 521 F.2nd 259.)

Parole: Prior California authority to the effect that in a parole situation a local law enforcement officer must first receive authorization from the parole officer (e.g., see People v. Coffman (1969) 2 Cal.App.3rd 681, 688-689; People v. Natale (1978) 77 Cal.App.3rd 568, 574.) has arguably been overruled by People v. Reyes (1998) 19 Cal.4th 743, which finds the standards for probation and parole searches to be the same.

Even prior to Reyes, supra, there was some California authority that at least where seeking the prior approval of the parole officer would be a “meaningless formality,” such as when “any parole
officer who refused to authorize a search given an articulable reasonable suspicion of criminal activity ‘would have been derelict in his duties,’” calling the parole officer is unnecessary. (People v. Brown (1989) Cal.App.3rd 187, 192.)

Note: Despite the lack, under California law, of any legal requirement to contact the appropriate parole officer or office before undertaking a parole search, the California Department of Correction requests and recommends, in instances involving the search of a parolee's residence or business, that you do so anyway, for operational reasons as well for reasons of safety and cooperation.

Federal authority, at least from the Ninth Circuit Court of Appeal, may still be holding onto the theory that parole is a tool for parole authorities for controlling parolees, and not something that local law enforcement is entitled to use. (See United States v. Jarrad (9th Cir. 1985) 754 F.2nd 1451, 1454; referring to a parole officer who authorizes a search at the request of the police as the police officers’ agent, or “stalking horse;” see also Latta v. Fitzharris (9th Cir. 1975) 521 F.2nd 246, 247, and United States v. Hallman (3rd Cir. 1966) 365 F.2nd 289.)

Searching While In Ignorance of a Search Condition: Whether a police officer must personally know of a probation or parole search and seizure condition (i.e., a “Fourth Waiver”) before conducting a search in order for the search to be later declared “lawful” has been the subject of some debate.

Issue: When a police officer conducts a warrantless search of a person or that person’s property or residence, which, as it turns out, is not supported by probable cause and/or exigent circumstances, and then belatedly discovers that the person being searched is subject to a probation or parole-imposed Fourth Waiver, may the search still be upheld?

Earlier Case Law tended to lean towards finding such searches to be lawful, at least if based upon a probation Fourth Waiver. (In re Tyrell J. (1994) 8 Cal.4th 68, 85; People v. Valasquez (1993) 21 Cal.App.4th 555.)

When dealing with a “parole search and seizure condition,” the courts were not so prone to excusing the officer’s failure to know of the existence of a Fourth Waiver. (See In re Martinez (1970) 1 Cal.3rd 641.)

Also, there was authority that an illegal arrest of someone subject to probationary search and seizure conditions does not result in suppression of any evidence recovered incident to the arrest, in that
the subject has waived any right to seek suppression of the evidence seized. (*People v. Valasquez*, *supra*, at p. 559.)

Juvenile probationers have been held to the same standards as are adults (*In re Marcellus L.* (1991) 229 Cal.App.3d 134 144-146; *In re Tyrell J.*, *supra*, overruled on other grounds.), although, perhaps, for different reasons.

*Present State of the Rule:*

The California Supreme Court ruled as recently as 1994 that a juvenile probationer, on the street, may be lawfully searched even though the officer does not discover until after the fact that he was on probation and subject to search and seizure conditions. (*In re Tyrell J.* (1994) 8 Cal.4th 68.)

See *People v. Lewis* (1999) 74 Cal.App.4th 662, at pages 668-669, using *In re Tyrell J.* to uphold the warrantless entry into a residence and arrest of a parolee-at-large/robbery suspect in his home, holding that the arresting officer’s lack of knowledge of the arrestee’s probation Fourth Waiver is irrelevant.

*However,* the California Supreme Court refused to extend the rule of *In re Tyrell J.* to the search of a residence when it was belatedly discovered that the suspect’s brother (and co-occupant) was subject to a Fourth Waiver, attaching more value to the privacy rights of a co-tenant who is not subject to search conditions. (*People v. Robles* (2000) 23 Cal.4th 789.)

*Finally,* recognizing that they might have gone too far in *In re Tyrell J.*, *supra*, a majority of the Supreme Court invalidated the search of a residence as to both the co-tenant (who was not on a Fourth Waiver), and the suspect who was discovered, after the fact, to be on parole, and thus subject to search and seizure conditions. (*People v. Sanders* (2003) 31 Cal.4th 318.)

While refusing to specifically overrule *In re Tyrell J.*, the Court noted the “chilly reception” the decision has received, and, at the very least, limited it to its facts; i.e., the search of a juvenile’s person, as opposed to the search of a residence in an adult case.

The First District Court of Appeal, in *People v. Bowers* (2004) 117 Cal.App.4th 1261, read *Sanders* as limiting the rule of *In re Tyrell J.* to juvenile cases, given the unique “special needs” of the
juvenile court probation system. In an adult prosecution, whether of a parolee or a probationer, and irrespective of whether it is the subject’s home or person (or, presumably, his vehicle or other personal possessions) that is being searched, not knowing of a Fourth Amendment search and seizure condition will preclude the use of such a waiver to save an otherwise illegal search. (People v. Bowers, supra, at pp. 1268-1269.)

Myers v. Superior Court (2004) 124 Cal.App.4th 1247, is in accord, noting the Tyrell J. is limited to probation searches of a juvenile.

But the Fifth District Court of Appeal went even further and took it upon itself, in effect (without specifically stating so), to overrule Tyrell J. and hold that a juvenile probationer, searched illegally, is protected by the rule of Sanders: An officer cannot rely upon a Fourth Wavier that he didn’t know about at the time of the search. (In re Joshua J. (2005) 129 Cal.App.4th 359.)

Since Sanders, courts have consistently ruled against the legality of searches done when the prosecution attempted to validate the search under the theory that the officer belatedly discovered that the defendant was subject to either probation or parole search and seizure conditions:

Searching law enforcement officers must be aware of a juvenile’s waiver of his or her probationary search and seizure rights when searched after being stopped in a motor vehicle. (People v. Hester (2004) 119 Cal.App.4th 376, 392-405.)

An otherwise illegal search of a residence is not saved by a belatedly discovered probation Fourth Wavier search and seizure condition. (People v. Bowers (2004) 117 Cal.App.4th 1261; see also People v. Lazalde (2004) 120 Cal.App.4th 858; a decision out of the Sixth Appellate District, involving an adult probationer and a motel room.)

The illegal search of an adult on the street, where it was belatedly discovered that he was on a probation Fourth wavier, is not made retroactively valid. (People v. Hoeninghaus (2004) 120 Cal.App.4th 1180.)

It is irrelevant whether the Fourth Waiver is based upon a probationary, or a parole, search and seizure
condition. The rule is the same. *(Id., at pp. 1192-1198.)*

The same rule has been held to apply to the person of a parolee who is found in public. *(People v. Jordan (2004) 121 Cal.App.4th 544, 552-553; see also People v. Bowers, supra.)*

Where the issue of the officer’s knowledge, or lack thereof, of a search and seizure condition was not resolved in the trial court *(Sanders being decided after the hearing)*, a remand to the lower court for further evidence on this issue, and not reversal of the judgment, is the proper remedy for an appellate court. *(People v. Moore (2006) 39 Cal.4th 168.)*

If, however, the trial court record shows the officer’s lack of prior information about the defendant’s Fourth Wavier status, there is no need for a remand to the trial court for further hearings. *(People v. Miller (2007) 146 Cal.App.4th 545.)*

The Ninth Circuit Court of Appeal is in accord, noting that *Whren v. United States* (1996) 517 U.S. 806 [135 L.Ed.2nd 89], upholding “pretext stops,” cannot be used to justify a detention or search based upon a belatedly discovered search condition. Per the Ninth Circuit, the theory of Whren is limited to those circumstances where a police officer is aware of facts that would support an arrest. “(A)lthough Whren stands for the proposition that a pretextual seizure based on the illegitimate subjective intentions of an officer may be permissible, it does not alter the fact that the pretext itself must be a constitutionally sufficient basis for the seizure and the facts supporting it must be known at the time it is conducted.” *(Moreno v. Baca (9th Cir. 2005) 431 F.3rd 633, 640.)*

*Finally*, recognizing that the case law and legal commentary was uniformly in opposition to the rule of *In re Tyrell J.*, the California Supreme Court finally reversed itself and held that a detention and search of a minor on probation with search and seizure conditions could not be justified by the belatedly discovered Fourth waiver. *(In re Jaime P. (2006) 40 Cal.4th 128.)*

*Exceptions:*

It is not necessary that the searching officer was aware of the existence of a signed parole search agreement, as required by P.C. 651.

*But note United States v. Caseres* (9th Cir. 2008) 533 F.3d 1064, at pp. 1075-1076, which erroneously (in this author’s opinion) held that an officer conducting a parole search must have been aware prior to the search that P.C. § 3067(a) was applicable to the defendant, i.e., that the prior conviction leading to his parole status occurred on or after January 1, 1997.

Determining that a person is on parole is enough information to justify a police officer’s assumption that he or she is subject to a Fourth waiver. (*People v. Middleton* (2005) 131 Cal.App.4th 732.)

Where an officer is erroneously told that the defendant is on parole, only to find out later that he was subject to a probationary Fourth waiver instead, the search will be upheld. It is not relevant what type of Fourth waiver applies to the defendant. (*People v. Hill* (2004) 118 Cal.App.4th 1344.)

