© 2009 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.

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 or conclusions contained in this Outline.

Comments concerning errors, misinterpretations, and/or other suggestions for 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
# Table of Contents

**Chapter Summary:**

- Chapter 1: The Fourth Amendment, United States Constitution 1
- Chapter 2: Consensual Encounters 10
- Chapter 3: Detentions 19
- Chapter 4: Arrests 79
- Chapter 5: Searches 176
- Chapter 6: Searches with a Search Warrant 202
- Chapter 7: Warrantless Searches 338
- Chapter 8: Searches of Persons 355
- Chapter 9: Searches of Vehicles 421
- Chapter 10: Searches of Residences and Other Buildings 445
- Chapter 11: New Law Enforcement Technology 479
- Chapter 12: Open Fields 488
- Chapter 13: Searches of Containers 489
- Chapter 14: Border Searches 503
- Chapter 15: Fourth Waiver Searches 514
- Chapter 16: Consent Searches 536
### Topics:

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

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Fourth Amendment:</td>
<td>1</td>
</tr>
<tr>
<td>California Constitution, Art I, § 13</td>
<td>1</td>
</tr>
<tr>
<td>California’s Exclusionary Rule</td>
<td>1</td>
</tr>
</tbody>
</table>

**Scope; The Fourth Amendment:**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Fourteenth Amendment “Due Process”</td>
<td>2</td>
</tr>
</tbody>
</table>

**The Exclusionary Rule:**

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

**Rule of Exclusion:**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benjamin Cardozo</td>
<td>4</td>
</tr>
<tr>
<td>Verbal Evidence</td>
<td>4</td>
</tr>
<tr>
<td>Illegal Detention</td>
<td>4</td>
</tr>
<tr>
<td>Fruit of the Poisonous Tree</td>
<td>4</td>
</tr>
<tr>
<td>Exceptions</td>
<td>5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expectation of Privacy</td>
<td>5</td>
</tr>
<tr>
<td>Juvenile Cases</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>On Appeal</td>
<td>6</td>
</tr>
</tbody>
</table>

**Case Authority:**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Courts’ Order of Priority</td>
<td>6</td>
</tr>
</tbody>
</table>

**Decisions from the United States Supreme Court:**

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>7</td>
</tr>
</tbody>
</table>
Decisions from lower Federal Courts: 7
  State Court Interpretation taking Precedence 7
  Opinions of the California Attorney General 8
  Writ of Habeas Corpus 8

The Outline: 9
  Police-Citizen Contacts 9
  Other Topics 9

Chapter 2: Consensual Encounters: 10
  General Rule 10
  Test 10
  Limitations 11
  No Detention 11
  Consensual Encounters vs. Detentions 14

Specific Issues: 15
  Contacts on Buses 15
  Flight 15
  Photographing Subjects 16
  Knock and Talks 17

Chapter 3: Detentions: 19
  General Rule 19
  Test 19
  Detentions vs. Arrests: 21
  General Rule 21
Indicators of an Arrest: 21

The Use of Firearms 21
The Use of Handcuffs 21
A Locked Patrol Car 22
Show of Force 22
Physical Touching 22
Transporting a Detainee 22

Exceptions: 23

In General 23
Examples 23
Case Law 23

Non-Consensual Transportation Exceptions 26

Reasonable Suspicion: 27

Defined 27
Articulable Objective Suspicion 27
A Hunch 28
The Totality of the Circumstances 29
The Officer’s Subjective Conclusions 29
A Seizure 29
Probable Cause vs. Reasonable Suspicion 29

Various Factors: 29

In General 29
A “High Crime” or “High Narcotics” Area 30
Types of Detentions: 31

Traffic Stops: 31

   Detention vs. Arrest 31
   No Law Enforcement Involvement 32
   Moving Violations 32
   Vehicle Code Equipment Violations 33
   Weaving Within the Lane 36
   Gang-Related Investigations 37
   Mistake of Law vs. Mistake of Fact 37
   Pretext Stops 39

Motor Vehicle Passengers: 41

   To Arrest a Passenger 41
   To Detain a Passenger 41
   Ordering Out 44
   Ordering In 45
   Flight 46