A suspect subject to search and seizure conditions is estopped from complaining about being searched by an officer who was unaware of the search conditions when the officer’s failure to know of the conditions was because defendant misidentified himself. (*People v. Watkins* (2009) 170 Cal.App.4th 1403.)

*Arresting and Searching in Ignorance of an Existing Warrant of Arrest:* The same theory may be used to find unlawful a search based upon a de facto arrest on less than probable cause when trying to justify the arrest (or a detention) by a belatedly-discovered existing arrest warrant. (*Moreno v. Baca* (9th Cir. 2005) 431 F.3rd 633.)


The need to use illegally seized evidence, from both Fourth and Fifth Amendment violations, in parole revocation hearings, outweighs the policy considerations underlying the Exclusionary Rule (i.e., deterring illegal police conduct.), and therefore is admissible in such circumstances. (*In re Martinez* (1970) 1 Cal.3rd 641, 648-650.)
**Entering a Residence; Probable Cause or Reasonable Suspicion?**

The Ninth Circuit Court of Appeal has ruled that in order to conduct a Fourth Waiver search of a residence, an officer must have probable cause to believe that the residence to be searched is in fact the parolee’s (or probationer’s) residence. *Motley v. Parks* (9th Cir. 2005) 432 F.3rd 1072, 1080-1082; *United States v. Franklin* (9th Cir. 2010) 603 F.3rd 652.

Noting that five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a minority opinion (see *United States v. Gorman* (9th Cir. 2002) 314 F.3rd 1105.), the Fourth District Court of Appeal (Div. 2) has found that an 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. Employing that standard, the entry into defendant’s apartment to conduct a probation search was lawful based on all of the information known to the officers. Accordingly, the court upheld the trial court’s conclusion that the officers had objectively reasonable grounds to conclude the defendant/probationer lived at the subject apartment and was present at the time, and therefore the officers had the right to enter the apartment to conduct a warrantless probation search. (*People v. Downey* (2011) 198 Cal.App.4th 652, 657-662.)

**Duration of a Fourth Waiver:**

A parole Fourth Waiver continues until he has had his formal parole hearing where he has the opportunity to contest the proposed revocation and parole is formally revoked. Being arrested and incarcerated on a parole hold pending a revocation hearing does not, in itself, negate a Fourth Waiver. (*People v. Hunter* (2006) 140 Cal.App.4th 1147.)

A probationer on a Fourth Waiver is also subject to warrantless searches and seizures until he has been accorded the right to a probation revocation hearing, even if in custody while awaiting that hearing, and even though, pending his hearing, a court has “summarily revoked” his probation. (*People v. Barkins* (1978) 81 Cal.App.3rd 30.)

**Good Faith Belief in the Existence of a Search Condition:** The United States Supreme Court recently ruled (in a 5-to-4 decision) that an officer’s good faith reliance on erroneous information will not invalidate an arrest even when that information comes from a law enforcement source, so long as the error was based upon non-reoccurring negligence only. Deliberate illegal acts, or a reckless disregard for constitutional requirements, or reoccurring or systematic negligence,
will not excuse the resulting unlawful arrest. (Herring v. United States (2009) 555 U.S. 135 [172 L.Ed.2nd 496].)

See “Mistaken Belief . . . that a Fourth Waiver Exists, . . .,” under “Arrests,” “Problems,” above.

Rights of Third Persons not subject to the Fourth Waiver, but who happen to live with a person who is subject to search and seizure conditions:

Common Areas:

Even over the objection of the person who is not subject to a Fourth Waiver, the police may search the Fourth Waiver subject’s private areas and all common areas. Only the non-Fourth Waiver subject’s private areas are protected from being searched. (Russi v. Superior Court (1973) 33 Cal.App.3rd 160, 168-171.)

In extending the rule of Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2nd 89 (i.e., that the officer’s subjective intent is irrelevant) to the Fourth Waiver situation, the California Supreme Court upheld the search of the common areas of a residence, looking for evidence against Suspect A, while using Suspect B’s Fourth Waiver as the legal justification, eventually resulting in recovery of evidence tending to incriminate Suspect C (i.e., defendant Woods). (People v. Woods (1999) 21 Cal.4th 668.)

“It long has been settled that a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary. (People v. Boyer (1989) 48 Cal.3rd 247, 276 . . .; People v. Haskett (1982) 30 Cal.3rd 841, 856 . . . People v. Viega (1989) 214 Cal.App.3rd 817, 828 . . . see People v. Clark (1993) 5 Cal.4th 950, 979 . . . [search of a car].) Warrantless consent searches of residences have been upheld even where the unmistakable purpose of the search was to obtain evidence against a non-consenting cohabitant. (E.g., United States v. Matlock (1974) 415 U.S. 164, 170 [ . . . 39 L.Ed.2nd 242] [roommate's consent, obtained after defendant was arrested and removed from the scene, sufficient]; People v Haskett, supra, 30 Cal.3rd at pp. 856-857.)” People v. Woods, supra, at pp. 675-676.)

But, see the limitations put on such searches when the attempted use of another’s search and seizure conditions
was not discovered until after the search for evidence against a co-habitant who was not on a Fourth Waiver. (People v. Robles (2000) 23 Cal.4th 789; People v. Sanders (2003) 31 Cal.4th 318; In re Jaime P. (2006) 40 Cal.4th 128; see above.)

“(A) warrantless search, justified by a probation search condition, may extend to common areas, shared by non-probationers, over which the probationer has ‘common authority.’ (United States v. Matlock (1974) 415 U.S. 164, 171 [39 L. Ed. 2nd 242, 250, . . .].) The ‘common authority’ theory of consent rests ‘on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.’ (Id. at p. 171, fn. 7 [39 L. Ed. 2nd, at p. 250]” (People v. Smith (2002) 95 Cal.App.4th 912, 916.)

The fact that a parolee or probationer lives with a third person who is not subject to search and seizure conditions cannot be used to immunize the one who is subject to a Fourth Waiver from government scrutiny. (People v. Kanos (1971) 14 Cal.App.3rd 642, 650-651; Russi v. Superior Court, supra, at pp. 166-167.)

But, there must be at least “probable cause” to believe that the person subject to the Fourth Waiver does in fact live there, as opposed to merely staying with the resident on an occasional basis. (United States v. Howard (9th Cir. 2006) 447 F.3rd 1257; see also Motley v. Parks (9th Cir. 2005) 432 F.3rd 1072, 1080-1082.)

Any evidence lawfully seized during a parole or probation search may be used in court against whomever the circumstances tend to connect it to. That may turn out to be the cotenant who was not on probation or parole. (Russi v. Superior Court, supra, at pp. 167-168; People v. Woods, supra.)

This rule is not conditioned upon the third person’s knowledge of the existence of the Fourth Waiver to which his or her cotenant was subject. (Russi v. Superior Court, supra, at p. 170.)

Also, it matters not whether the cotenant is the parolee or probationer’s wife, live-in “significant other,” or just some “drinking buddy.” (People v. Triche (1957) 148 Cal.App.2nd 198, 203.)
Search and Seizure Conditions Discovered After the Fact: It is quite clear now that when the search and seizure conditions of one co-tenant are belatedly discovered (i.e., after an otherwise illegal, warrantless search), given the importance of the non-waiver subject’s privacy rights in a residence, any evidence found as a result will not be admissible against that person. (*People v. Robles* (2000) 23 Cal.4th 789; *People v. Sanders* (2003) 31 Cal.4th 318; *In re Jaime P.* (2006) 40 Cal.4th 128; see above.)

Private Areas:

A Fourth Waiver imposed on one cotenant will not justify the search of areas or property exclusive to a third person. (*People v. Veronica* (1980) 107 Cal.App.3rd 906.)

“Neither reason nor authority support the proposition that police may conduct a general search of the private belongings of one who lives with a probationer.” To justify searching the property exclusive to a non-probationer or non-parolee, the officers will need “some cause” to believe the person subject to search and seizure conditions has secreted contraband in the property of a third person. (Italics added; *People v. Alders* (1978) 87 Cal.App.3rd 313, 317-318.)

The searching officers need only entertain a “reasonable suspicion,” based upon an evaluation of all the surrounding circumstances, that the item to be searched was either owned, or (at least jointly) controlled by, the person subject to the Fourth Waiver. (*People v. Boyd* (1990) 224 Cal.App.3rd 736, 745-346, 749-750.)

While some older cases have required that an officer have full “probable cause” to believe that a place or item to be searched is owned, controlled, or jointly possessed by the Fourth Waiver suspect (e.g., see *People v. Montoya* (1981) 114 Cal.App.3rd 556, 562.), the more recent cases, and the weight of authority, have held that so long as the searching officers have a “reasonable suspicion,” the resulting search will be upheld. (*People v. Palmquist* (1981) 123 Cal.App.3rd 1, 12; *People v. Boyd, supra*, at p. 750.)

See *People v. Smith* (2002) 95 Cal.App.4th 912; search of defendant, non-probationer’s purse, under the theory that the person subject to the search and seizure conditions (a male) had joint authority over her purse, was upheld.
A search of the female defendant’s purse left in the car when an officer is conducting a parole search of a male parolee, is illegal absent a reasonable suspicion to believe that the parolee had joint access, possession or control over the purse. (*People v. Baker* (2008) 164 Cal.App.4th 1152.)

A parolee being a mere passenger in a car, without any evidence giving a police officer a reasonable belief that the parolee has authority over the interior of the car (i.e., at least an “*apparent authority*” to allow others to search it), does not justify a search of the interior of the car. The owner/driver’s expectation of privacy is violated by a warrantless, non-consensual search of his car despite the presence of the parolee. (*People v. Schmitz* (2010) 187 Cal.App.4th 722, 729-733.)

*Note:* Certiorari was granted by the California Supreme Court on 12/2/10, making this case no longer available for citation pending a decision by the Court.

*When it is Unknown Who Owns the Property About to be Searched:* Where the officers do not know who owns or possesses a place or item to be searched, and such information can be easily ascertained, it may, depending upon the circumstances, be incumbent upon them to attempt to determine ownership in order to protect the privacy interests of the third persons involved.

“If it is *objectively unreasonable* for officers to believe that the residence or item falls within the scope of a search condition, any evidence seized will be deemed the product of a warrantless search absent other considerations.” *(Italics added; People v. Tidalgo* (1981) 123 Cal.App.3rd 301, 306-307.)*

However, the officers may still act upon appearances, so long as they act reasonably.

While some courts argue that officers may have a duty to inquire as to the ownership or control of certain items (see *People v. Montoya* (1981) 114 Cal.App.3rd 556, 562-563.), other more reasoned court decisions recognize that “an officer could hardly expect that a parolee (or probationer) would claim ownership of an item which he knew contained contraband.” (*People v. Britton* (1984) 156 Cal.App.3rd 689, 701.)
If an officer reasonably believes he will not receive an honest answer, there appears to be no legal reason why he or she must either inquire, or accept the answer as true if inquiry is in fact made. (People v. Boyd (1990) 224 Cal.App.34d 736, 746-750; see also United States v. Davis (9th Cir. 1991) 932 F.2nd 752, 760.)

Detention of Third Persons:

Police may lawfully detain visitors to a probationer’s home while executing a “Fourth Waiver” search for purposes of identifying the visitors (as possible felons) and for the officers’ safety. (People v. Matelski (2000) 82 Cal.App.4th 837.)

Third party occupants of a home searched under the conditions of a Fourth waiver may lawfully be detained during the search. The justifications for such a detention include:

- The need to prevent flight in the event incriminating evidence is found;
- Minimizing the risk of harm to the officers, and
- Facilitating the orderly completion of the search while avoiding the use of force. (Sanchez v. Canales (9th Cir. 2009) 574 F.3rd 1169, citing Muehler v. Mena (2005) 544 U.S. 93 [161 L.Ed.2nd 299]; a search warrant case.)

In a Vehicle:

A search and seizure condition justifies a detention without a reasonable suspicion of criminal activity, including while riding in a vehicle as a passenger, and a search of the car under the terms of the defendant’s Fourth waiver. (See People v. Viers (1991) 1 Cal.App.4th 990, 993-994; defendant stopped in his vehicle.)

Viers further held that it was irrelevant that the officers were unaware of defendant’s probation status when the search was conducted; a conclusion that has since been abrogated by People v. Sanders (2003) 31 Cal.4th 318. (See Myers v. Superior Court (124 Cal.App.4th 1247.)

See “Searching While In Ignorance of a Search Condition,” above.
Knock and Notice:


See “Knock and Notice,” under “Searches With a Search Warrant,” above.

This includes the doctrine of “substantial compliance,” where forced entry may be made so long as the “policies and purposes” (i.e., respecting the right to privacy within the home and avoiding violent confrontations) of the knock-notice rules have been satisfied. (People v. Montenegro (1985) 173 Cal.App.3rd 983, 988-989.)

However, a court may not impose a waiver of the knock and notice requirements as a condition of probation. (People v. Freund (1975) 48 Cal.App.3rd 49, 56-58.)

Detentions, Patdowns and Arrests:

Detentions: A search and seizure condition justifies a detention without a reasonable suspicion of criminal activity. (People v. Viers (1991) 1 Cal.App.4th 990, 993-994.)

Viers further held that it was irrelevant that the officers were unaware of defendant’s probation status when the search was conducted; a conclusion that has since been abrogated by People v. Sanders (2003) 31 Cal.4th 318. (See Myers v. Superior Court (124 Cal.App.4th 1247.)

See “Searching While In Ignorance of a Search Condition,” above.

Patdowns:

Old Rule: When the rule was that a parole search required at least a “reasonable suspicion” of renewed criminal activity, a police officer could not justify a patdown (frisk) search of a detained suspect for weapons based upon the detainee’s status as a parolee alone, in the absence of other suspicious circumstances furnishing
grounds to believe he may be armed, unless, perhaps, it was known
that his prior offense involved the use of weapons.  (People v.
Williams (1992) 3 Cal.App.4th 1100, 1105, 1108; People v.
Montenegro (1985) 173 Cal.App.3d 983.)

New Rule:  In that under the present state of the law, a parolee or
probationer may be searched without any cause (See People v.
Reyes (1998) 19 Cal.4th 743.), this rule (requiring a reasonable
suspicion) is probably no longer valid, at least pending review of
the necessary standards by the United States Supreme Court. (See
“Standard of Proof Required,” above.)

Arrests:  The fact that a person is a parolee-at-large, and subject to search
or seizure without a warrant or probable cause, justifies a warrantless entry
into the subject’s house for the purpose of arresting him.  (People v. Lewis

There is no authority, however, allowing for a non-consensual
transportation of a parolee or probationer, absent probable cause to
arrest the subject. In that a non-consensual transportation of a
subject is generally considered to be an arrest (Dunaway v. New
York (1979) 442 U.S. 200, 206-216 [60 L.Ed.2nd 824, 832-838];
see “Detentions,” above), and thus illegal absent probable cause to
arrest the subject, it is likely that the use of a Fourth Waiver
condition as an excuse to transport the subject, absent probable
cause to arrest him, would not be upheld.

Out-of-State Probationer or Parolee:  The validity of a search of a probationer or
parolee from another state, supervision for whom has been transferred to
California pursuant to Penal Code §§ 11175 et seq. (Uniform Act for Out-of-
State Parolee (and Probationer) Supervision), is to be determined by California

AIDS & HIV:  A parole or probation officer seeking the assistance of law
enforcement to apprehend or take into custody a parolee or probationer who has a
record of assault on a peace officer, must, by statute, inform the officers of the
suspect’s infliction with AIDS or HIV.  (P.C. § 7521)
Chapter 16

Consent Searches:


“It is well settled that a search conducted pursuant to a valid consent is constitutionally permissible.” (Citation omitted; United States v. Soriano (9th Cir 2004) 361 F.3rd 494, 501.)

“(A) search conducted pursuant to a valid consent is constitutionally permissible.” (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 222 [36 L.Ed.2nd 854, 860].)

Why do people consent? Would a person who has something to hide really consent to being searched? Yes!

Some persons are more concerned with what they perceive to be the appearance of guilt, and feel they must consent to avoid such an appearance, hoping the law enforcement officer will either lose interest or fail to find whatever it is the person hopes to keep concealed. Consent under these circumstances, however, if the person reasonably should have felt like he or she had the option of refusing, is still a valid consent. (See People v. James (1977) 19 Cal.3rd 99, 114.)


“Whether consent to search was voluntarily given is ‘to be determined from the totality of all the circumstances.’” (Italics added; United States v. Soriano (9th Cir. 2003) 361 F.3rd 494, 501; citing Schneckloth v. Bustamonte, supra; see also Pavao v. Pagay (9th Cir. 2002) 307 F.3rd 915, 919; United States v. Crapser (9th Cir. 2007) 472 F.3rd 1141, 1149.)
“(T)he government’s burden to show voluntariness cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” (United States v. Perez-Lopez (9th Cir. 2003) 348 F.3rd 839, 846; see also United States v. Bautista (9th Cir. 2004) 362 F.3rd 584, 589.)

“On appeal, evidence regarding the question of consent must be viewed in the light most favorable to the fact-finder’s decision.” (United States v. Kaplan (9th Cir. 1990) 895 F.2nd 618, 622.)

Factors: As described in People v. Ramirez (1997) 59 Cal.App.4th 1548, at page 1558, the following are among the factors that will be taken into consideration in determining the validity of a consent to search, although none of these factors are necessarily dispositive in and of itself:

- Whether the person consenting was in custody.
- Whether the arresting officers had their guns drawn.
- Whether Miranda warnings had been given. (But, see Miranda, below.)
- Whether the person consenting was told that he or she had a right not to consent.
- Whether the person consenting was told that a search warrant could be obtained.

(See also United States v. Soriano, supra, at pp. 968-969; United States v. Rodriguez-Preciado (9th Cir. 2005) 399 F.3rd 1118, 1126; United States v. Crapser (9th Cir. 2007) 472 F.3rd 1141, 149; United States v. Rodriguez (9th Cir. 2006) 464 F.3rd 1072, 1077; United States v. Brown (9th Cir. 2009) 563 F.3rd 410, 415; United States v. Vongxay (9th Cir. 2010) 594 F.3rd 1111, 1119-1120; (Liberal v. Estrada (9th Cir. 2011) 632 F.3rd 1064, 1082-1083.)