Search Incident to Citation 47

   To Identify a Suspect in a Criminal Offense 48

Detention of Residents During the Execution of a Search Warrant 48

Prolonged Detentions 49

Enlarging the Scope of the Original Detention 51

Taking Fingerprint 53

Driving Under the Influence Cases: 53
Weaving 53

DUI (and Other Regulatory “Special Needs”) Checkpoints 54

Other Regulatory Checkpoints 55

Duel Purpose Checkpoints 57

Multiple Agency Checkpoints 57

Drug Interdiction Checkpoints 57

A Field Interview 58

During Execution of a Search or Arrest Warrant, or Fourth Waiver Search 59

Pending the Obtaining of a Search Warrant 61

Anonymous Information: 61

Rule: 61

Pat Down for Weapons 62

Contraband in a Vehicle 63

Specific Physical Description 63

Further Examples 63

Looking for Exceptions 64

Corroboration: 66

Rule 66

Examples 67

In a Prison or Jail Cell 68

Minors: 68

School Officials 68
A School Resource Officer 69
Minors Violating Curfew 69

Miranda 70

Use of Force: 70
Factors 70
Refusal to Submit 70

Use of Firearms, Handcuffs, Locked Patrol Car, or a Show of Force 71

Detentions in a Residence During the Execution of a Search Warrant 71

Deadly Force 71

Demanding Identification 72

Detentions of Employees in the Workplace (or Students at School) 73

Seizure of Firearms During a Detention 74

Detention Examples, in General 75

Merchants, Library Employees and Theater Owners 78

Chapter 4: Arrests: 79

Defined 79

Standard of Proof; Probable Cause: 79

Defined 79

When Probable Cause Exists 79

The Collective Knowledge Doctrine 81

Miscellaneous Rules 82
### Use of Deadly Force by Police Officers

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Authority for Arrests:</td>
<td>110</td>
</tr>
<tr>
<td>Arrests by a Peace Officer</td>
<td>110</td>
</tr>
<tr>
<td>Arrests by a Private Person</td>
<td>111</td>
</tr>
<tr>
<td>Out of State Officers in Fresh Pursuit:</td>
<td>113</td>
</tr>
<tr>
<td>Federal Officers</td>
<td>113</td>
</tr>
<tr>
<td>Bounty Hunters</td>
<td>114</td>
</tr>
<tr>
<td>Arrest Options:</td>
<td>117</td>
</tr>
<tr>
<td>Release Without Charges</td>
<td>117</td>
</tr>
<tr>
<td>Seek an Arrest Warrant</td>
<td>118</td>
</tr>
<tr>
<td>Issuance of a Misdemeanor Citation</td>
<td>118</td>
</tr>
<tr>
<td>Booking into Jail</td>
<td>119</td>
</tr>
<tr>
<td>Take the Subject Directly Before a Magistrate</td>
<td>119</td>
</tr>
<tr>
<td>Legal Requirements of an Arrest:</td>
<td>119</td>
</tr>
<tr>
<td>Felonies</td>
<td>119</td>
</tr>
<tr>
<td>Misdemeanors and Infractions:</td>
<td>120</td>
</tr>
<tr>
<td>“In the Presence” Requirement:</td>
<td>120</td>
</tr>
<tr>
<td>“In the Presence,” Defined</td>
<td>120</td>
</tr>
<tr>
<td>Exceptions:</td>
<td>120</td>
</tr>
<tr>
<td>Juvenile Arrests</td>
<td>120</td>
</tr>
<tr>
<td>Driving While Under the Influence Arrests</td>
<td>120</td>
</tr>
<tr>
<td>Battery on School Grounds</td>
<td>121</td>
</tr>
<tr>
<td>Carrying a Loaded Firearm</td>
<td>121</td>
</tr>
</tbody>
</table>
Assault or Battery Against the Person of a Firefighter, Emergency Medical Technician or Paramedic 121

Domestic Violence Restraining Orders 121

Domestic Violence Assaults or Batteries 122

Elder Abuse 123

Carrying a Concealed Firearm at an Airport 123

Operating a Vessel or Recreational Vessel or Manipulation of Water Skis, Aquaplane or Similar Device While Under the Influence 124

Operating a Vessel While Under the Influence of Alcohol and/or Drugs with an Accident 124

Vehicle Code Violations, Exceptions 124

Vehicle Code Parking Citations 124

Stale Misdemeanor Rule 125

Sanctions for Violations 126

Arrests for an Infraction or Misdemeanor:

Release Requirement 127

Exceptions 128

V.C. § 40302 128

Other Satisfactory Evidence of His Identity 129
Arrestable Offenses 129
The Unlicensed Driver 131
Non-Residents 131
Traffic Arrest Bail Bond Certificate 131
Misdemeanor Citations 131
With an Existing Warrant of Arrest 133

Arrest Warrants: 134
 Defined 134
 Content 134

Other Types of Arrest Warrants: 135
 Bench Warrant 135
 Telephonic Arrest Warrant 135
 *Ramey* Warrant 135
 A “DNA, John Doe” Warrant 136

Necessity of an Arrest Warrant 136

Service and Return: 136
 Felony Arrest Warrants 136
 Misdemeanor Arrest Warrants: 136
 Night Service 137

Necessity for Having a Copy of the Arrest Warrant 137

Knock and Notice 137

An Invalid Warrant 137
Procedure After Arrest: 137

Disposition of Prisoner: 137

In-County Arrest Warrants 138

Out-of-County Arrest Warrants 138

Necessity of Having Probable Cause 139

The Steagald Warrant 140

Extensions 140

Statute of Limitations 140

Effect of an Arrest Warrant on the Exclusion of Evidence after an Illegal Detention 140

Statutory Limitations: 140

Daytime and Nighttime Arrests: 140

Felony Arrests: 141

Without an Arrest Warrant 141

With an Arrest Warrant 141

Misdemeanor (and Infraction) Arrests: 141

Without an Arrest Warrant 141

With an Arrest Warrant 142

Penal Code § 964: Victim and Witness Confidential Information: 143

Live Lineups 143

Case Law Limitations: 143

Ramey: 143

General Rule 143
Exceptions: 144

Consent 144
Exigent Circumstances 145
Already Lawfully Inside 148
Standing in the Threshold 148
While Serving a Search Warrant 149
A Parolee 149
Inviting Defendant Outside 149

Sufficiency of Evidence that the Suspect is Inside 151
Within a Third Person’s Home 152
Consequences of a Ramey/Payton Violations 154

Knock and Notice 155

Problems: 155

Arresting for the Wrong Offense 155

Mistaken Belief in Existence of an Arrest Warrant or Fourth Waiver: 156

Problem 157
Rule 157
Extension of Rule 157
Reasoning 157

Law Enforcement vs. Non-Law Enforcement Source: 158

Law Enforcement Sources: 158

Police Computer Records 158
Parole 158
Probation 159
Exception; DMV Hearings 159
Non-Law Enforcement Source: 159
Courts 159
Reversed Prior Conviction 160
Legislature 160
Dept. of Motor Vehicles 161
Juvenile Probation 161

Arresting and Searching in Ignorance of an Existing Warrant of Arrest 161
Minors and Curfew 161
Minors and Truancy 163
Information Provided to an Arrested Person: 163
P.C. § 841; Information to be Provided 163
Foreign Nationals: 164
Advisal to Arrestee/Detainee 164
Automatic Notice to Foreign Country 165
Sanctions for Violations 165
P.C. § 834b 168

Miranda 169

Follow-Up Requirements After Arrest: 170
Other Rights of the Arrestee: 170
Right to Access to an Attorney 170
Right to Access to a Physician or Psychiatrist 171
Right to Telephone Calls:

Minors 173
Other Statutory Obligations of the Arresting Officer 173

Civil Liability 175

Chapter 5: Searches:

Things Subject to Search and Seizure 176

General Rule:

Search Warrant 176
Probable Cause 176

Presumptions 176

Remedy for Violations; The Exclusionary Rule:

The Fourth Amendment 177
The Fruit of the Poisonous Tree 177

Exceptions:

Private Persons 178
The Good Faith Exception 179
The Taint has been Attenuated 179
Statutory-Only Violations 181