Circumstances Affecting Voluntariness:

Under Arrest: The fact alone that the suspect is under arrest is not enough to demonstrate coercion. (United States v. Watson (1976) 423 U.S. 411 [46 L.Ed.2nd 598]; People v. Llamas (1991) 235 Cal.App.3rd 441, 447.)

Use of Firearms: Attempting to obtain a consent from a suspect while firearms are being displayed will inevitably result in a finding that the consent was coerced. (People v. McKelvy (1972) 23 Cal.App.3rd 1027, 1034: “(N)o matter how politely the officer may have phrased his request for the object, it is apparent that defendant’s compliance was in fact under compulsion of a direct
command by the officer. . . . The evidence established ‘no more than acquiescence to a claim of lawful authority.’”

In McKelvy, the defendant was standing in a police spotlight, surrounded by four police officers, all of whom were armed with either a shotgun or a carbine. Handing over contraband to the officers under these circumstances was held not to be a consensual act.

Even an implied assertion of authority by the police officer may be enough to invalidate a consent to search. (People v. Fields (1979) 95 Cal.App.3rd 972, 976; Amos v. United States (1921) 255 U.S. 313, 317 [65 L.Ed.2nd 654, 656].)

Threatening to Obtain a Search Warrant: While telling a suspect that officers will obtain a warrant invalidates a consensual search under circumstances where the officers do not actually have the necessary probable cause to obtain a warrant, threatening to get a warrant when the officers do have the necessary probable cause is lawful. (People v. Robinson (1957) 149 Cal.App.2nd 282, 286; People v. Goldberg (1984) 161 Cal.App.3rd 170, 188; Bumper v. North Carolina (1968) 391 U.S. 543 [20 L.Ed.2nd 797] United States v. Soriano (9th Cir. 2003) 361 F.3rd 494, 971; People v. Williams (2007) 156 Cal.App.4th 949, 961.)

Whether or not the threat to get a warrant is done in a threatening manner is also a factor to consider. (United States v. Rodriguez (9th Cir. 2006) 464 F.3rd 1072, 1078.)

Threatening to Use a Drug-Sniffing Dog: Threatening to use a drug-sniffing dog, when such use does not require the suspect’s consent and is otherwise lawful, will also not invalidate the resulting consent to search. (United States v. Todhunter (9th Cir. 2002) 297 F.3rd 886, 891.)

Implying Guilt: It is improper to purposely put a subject in the position where he feels that by exercising his right to refuse, he would be incriminating himself or admitting participation in illegal activity. (Crofoot v. Superior Court (1981) 121 Cal.App.3rd 717, 725.)

For example: “You don’t have anything in your pockets you don’t want me to see, do you?” (Negative response) “Then you wouldn’t mind me looking, would you?” (See Ibid.)
“(I)mPLICIT IN THE OFFICER’S STATEMENT IS THE THREAT THAT BY EXERCISING HIS RIGHT TO REFUSE THE SEARCH (THE SUSPECT) WOULD BE INCriminating HIMSELF OR ADMITTING PARTICIPATION IN ILLEGAL ACTIVITY.” (IbID.)

Using a Ruse: A free and voluntary consent, as a general rule, may not be obtained by, or as the product of, a ruse. (People v. Reyes (2000) 83 Cal.App.4th 7, 13; People v. Reeves (1964) 61 Cal.2nd 268, 273; People v. Miller (1967) 248 Cal.App.2nd 731.)

But, where the ruse is only partial, and does not disguise the scope of the proposed search, then the resulting search may be upheld. (People v. Avalos (1996) 47 Cal.App.4th 1568.)

Threats to Take Away One’s Children: Threatening to take away one’s children, letting social services take them, if the person does not cooperate, will negate a consent to search. (United States v. Soriano (9th Cir. 2003) 346 F.3rd 963.)

In Soriano, the consent was saved when a federal agent immediately interrupted the police officer who made the threat, and assured the female subject that she was not then a suspect, nor likely to be arrested, and therefore need not worry about having her children taken away. However, the decision was a split decision, with the dissent arguing that the woman’s consent was still not free and voluntary despite the agent’s attempt to save it. (See pp. 975-979.)

See also Lynum v. Illinois (1963) 372 U.S. 528, 534 [9 L.Ed.2nd 922, 926]; and United States v. Tingle (9th Cir. 1981) 658 F.2nd 1332, 1336; two confession cases where statements were rendered involuntary due to threats to take the children away if the subjects did not cooperate.

And see In re Rudy F. (2004) 117 Cal.App.4th 1124, where a consent to search was negated by the threat to “book” the person’s children; the issue not even being contested on appeal.

Other Inducements:

Telling defendant that the owner of the house had already consented to the search, a truthful statement, resulting in defendant giving his own consent to the search of his room
in that house, did not invalidate defendant’s consent. *(People v. Monterroso* (2004) 34 Cal.4th 743, 758-759.)

Threatening an employee with the loss of his job if he didn’t retrieve items from his home was not a voluntary consent and a **Fourth Amendment** search violation. *(Delia v. City of Rialto* (2010) [2010 U.S. App. LEXIS 26968]; firefighter suit against his department after being ordered by supervisors to bring items out of his house to show that he’d called in sick under false pretenses.)

Writ of Certiorari was granted *(Filarsky v. Delia* (2011) 132 S. Ct. 70, 180 L. Ed. 2nd 939, 2011 U.S. LEXIS 5204).), making this case unavailable for citation.

**Combination of Factors:** Being under arrest, in handcuffs, without having received his **Miranda** rights and without having been told of his right to refuse a consent search, held *not* to be enough to prevent defendant from consenting to the search of his room. *(People v. Monterroso, supra, at pp. 757-759.)*

**Note:** But this combination of factors certainly made it an issue that could have gone either way.

**During a Consensual Encounter:** Asking a person for consent to search his person does not, by itself, convert a consensual encounter into a detention “as long as the police do not convey a message that compliance with their requests is required.” *(United States v. Washington* (9th Cir. 2007) 490 F.3rd 765, 770.)

**Manner of Inquiry:** It is not so much what the officer is asking, but rather the “manner or mode” in which it is put to the citizen which determines whether the response is voluntary or not. *(People v. Franklin* (1987) 192 Cal.App.3rd 938, 941.)

**Reasonable Person Test:** For a consent search to be valid, the suspect must *reasonably* believe, under the circumstances, he has a choice. *(People v. James* (1977) 19 Cal.3rd 99, 116.)

**Note:** Asking for consent to search in a manner implying (even if not expressly stating) that the suspect is being offered a choice, helps to prove that a positive response was voluntary. For instance: “Sir, do you mind if I look in your car?” Or, “Sir, may I look in your car?” Not; “I’m going to search your car!”
Product of a Constitutional Violation: A suspect’s consent to search given immediately (i.e., without sufficient intervening factors) after each of the following will likely be held to be invalid:


But, note that the fact that a suspect is being illegally detained does not necessarily mean, by itself, that the consent is involuntary. (See People v. Llamas (1991) 235 Cal.App.3d 441; noting, but not addressing the issue whether being illegally detained invalidated a consent under the “fruit of the poisonous tree” doctrine.)

Under the “fruit of the poisonous tree” doctrine, subsequent events may dispel the coercive taint of the initial illegality, making a subsequent consent lawful. (See United States v. Ibarra (10th Cir. 1992) 955 F.2nd 1405, 1411, fn. 8.)

“Where an illegal detention occurs, unless ‘subsequent events adequately dispel the coercive taint of the initial illegality, i.e., where there is no longer causality, the subsequent consent is’ ineffective. (Citations.)” (People v. Zamudio (2008) 43 Cal.4th 327, 341.)

Illegal Detention: As a “seizure” of one’s person, the products of an illegal detention are also subject to being suppressed under the Exclusionary Rule. (See People v. Krohn, supra; detaining defendant for drinking in public, when he was not in a public place, is an illegal detention and requires the suppression of the controlled substances found on his person in a subsequent consensual search.)

“Where an illegal detention occurs, unless ‘subsequent events adequately dispel the coercive taint of the initial illegality, i.e., where there is no longer causality, the subsequent consent is’ ineffective.” People v. Zamudio (2008) 43 Cal.4th 327, 340; citing People v. $48,715 United States Currency (1997) 58 Cal.App.4th 1507, 1514.)
And, an illegal detention (or arrest) will not serve to invalidate a previously obtained, otherwise lawful, consent. *(People v. $48,715 United States Currency, supra, at pp. 1513-1515.)*

Generally, a consent to search obtained during an unlawfully prolonged detention will require the suppression of any evidence discovered during the resulting search. *(See United States v. Chavez-Valenzuela (9th Cir. 2001) 268 F.3rd 719.)*

However, the Ninth Circuit Court of Appeal has held that a minimally prolonged detention (e.g., a couple of minutes), at least when motivated by other newly discovered information even though that new information by itself might not constitute a reasonable suspicion, does not make the prolonging of the detention unreasonable. Under such circumstances, a minimally prolonged detention is not unlawful. A consent to search obtained during that disputed time period is lawful. *(United States v. Turvin et al. (9th Cir. 2008) 517 F.3rd 1097.)*

See “Consent During a Prolonged Detention,” below.

- **Illegal search.** *(People v. Lawler (1973) 9 Cal.3rd 156, 163; Burrows v. Superior Court (1974) 13 Cal.3rd 238, 251.)*
  
  *But,* a search done under the authority of a search warrant that is held only to be partially invalid may not require the suppression of evidence recovered from a consensual search of another property obtained during the execution of the warrant. *(See United States v. SDI Future Health, Inc. (9th Cir. 2009) 568 F.3rd 684, 707-708.)*

- **Illegal interrogation.** *(People v. Superior Court [Keithley] (1975) 13 Cal.3rd 406, 410; following the violation of the suspect’s Miranda rights.)*

- Without informing a charged defendant’s lawyer in violation of the Sixth Amendment rights (i.e., after his arraignment). *(Tidwell v. Superior Court (1971) 17 Cal.App.3rd 780, 789.)*

  But see *United States v. Kon YuLeung* (2nd Cir. 1990) 910 F.2nd 33, 38-40 (consent valid despite having been indicted);
and United States v. Hidalgo (11th Cir. 1993) 7 F.3rd 1566, 1570, both holding that obtaining a defendant’s consent to search is not a critical stage of the proceedings protected by the Sixth Amendment.

Consent During a Prolonged Detention:

General Rule: Prolonged Detentions are Illegal: A traffic stop (or any other detention) which is reasonable in its inception may become unreasonable if prolonged beyond that point reasonably necessary for the officer to complete the purposes of the stop or detention. (People v. McGaughran (1979) 25 Cal.3rd 577.)

Under the theory of McGaughran, a consent obtained during an unconstitutionally prolonged detention may be subject to suppression as the product of that illegal detention. (See People v. Llamas (1991) 235 Cal.App.3rd 441, 447; and People v. Valenzuela (1994) 28 Cal.App.4th 817, 833.)

An otherwise lawful “knock and talk,” where officers continued to press the defendant for permission to enter his apartment after his denial of any illegal activity, converted the contact into an unlawfully “extended” detention, causing the Court to conclude that a later consent-to-search was the product of the illegal detention, and thus invalid. (United States v. Washington (9th Cir. 2004) 387 F.3rd 1060.)

Lawfully Prolonged Detentions:

The Ninth Circuit Court of Appeal has held that a minimally prolonged detention (e.g., a couple of minutes), at least when motivated by other newly discovered information even though that new information by itself might not constitute a reasonable suspicion, does not make the prolonging of the detention unreasonable. Under such circumstances, a minimally prolonged detention is not unlawful. (United States v. Turvin et al. (9th Cir. 2008) 517 F.3rd 1097.)

Developing new information to the effect that a vehicle’s passenger might be an under-age prostitute and that the defendant driver her pimp, a continued detention for the purpose of investigating that possibility was lawful. (United States v. Rodgers (9th Cir. Sep. 7, 2011) 656 F.3rd 1023, 1027; Extending a traffic stop for the purpose of investigating other crimes for which there is no suspicion constitutes an illegal detention. But it is also a rule that “(a) ‘period of detention [may be] permissibly extended
After Detention Ends: If the person voluntarily consents to having his vehicle searched after he is free to leave, there is no prolonged detention. The officer is under no obligation to advise him that he is no longer being detained (or that he has a right to refuse to allow the officer to search). *(Robinette v. Ohio (1996) 519 U.S. 33 [136 L.Ed.2nd 347].)*

*However;* the Ninth Circuit Court of Appeal believes that a consent search, obtained after the purposes of the traffic stop had been satisfied, is invalid as a product of an illegally prolonged detention, the extended detention being the result of the officer’s unnecessary inquiries made during the traffic stop. *(United States v. Chavez-Valenzuela (9th Cir. 2001) 268 F.3rd 719, amended at 279 F.3rd 1062.)* *Robinette* was not discussed by the Court.

The Ninth Circuit Court of Appeal is of the belief that an officer must be able to “articulate suspicious factors that are particularized and objective” in order to “broaden the scope of questioning” beyond the purposes of the initial traffic stop.” *(United States v. Murillo (9th Cir. 2001) 255 F.3rd 1169, 1174.)*; a questionable rule in light of *Robinette.*

But see the dissenting opinion in the denial for a rehearing en banc in *United States v. Chavez-Valenzuela, supra,* pointing out the absurdity of what Justice O’Scannlain refers to as the “seven minute rule,” noting this decision’s conflict with *Robinette* and other Supreme Court authority. (281 F.3rd 897.)

The Ninth Circuit’s argument on this issue is similar to that made by the Ohio Supreme Court, and rejected by the U.S. Supreme Court, in *Robinette:* Per the Ohio Supreme Court: “When the motivation behind a police officer’s continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure. (73 Ohio St.3rd at p. 650.)”
Contrary to the Ninth Circuit’s published opinions on this issue, the Supreme Court has held: “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.” **(United States v. Drayton** (2002) 536 U.S. 194 [153 L.Ed.2nd 242.]; citing **Florida v. Bostick** (1991) 501 U.S. 429, 434-435 [115 L.Ed.2nd 389, 398-399].)

Most recently, in **Illinois v Caballes** (2005) 543 U.S. 405 [160 L.Ed.2nd 842], the U.S. Supreme Court rejected the argument that allowing a narcotics-sniffing dog to sniff around the outside of a vehicle that was lawfully stopped for a traffic offense “unjustifiably enlarge(s) the scope of a routine traffic stop into a drug investigation.” Per the Supreme Court: No expectation of privacy is violated by this procedure, and therefore does not implicate the Fourth Amendment.

Also, the U.S. Supreme Court recently rejected the Ninth Circuit’s unsupported conclusion that, absent “a particularized reasonable suspicion that an individual is not a citizen,” it is a Fourth Amendment violation to ask him or her about the subject’s citizenship (see **Mena v. City of Simi Valley** (9th Cir. 2003) 332 F.3rd 1255, 1264-1265; reversed by the U.S. Supreme Court in **Muehler v. Mena** (2005) 544 U.S. 93 [161 L.Ed.2nd 299].)

California courts seem to be in line with these latest Supreme Court pronouncements on the issue: “Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a Fourth Amendment violation. Mere questioning is neither a search nor a seizure. [Citation.] While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. [Citation.]” **(People v. Brown** (1998) 62 Cal.App.4th 493, 499-500; see also **People v. Gallardo** (2005) 130 Cal.App.4th 234, 239; asking for consent to search during the time it would have taken to write the citation that was the original cause of the stop is legal, despite the lack of any evidence to believe there was something there to search for.)

© 2012 Robert C. Phillips. All rights reserved
Despite the above authority, the Ninth Circuit continues to insist that questioning a detainee about possible criminal activity not related to the cause of the detention, and without a “particularized suspicion” to support a belief that the detainee is involved in that activity, is a Fourth Amendment violation. (United States v. Mendez (9th Cir. 2006) 467 F.3d 1162.)

**The Scope of the Consent;** i.e., what areas may be searched based upon the consent given?

**Burden of Proof:** The prosecution bears the burden to prove that a warrantless search was within the scope of the consent given. (People v. Cantor (2007) 149 Cal.App.4th 961, 965.)

**Test:** The scope of the consent is measured by a standard of objective reasonableness based upon all the surrounding circumstances: “What would the typical reasonable person have understood by the exchange between the officer and the suspect?” (Florida v. Jimeno (1991) 500 U.S. 248, 251 [114 L.Ed.2nd 297, 303].)

In determining the reasonableness of a searching officer’s conduct in a consensual search of a residence, a court must balance the extent of the intrusion into defendant’s privacy rights with the governmental interest justifying it. (People v. Smith (2010) 190 Cal.App.4th 572, 577-580; upholding the opening of the door to a noisy clothes dryer so that the officers could maintain control of a potentially dangerous situation and to communicate with subjects in the house.)

When defendant turned around and raised his arms in response to the officer’s statement; “Hey, I’d like to shake you down real quick, if you don’t mind,” this was held to be a consent to a patdown only, and not to a full body search. (People v. Tufono (1997) 57 Cal.App.4th 1534, 1542-1543; recovery of a vial during a full search held to be illegal.)

Consenting to being searched for weapons did not allow for the officer reaching into his pocket and retrieving marijuana. (People v. Rice (1968) 259 Cal.App.2nd 399, 403.)

And giving an officer permission to enter his home for the purpose of finding someone who had run into the house did not authorize the search for a crowbar used in a burglary and found in a bedroom closet. (People v. Superior Court [Arketa] (1970) 10 Cal.App.3rd 122.)
“(N)either a general consent to search a particular premises nor a consent to search for specific items includes the right to intercept telephone calls to the premises involved.” *(People v. Harwood* (1977) 74 Cal.App.3	extsuperscript{rd} 460, 468.)

However, the rule of *Jimeno, supra*, was applied to uphold a car search that involved removing a plastic vent cover on a door post which displayed striation marks indicating recent removal or tampering. *(People v. Crenshaw* (1992) 9 Cal.App.4	extsuperscript{th} 1403, 1414.)

Stepping aside while swinging the door open to an officer who was responding to an incomplete 911 call for help, was held to be a consent to enter. *(Pavao v. Pagay* (9th Cir. 2002) 307 F.3	extsuperscript{rd} 915.)

Voluntarily consenting to the search of his vehicle, during which only money was found, and then later that day admitting that methamphetamine was hidden in a particular place in the vehicle, was sufficient to reasonably cause the officers to believe that they had consent to go back into the vehicle to recover the meth. *(United States v. Rodriguez-Preciado* (9th Cir. 2005) 399 F.3	extsuperscript{rd} 1118, 1131, as amended at 416 F.3	extsuperscript{rd} 939.)