Doctrine of Inevitable Discovery 184
An Injured Person 184
Evidence of identity 184
<table>
<thead>
<tr>
<th>Standing:</th>
<th>185</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defined</td>
<td>185</td>
</tr>
<tr>
<td>Reasonable Expectation of Privacy</td>
<td>186</td>
</tr>
<tr>
<td>Test</td>
<td>186</td>
</tr>
<tr>
<td>Prior California Rule</td>
<td>187</td>
</tr>
<tr>
<td>Rules for Determining Standing:</td>
<td>187</td>
</tr>
<tr>
<td>Burden of Proof</td>
<td>187</td>
</tr>
<tr>
<td>Factors to Consider</td>
<td>188</td>
</tr>
<tr>
<td>On Appeal</td>
<td>188</td>
</tr>
<tr>
<td>Standing; Examples:</td>
<td>188</td>
</tr>
<tr>
<td>Vehicles</td>
<td>188</td>
</tr>
<tr>
<td>Residential Visitors</td>
<td>190</td>
</tr>
<tr>
<td>Personal Property</td>
<td>192</td>
</tr>
<tr>
<td>Outside Common Areas</td>
<td>193</td>
</tr>
<tr>
<td>Businesses</td>
<td>193</td>
</tr>
<tr>
<td>Renters with a Stolen Credit Card</td>
<td>194</td>
</tr>
<tr>
<td>Exposure to Public View</td>
<td>195</td>
</tr>
<tr>
<td>Abandoned Property</td>
<td>195</td>
</tr>
<tr>
<td>Disclaiming Standing</td>
<td>196</td>
</tr>
<tr>
<td>Reasonableness:</td>
<td>196</td>
</tr>
<tr>
<td>Determining Reasonableness</td>
<td>196</td>
</tr>
<tr>
<td>Old Rule</td>
<td>196</td>
</tr>
</tbody>
</table>
Magistrate Abandoned Judicial Role 206
Lack of Indicia of Probable Cause 207
Warrant Deficient 208
Affidavit Based on Illegally Collected Information 208
Wiretap Statutes Violation 208
Exigent Circumstances 208
Examples 209
Ramey Inapplicable 209
Consensual Searches 209
Informants 210
Acting in the Performance of His Duties 210
Mental Patients Detained per H&S § 5150: Seizure of Weapons 210
Non-Standard Types of Warrants:
Telephonic Search Warrants 210
Anticipatory Search Warrants 211
Sneak and Peek Warrants 214
AIDS Testing 215
Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services, per P.C. § 1524.2 215
Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services in Misdemeanor cases, per P.C. § 1524.3 217
Requirement of a “Neutral and Detached” Magistrate: 217
Rule 217

Violations 218

Composition of a Search Warrant: 218

The Warrant Itself: 218

Contents 218

Statutory Grounds for Issuance 219

The Affidavit to the Search Warrant: 221

Defined 221

Probable Cause 221

Minimum Contents 223

The “Reasonable Particularity” Requirement: 226

The Persons, Places, Things and Vehicles to be Searched 226

The Property to be Seized 229

Inadvertent Changes to the Language of a Warrant and Affidavit 233

General Warrants 233

Supplementation to the Affidavit 235

Combined Affidavit with Warrant 235

Multiple Affiants/Affidavits 236

Staleness 236

Fingerprints 237

Description of the Facts 238

Good Faith 238
Use of Hearsay 239
Miranda 239
Fourth Amendment Violations 239
Privileged Information 240
Nighttime Searches 240
Leaving a Copy at the Scene 241
Victim and Witness Confidential Information 241
The Receipt and Inventory 242
Sources of Information Establishing Probable Cause: 242
Other Police Officers 242
Citizen Informants 243
Reliable ("Tested") Informants 244
Unreliable ("Untested") Informants 246
Anonymous Informants 246
Confidential Informants:
  Problem 248
  Rule 248
  Restrictions 248
  Revealing an Informant’s Identity 248
Luttenberger Motions 249
An Informant Sworn Before A Magistrate; A Skelton Warrant 250
Probable Cause Issues:
  Anonymous Information 251
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The <em>Cleland</em> Warrant</td>
<td>251</td>
</tr>
<tr>
<td>Trashcan Searches</td>
<td>252</td>
</tr>
<tr>
<td>Computer Searches</td>
<td>252</td>
</tr>
<tr>
<td><strong>Use of a Search Warrant:</strong></td>
<td>253</td>
</tr>
<tr>
<td><strong>Rule</strong></td>
<td>253</td>
</tr>
<tr>
<td><strong>Exceptions:</strong></td>
<td>253</td>
</tr>
<tr>
<td>Exigent Circumstances</td>
<td>253</td>
</tr>
<tr>
<td>Consent</td>
<td>253</td>
</tr>
<tr>
<td>Inevitable Discovery</td>
<td>254</td>
</tr>
<tr>
<td>Searches of Vehicles</td>
<td>254</td>
</tr>
<tr>
<td>Searches of Persons with Probable Cause</td>
<td>254</td>
</tr>
<tr>
<td>Searches Incident to Arrest</td>
<td>255</td>
</tr>
<tr>
<td>Administrative/Regulatory Searches</td>
<td>255</td>
</tr>
<tr>
<td>Crime Scene Searches</td>
<td>255</td>
</tr>
<tr>
<td>Bank Records:</td>
<td>256</td>
</tr>
<tr>
<td>Customer Authorization</td>
<td>256</td>
</tr>
<tr>
<td>Administrative Subpoena or Summons</td>
<td>256</td>
</tr>
<tr>
<td>Search Warrant</td>
<td>256</td>
</tr>
<tr>
<td>Judicial Subpoena or Subpoena Duces Tecum</td>
<td>256</td>
</tr>
<tr>
<td>Police Request</td>
<td>257</td>
</tr>
<tr>
<td>Victimized Financial Institution</td>
<td>257</td>
</tr>
<tr>
<td>Credit Card Information</td>
<td>257</td>
</tr>
<tr>
<td>Telephone Records:</td>
<td>257</td>
</tr>
</tbody>
</table>
Application for a Wiretap Order 267