The test is: “(W)hat would the typical reasonable person have understood by the exchange between the officer and the suspect?” “(A)n officer does not exceed the scope of a suspect’s consent by ‘searching’ when the officer asked only if he or she could ‘look.’” Checking under the trunk’s carpet lining in the suspect’s vehicle, therefore, was no more than part of an otherwise lawful search based upon the defendant’s consent to “look” for anything that they were “not supposed to have.” *(United States v. McWeeney* (9th Cir. 2006) 454 F.3	extsuperscript{rd} 1030, 1034-1035.)

With defendant agreeing to the officer’s request to “check (defendant’s car) real quick and get you on your way,” the scope of that consent was exceeded at some point before the search had continued for fifteen minutes without finding anything, and certainly when the officer later pulled a box from the trunk and removed the back panel to the box by unscrewing some screws. *(People v. Cantor* (2007) 149 Cal.App.4	extsuperscript{th} 961.)

When asked for consent to search his person, a reasonable person would expect that an officer will then ask him to exit his vehicle for the purpose of conducting that search. *(United States v. Washington* (9th Cir. 2007) 490 F.3	extsuperscript{rd} 765, 770-771.)
Consent to search defendant’s truck found to extend to a second
search absent any evidence to indicate that defendant was limiting
his consent to the first search only. (People v. Valencia (2011)
201 Cal.App.4th 922.)

Express vs. Implied Consent:  A person’s consent may be “express” or “implied.”
(Torbet v. United Airlines, Inc. (9th Cir. 2002) 298 F.3rd 1087, 1089 (People v.
Panah (2005) 35 Cal.4th 395, 466-467.)

Express Consent: Answering in the affirmative when asked for consent to
search is the most obvious example of an “express consent.”

Also, however, an affirmative head-nod made by defendant to his
son in response to an officer’s request for permission for his son to
retrieve a gun from defendant’s tent, held to be an express consent.
(United States v. Basher (9th Cir. 2011) 629 F.3rd 1161, 1168-
1169.)

An “implied consent” exists when, considering the “totality of the
circumstances,” a reasonable person would have understood that he is
agreeing to a search. (United States v. Jenkins (4th Cir. 1993) 986 F.2nd
76, 79.)

Raising one’s arms into the air after being asked by a police officer
for consent to search his person was held to be the defendant’s
implied consent to such a search. (United States v. Vongxay (9th
Cir. 2010) 594 F.3rd 1111, 1119-1120.)

“(O)nly in narrow circumstances may consent be implied by
actions and in most implied consent case it is the suspect himself
(as opposed to a third party) who takes an action which implies
consent.” Espinosa v. City and County of San Francisco (9th Cir.
2010) 598 F.3rd 528, 536.)

But, “(a) ‘search cannot be validated upon an implied consent
based upon the failure of defendant . . . to protest the entry . . . .’

Note: Certiorari was granted by the California Supreme
Court on 12/2/10, making this case no longer available for
citation pending a decision by the Court.

© 2012 Robert C. Phillips. All rights reserved
Examples:

Upon submission to having one’s x-rayed luggage (Torbet v. United Airlines, Inc., supra.) and/or by walking through a magnetometer (United States v. Aukai (9th Cir., 2007) 497 F.3rd 955.) at an airport.

See “Warrantless Searches,” “Airport Searches,” above.

Upon entering a military base where signs are posted warning that persons on the base are subject to being searched. (United States v. Ellis (5th Cir. 1977) 547 F.2nd 863, Naval base; United States v. Jenkins, supra; Morgan v. United States (9th Cir. 2003) 323 F.3rd 776.)

A civilian staying in the on-base housing of a military serviceman has possibly impliedly waived his right to privacy when his property (e.g., computers) is searched. (United States v. Krupa (9th Cir. 2011) 658 F.3rd 1174, 1179-1180.)

Defendant visiting a county jail visitor center is subject to search, particularly where signs are posted warning him that he was subject to search. This includes outside lockers on the jail property where visitors could deposit items not allowed in the jail. “Implied consent” applies to administrative searches of closely regulated businesses, including a county jail. (People v. Boulter (2011) 199 Cal.App.4th 761.)

A co-owner of a laptop computer has actual authority to give consent to the police to search. And if it turns out that the person is not actually a co-owner, the doctrine of apparent authority may justify the search when it reasonably appears under the circumstances that she did have such authority. (United States v. Stanley (9th Cir. 2011) 653 F.3rd 946, 950-952.)

Consent may be implied as determined by the totality of all the circumstances. For instance, in the case of a military base, one impliedly consents to the search of his or her vehicle when driving upon the base and noting:

- The barbed-wire fence;
- The security guards at the gate;
- The sign warning of the possibility of search; and
- A civilian’s common-sense awareness of the nature of a military base.
(United States v. Jenkins, supra, at p. 78; Morgan v. United States, supra, at pp. 787-788.)

Issues:

- May a suspect withdraw consent once it’s given? Yes. (People v. Martinez (1968) 259 Cal.App.2nd Supp. 943, 945; United States v. McWeeney (9th Cir. 2006) 454 F.3rd 1030, 1035; see also (United States v. Krupa (9th Cir. 2011) 658 F.3rd 1174.)

But see People v. Schomer (1971) 17 Cal.App.3rd 427, where an unlimited search for a runaway minor of the defendant’s apartment was allowed for some twenty minutes until defendant realized that the officers were getting close to his marijuana at which time he tried to withdraw the consent. The marijuana was seen in plain sight. Defendant testified that he did not object to the officers searching for a person, but objected to them looking for narcotics. The attempted withdrawal of consent was held to be ineffective under these circumstances where the defendant later testified that he had not objected to the officers searching for a person, but only to searching for contraband.

And see “Warrantless Searches,” “Airport Searches,” above, where by submitting one’s carryon luggage and/or his person to the initial x-ray and/or magnetometer screening at an airport, a person loses his right to revoke permission when asked to submit to a secondary screening. (Torbet v. United Airlines, Inc. (9th Cir. 2002) 298 F.3rd 1087; United States v. Aukai (9th Cir. 2006) 440 F.3rd 1168.)

Where officers “created a setting in which the reasonable person would believe that he or she had no authority to limit or withdraw their consent,” the resulting consent search may be invalidated. (United States v. McWeeney, supra, at pp. 1036-1037.)

Per the Court in McWeeney (at p. 1037), factors to consider in evaluating this issue include, but are not limited to:

- The language used to instruct the suspect;
- The physical surroundings of the search;
- The extent to which there were legitimate reasons for the officers to preclude the suspect from observing the search;
• The relationship between the means used to prevent observation of the search and the reasons justifying the prevention;
• The existence of any changes in circumstances between when consent is obtained and when the officers prevent the suspect from observing the search; and
• The degree of pressure applied to prevent the suspect either from observing the search or voicing his objection to its proceeding further.

• May a suspect limit the consent to certain areas? Yes. (Ibid.)

But, if he does not limit the consent to a specific area, the officer may search the whole thing reasonably believed to be included in the request. E.g.; A consent to search one’s car, unless specifically limited, includes the whole car and any containers in the car. (People Clark (1993) 5 Cal.4th 950, 977-980.)

• May a drug-sniffing dog be used without obtaining any more than a general consent to search? Yes; at least when it is a vehicle (as opposed to a residence) being searched, the defendant should have been aware that a dog was available, and he failed to object when the dog was used. (People v. Bell (1996) 43 Cal.App.4th 754.)

See also People v. $48,715 United States Currency (1997) 58 Cal.App.4th 1507, 1515-1516: “A "sniff" by a trained drug-sniffing dog in a public place is not a "search" within the meaning of the Fourth Amendment’ at all. Accordingly, no consent is needed for participation of the dog. (Citation)” (See also United States v. Todhunter (9th Cir. 2002) 297 F.3rd 886, 891.) (See “Dogs Used to Search,” above.)

• May a suspect place conditions on the search? (E.g.; “Yes officer, but only if I may be present.”) Arguably; Yes.

If a person may limit the areas to be searched, it would seem that he could also impose any conditions he chooses. ( See People Clark, supra, recognizing the validity of a conditional consent even though not discussing the issue.)

• May an officer use a ruse or deception in obtaining a consent? Generally, No.
Consent has to be given freely and voluntarily, with a knowledge of the right to refuse. If the suspect reasonably misconstrues, due to an officer’s misrepresentations, the purpose of the search, it will probably be held to be involuntary. (See People v. Reeves (1964) 61 Cal.2nd 268, 273; People v. Mesaris (1970) 14 Cal.App.3rd 71.)

But, a ruse is but one factor to consider. If, under the totality of the circumstances, a suspect is not materially misled as to the privacy rights he is giving up by consenting, the search will be held to be valid. (People v. Avalos (1996) 47 Cal.App.4th 1567.)

- Can a suspect who is under arrest validly consent to being searched? Yes.

The fact that the defendant is in custody at the time is but one factor to consider when determining whether that defendant gave a free and voluntary consent. (United States v. Crapser (9th Cir. 2007) 472 F.3rd 1141, 1149.)

- Does a consensual search of a residence have to be based upon some level of suspicion. No.

Conducting a “knock and talk,” and asking the homeowner for consent to conduct a search of the residence, follows the same rules as in the case of a “consensual encounter” of a person on the street, and need not be supported by even a “reasonable suspicion.” (People v. Rivera (2007) 41 Cal.4th 304; contact initiated due to an uncorroborated anonymous tip.)

Other Elements of a Consent Search:


The fact he has been asked for consent should indicate to a reasonable person that he has a right to refuse.

However, should an officer tell a suspect he has the right to refuse, this fact adds to the weight of the argument that his consent was voluntary.

A person’s refusal to consent to a search is not admissible in court against that person to show a consciousness of guilt, even where
the officers had a legal right to make a warrantless entry. To use a person’s refusal “merely serves to punish the exercise of the right to insist upon a warrant.” I.e.; “(A) penalty imposed by courts for exercising a constitutional right.” (People v. Wood (2002) 103 Cal.App.4th 803, 808; People v Keener (1983) 148 Cal.App.3rd 73, 79.)

**Miranda:** There is no requirement that a suspect be advised of his Miranda rights (per Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2nd 694].) prior to giving a valid consent. (People v. Brewer (2000) 81 Cal.App.4th 442; People v. Monterroso, supra.)

Nor is it relevant that the subject had already invoked his Miranda rights. (United States v Kon Yu Leung (2nd Cir. 1990) 910 F.2nd 33, 38; United States v. Hidalgo (11th Cir. 1993) 7 F.3rd 1566; United States v. Shlater (7th Cir. 1996) 85 F.3rd 1251, 1255-1256.)


But see United States v. Reilly (9th Cir. 2000) 224 F.3rd 986, 994, where it was erroneously held that a defendant’s invocation of his right to an attorney precluded officers from asking him for his consent to search.

An advisal of one’s Miranda rights before asking for consent to search is some evidence, however, that his consent is given freely and voluntarily, in that the giving of a Miranda admonishment infers that he is not without rights. (United States v. Morning (9th Cir. 1995) 64 F.3rd 531, 533.)

Note also, older authority indicating that illegally continuing an interrogation after the suspect invokes his Miranda rights, followed by a request for a consent search, will likely result in the consent being held to be invalid (People v. Superior Court [Keithley] (1975) 13 Cal.3rd 406, 410.), which is questionable authority in light of the rule that the “fruit of the poisonous tree” doctrine does not apply to Miranda violations. (Oregon v. Elstad
(1985) 470 U.S. 298 [84 L.Ed.2nd 222]; Dickerson v. United States

And the Ninth Circuit Court of Appeal has recently called into
question whether the giving of a Miranda admonishment is really
a factor that should be considered at all when determining the
validity of a consent to search. (United States v. Perez-Lopez (9th
Cir. 2003) 348 F.3rd 839, 846-847, criticizing its own contrary
decision in United States v. Morning, supra.)

Written Consent: There is no legal requirement that a consent to search be
obtained in writing. However, obtaining a suspect’s consent in writing
tends to help to convince a court of the voluntariness of the resulting

Answering the Telephone:

Consent to enter a residence does not include an implied consent to answer
the telephone while there. (People v. Harwood (1978) 74 Cal.App.3rd
460.)

However, while lawfully in a residence, probable cause to believe that a
caller might be the fugitive defendant, officers may answer the telephone
and pretend to be a resident when done for the purpose of attempting to
locate the defendant. (People v. Ledesma (2006) 39 Cal.4th 641, 704.)

Consent by Others:

General Rule: Police may rely upon the consent of whoever they
“reasonably believe,” under the circumstances, possesses common
[111 L.Ed.2nd 148]; People v. Reed (1967) 252 Cal.App.2nd 994, 996;
1201.)

The person giving consent must have either the “actual authority,”
or the “apparent authority,” to give consent:

“Actual Authority;” Where the owner of property has
expressly granted authority for a person to give consent, or
where it is known that the person has mutual use or joint
access, then he or she is said to have “actual authority” to
consent to a search of that property. (United States v.
Davis (9th Cir. 2003) 332 F.3rd 1163, 1169; People v.
Superior Court [Walker], supra, at pp. 1205-1208.)
“Apparent Authority:” A determination made based upon the circumstances and whether the officers reasonably believe that the person giving consent had the authority to do so. (*United States v. Fiorillo* (9th Cir. 1999) 186 F.3rd 1136; *People v. Superior Court [Walker]*, supra, at pp. 1208-1214.)

To establish “apparent authority,” the prosecution must show:

- The police believed an untrue fact that they used to assess the consenter’s control over the area to be searched;

- It was objectively reasonable for the officers to believe that the fact was true; and

- If that fact were true, the consenter would have had actual authority to give that consent.

(*United States v. Reid* (9th Cir. 2000) 226 F.3rd 1020, 1025; *United States v. Enslin* (9th Cir. 2003) 315 F.3rd 1205, 1215; *United States v. Ruiz* (9th Cir. 2005) 428 F.3rd 877; *Espinosa v. City and County of San Francisco* (9th Cir. 2010) 598 F.3rd 528, 536-537.)

Where U.S. Marshals knew that the person giving consent was a resident of the home, and had no reason to know that defendant was occupying a back bedroom, the officers could reasonably assume the consenter/resident had the authority to authorize entry into that back bedroom. (*United States v. Enslin*, supra.)

Paper bags left by defendant in an acquaintance’s garage, where the acquaintance had free access to the bags, may be lawfully searched with consent from the acquaintance. By leaving the bags with the acquaintance, knowing and not objecting to the fact that she (the acquaintance) would go into the bags, defendant “assumed the risk” that she would allow others to look into the bags. (*People v. Schmeck* (2005) 37 Cal.4th 240, 280-282.)

Apparent authority found where the resident of a house gave consent to search a container set out in plain sight and no one objected when such consent was requested. (*United States v. Ruiz*, supra.)
However, the search of a purse based upon the consent of the purse owner’s boyfriend was held to be unlawful because it was unreasonable for the officers to think that the boyfriend had the necessary authority. (See United States v. Welch (9th Cir. 1993) 4 F.3rd 761.)

“(A) guest who has the run of the house in the occupant’s absence has the apparent authority to give consent to enter an area where a visitor normally would be received.” (People v. Ledesma (2006) 39 Cal.4th 657, 703-704.)

And, although receiving consent to enter a residence does not infer a consent to answer the telephone while in the residence (People v. Harwood (1977) 74 Cal.App.3rd 460, 458.), the telephone may be answered where the officers have probable cause to believe defendant will be calling and taking the time to get a warrant would compromise the officer’s ability to quickly locate and apprehend him. (People v. Ledesma, supra, at p. 704.)

A business that owns the company’s computers may consent to the search of a computer used by an employee, at least when the employee is on notice that he has no reasonable expectation of privacy in the contents of the computer he is using. (United States v. Ziegler (9th Cir. 2007) 474 F.3rd 1184.)

Examples:

Landlord:

A landlord may not give a valid consent for police to search a renter’s home, the renter having a superior right to possession at least for the duration of the agreed rental period. (Chapman v. United States (1961) 365 U.S. 610, [5 L.Ed.2nd 828]; People v. Roman (1991) 227 Cal.App.3rd 674.)

However, a landlord has a right to inspect the home for violations of the rental agreement, with notice to the renter and at a reasonable time, and under other limited circumstances. (Civil Code § 1954) Anything they observe in the process may serve as probable cause to obtain a warrant for a search by law enforcement.
Same rule applies to the manager or clerk in a hotel or motel. (*Stoner v. California* (1964) 376 U.S. 483 [11 L.Ed.2nd 856]; *People v. Burke* (1962) 208 Cal.App.2nd 149, 160-161.)

And with an apartment manager. (*People v. Roberts* (1956) 47 Cal.2nd 374, 377.)

*Military personnel*, living off base in a motel, but with the housing paid for by the military as an alternative to living in the on-base barracks, retain the same privacy protections as anyone else in the civilian world. (*People v. Rodriguez* (1966) 242 Cal.App.2nd 744.)

The same rule applies to any off-base military housing, at least when the case is a state case being investigated by state law enforcement officers for presentation in state court. (*People v. Miller* (1987) 196 Cal.App.3rd 307.)

However, on the base, a commanding officer may authorize a warrantless search of property, including the serviceman’s locker (*People v. Shepard* (1963) 212 Cal.App.2nd 697, 700.) and his room in the barracks. (*People v. Jasmin* (2008) 167 Cal.App.4th 98.)

Evidence properly seized pursuant to a service member’s commanding officer’s (or “competent military authority”) oral or written authorization to search a person or an area, for specified property or evidence or for a specific person (see *Military Rules of Evidence, Rule 315(a) & (b)*), the results may be used in state court. (*People v. Jasmin, supra*, at p. 110.)

*Parent:*

A parent may give consent to search the home and even the child’s room over the child’s objection, except areas exclusive to the child (e.g.; a footlocker which was locked by the child). (*In re Scott K.* (1979) 24 Cal.3rd 395, 404-405.)
The search of an adult child’s bedroom in his parents’ home, made with the consent of a parent, is reasonable “absent circumstances establishing the son has been given exclusive control over the bedroom.” (People v. Daniels (1971) 16 Cal.App.3rd 36.)

Parents of an 18-year-old adult son were held to have “actual” authority to give consent to search the son’s room when the son did not pay rent, and there was no evidence of any agreement on the part of the parent not to enter the son’s room. (United States v. Rith (10th Cir. 1999) 164 F.3rd 1323.)

Father, with the apparent authority to allow police officers to search his entire residence, including the bedroom of his adult son, under circumstances where the father and defendant son had apparent free access to each other’s room, validly authorized police to enter the son’s room. (People v. Oodham (2000) 81 Cal.App.4th 1.)

Query: If the adult child is paying rent and there is nothing else to suggest that the parents have free access to the child’s room, would not the landlord-tenant rules (See Civil Code §§ 789.3, 1954) be applicable?

Parents have to have access to their minor child’s bedroom and the power to give consent to the search of the bedroom to the police in order to properly execute their duty of supervision and control over the child. “In the absence of evidence suggesting a parent has abdicated this role toward his or her child, police officers may reasonably conclude that a parent can validly consent to the search of a minor child's bedroom.” (In re D.C. (2010) 188 Cal.App.4th 978.)

The Court reaffirmed the California Supreme Court’s decision in In re Scott K., supra, noting that a minor may retain the right to exclude others from areas that are exclusive to the minor (a footlocker which was locked by the child). (In re D.C., supra, at pp. 987-988.)

The Court also rejected the contrary rule of United States v. Whitfield (D.C. Cir. 1991) 291 U.S. App. D.C. 243 [939 F.2nd 1071], which held that a parent
does not have the authority to consent to the search of their adult son’s bedroom. (Id., at pp. 986-987.)

_Choice:_ Whether or not a child may validly allow police into the family residence depends upon a determination whether, under the circumstances, it is reasonable to believe that the child had the authority to do so.

An 11-year-old step-daughter, baby sitting in the defendant’s absence, was held _not_ to have the authority to admit the police. (_People v. Jacobs_ (1987) 43 Cal.3rd 472.)

But, where a 12-year-old abuse victim led police to her aunt’s house and where, in her aunt’s absence, the victim was in charge of the house, living and working there, the victim could validly give consent to search for implements used to abuse her when the aunt had initially invited police inside, and after the aunt was arrested and removed from the house. (_People v. Santiago_ (1997) 55 Cal.App.4th 1540.)

The 16-year-old daughter of the defendant had the apparent authority to allow the officers the right to enter defendant’s residence. (_People v. Hoxter_ (1999) 75 Cal.App.4th 406.)

_Co-Occupants (Roommates or Husband and Wife):_ When two or more people have equal access to a residence (e.g.; roommates, husband and wife, etc.), the rules regarding one co-occupant giving consent vary depending upon the circumstances:

The adult sister sharing an apartment with her adult brothers does not have apparent authority to consent to the search of the brothers’ bedroom. (_Beach v. Superior Court_ (1970) 11 Cal.App.3rd 1032, 1034–1035.)

When adult roommates have separate rooms, exclusive control by each of the individuals over his or her own room is presumed, absent evidence to the contrary. (_United States v. Almeida-Perez_ (8th Cir. 2008) 549 F.3rd 1162, 1172; _U.S. v. Barrera-Martinez_ (N.D. Ill. 2003) 274 F.Supp.2nd 1162, 950, 962.)

Generally, consent to a search given by someone with authority cannot be revoked by an _absent_ co-occupant’s denial of consent, even if that denial is clear and contemporaneous with the search. (_United States v.
**Matlock** (1974) 415 U.S. 164, 172 [39 L.Ed.2nd 242]: The mutual use of property carries with it the risk that just one of the occupants might permit a search of the common areas.

Defendant in **Matlock** was in a patrol car out front of the residence. For purposes of this rule, he was deemed to be “absent.” (see also **People v. Haskett** (1982) 30 Cal.3rd 841, 855-857; with defendant outside in a police car, objecting, but his wife, in the residence, saying okay, the entry was held to be lawful.

But, when two equally-situated cotenants, both present at the scene, are asked for permission to enter and/or search a residence, with one saying “yes” but the other saying “no,” entry and/or search may not be made absent an exigent circumstance or a search warrant. (**Georgia v. Randolph** (2006) 547 U.S. 103 [164 L.Ed.2nd 208].)

California authority to the contrary (e.g., see **People v. Wilkins** (1993) 14 Cal.App.4th 761, 769-776.) is no longer valid in light of this recent Supreme Court opinion.

**Randolph** listed a number of exceptions to this rule:

- Where there is a “recognized hierarchy” (e.g., parent vs. child), objections from the one with the inferior status may be ignored.
- With a reasonable (articulable) fear for the safety of the person inviting officers inside, or anyone else inside, entry may be made to check the victim’s welfare and/or to stop pending violence.
- An objection from an **absent cotenant** (even if handcuffed in a patrol car immediately out front) may be ignored, at least so long as he is not led away from the scene for the purpose of justifying an entry into the residence.
- It is not necessary to solicit possible objections from a cotenant, even if that person is inside and/or available and even if
it could be expected that that person would object.

- Any other exigent circumstance (safety of the occupants, protection of possible physical evidence, etc.) may justify an immediate entry, at least until the scene is secured and/or the suspects detained pending the obtaining of a search warrant.
- Entering with the victim of domestic violence, at her request, for the purpose of protecting her as she collects her belongings.
- The consenting cotenant may retrieve evidence and bring it out to the police.
- With probable cause, a search warrant may be obtained for the search of the residence.

The rule of *Randolph* does not govern when a minor objects to the search of his room but is overruled by his mother. *Randolph* applies only to disagreements between joint adult occupants having apparently equal authority over a residence. (*In re D.C.* (2010) 188 Cal.App.4th 978, 988-989.)

The Ninth Circuit has ruled that when the objecting cotenant is taken to jail before the consenting cotenant shows up at the scene and gives his consent, the rule of *Randolph* still applies. It is not necessary, despite the specific language in *Randolph*, that the objecting party be taken away “for the purpose of” avoiding the rule of *Randolph*. (*United States v. Murphy* (9th Cir. Feb. 20, 2008) 516 F.3rd 1117, 1124-1125.)

Several other federal circuits disagree with the *Murphy* on this issue. (See *United States v. Hudspeth* (8th Cir. 2008) 518 F.3rd 954; *United States v. Henderson* (7th Cir. 2008) 536 F.3rd 776.)

Subsequent to *Murphy*, the Ninth Circuit decided *United States v. Brown* (9th Cir. 2009) 563 F.3rd 410, which reemphasized the rule that a cotenant must have been removed “for the purpose of” avoiding a possible objection, ruling that there must be some evidence that that was the purpose of the police in taking the defendant from the scene. It was also noted that there is no duty to ask the absent cotenant for consent.
When a cotenant, who is absent from the scene, consents to a law enforcement entry into a residence, but another cotenant who is present at the scene objects, an entry is unlawful.  *Tompkins v. Superior Court* (1959) 59 Cal.2nd 65.

But note, should the present cotenant fail to object, consent from the absent cotenant allows the entry.  *People v. Viega* (1989) 214 Cal.App.3rd 817.

And also note *United States v. Rith* (10th Cir. 1999) 164 F.3rd 1323, where the absent parents’ permission to enter the house took precedence over the present 18-year-old son’s objection to the officers’ entry.

With roommates, the consenting co-occupant may only consent to entry of his personal room and any common areas.  He may not give a valid consent to another cotenant’s private room.  *People v. Boyer* (1989) 48 Cal.3rd 247, 276; *United States v. Davis* (9th Cir. 2003) 332 F.3rd 1163.

When the estranged wife retains property within the residence, remains liable for rent, civil liability for accidents, etc., and has not established a permanent residence elsewhere, she still has the apparent authority to allow police into her residence where the husband still lives.  *People v. Bishop* (1996) 44 Cal.App.4th 220.

The fact that the husband had changed the locks is only indicative of the level of antagonism, and is not a limitation of the wife’s authority to allow the police to enter and search.  *Ibid.*

*Evidence of a Defendant's Refusal to Consent to a Warrantless Search:*

It is improper for a prosecutor to introduce evidence of, or comment to a jury about, a defendant’s refusal to consent to a warrantless search of his property.  *People v. Wood* (2002) 103 Cal.App.4th 803; *People v. Keener* (1983) 148 Cal.App.3rd 73, 79; “Presenting evidence of an individual’s exercise of a right to refuse to consent to entry in order to demonstrate a consciousness of guilt merely serves to punish the exercise of the right to insist upon a warrant.”

© 2012 Robert C. Phillips.  All rights reserved
Sanctions for Violations:

If the consent is held to be involuntary, then all the direct products of that “consent” will be suppressed under the “fruit of the poisonous tree” doctrine. (See cases cited above.)

If an otherwise voluntary consent is the direct product of some other illegal police act (e.g.; illegal arrest, detention, etc.), then the consent and the resulting direct products of the consent may also be suppressed. *(People v. Valenzuela* (1994) 28 Cal.App.4th 817, 833.)

A consent to search that is the product of an illegal detention is also subject to suppression, as are the products of that search. *(People v. Krohn* (2007) 149 Cal.App.4th 1294.)

Handcuffing a person suspected of possible involvement in a narcotics transaction, but where the officer testified only that he was “uncomfortable” with the fact that defendant was tall (6’ 6”) and that narcotics suspects sometimes carry weapons (although the officer did not conduct a pat him down for weapons), converted a detention into an arrest, making the subsequent consent to search involuntary. *(People v. Stier* (2008) 168 Cal.App.4th 21.)