Definitions: 272

Wire Communication 272

Electronic Pager Communication 272

Electronic Cellular Telephone Communication 272

Aural Transfer 272

Authority to Issue a Wiretap Order 273

Judicial Guidelines 276

Contents of the Wiretap Order 276

Oral Approval in Lieu of Court Order 277

Duration of a Wiretap Order 278

Progress Report 279

Report to Attorney General 280

Annual Report to the Legislature 280

Recording, Sealing and Retaining Intercepted Communications 283

Application and Orders to be Sealed 284

Notice to Parities to Intercepted Communications 284

Discovery Prerequisites to Use in Evidence 285

Motions to Suppress 286

Disclosure to Other Law Enforcement Agencies 287

Use of Intercepted Information 288

Disclosure of Intercepted Information in Testimony 288
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retention of the Documents</td>
<td>298</td>
</tr>
<tr>
<td>Mechanics of Preparation</td>
<td>299</td>
</tr>
<tr>
<td>Service and Return:</td>
<td>300</td>
</tr>
<tr>
<td>To “Any Peace Officer”</td>
<td>300</td>
</tr>
<tr>
<td>Necessity to Serve</td>
<td>300</td>
</tr>
<tr>
<td>Night Service</td>
<td>300</td>
</tr>
<tr>
<td>Out-of-County Service</td>
<td>300</td>
</tr>
<tr>
<td>Who May Serve</td>
<td>301</td>
</tr>
<tr>
<td>Knock and Notice:</td>
<td>303</td>
</tr>
<tr>
<td>General Rule</td>
<td>303</td>
</tr>
<tr>
<td>Purpose</td>
<td>303</td>
</tr>
<tr>
<td>Problem</td>
<td>304</td>
</tr>
<tr>
<td>Exceptions:</td>
<td>304</td>
</tr>
<tr>
<td>Businesses</td>
<td>304</td>
</tr>
<tr>
<td>Inner Doors of a Residence</td>
<td>304</td>
</tr>
<tr>
<td>Refusal:</td>
<td>305</td>
</tr>
<tr>
<td>Implied Refusal</td>
<td>305</td>
</tr>
<tr>
<td>Reasonable Time</td>
<td>305</td>
</tr>
<tr>
<td>Exigent Circumstances</td>
<td>306</td>
</tr>
<tr>
<td>Doctrine of Substantial Compliance</td>
<td>309</td>
</tr>
<tr>
<td>No-Knock Search Warrants</td>
<td>310</td>
</tr>
<tr>
<td>Entry by Ruse</td>
<td>311</td>
</tr>
<tr>
<td>Standing; An Absent Tenant</td>
<td>312</td>
</tr>
</tbody>
</table>
Sanctions for Violations 313

Not Necessarily a Fourth Amendment Violation 314

Seizing Items not Listed in the Warrant 315

Answering the Telephone 317

Time Limitations 318

One Continuous Search 319

Leaving a Copy of the Warrant: 319

  The Receipt and Inventory 320

  The Federal Rules of Criminal Procedure 320

  The Ninth Circuit Court of Appeal’s Opinion 320

Destruction of Property 322

Sealing the Warrant Affidavit: 322

  How Accomplished 322

  When Warrants May be Sealed 322

Criticism of Procedure 324

Court Procedures 324

Retirement of the Documents 326

Return of Property 326

Extensions 327

Special Masters: 328

  Rule 328

  When Not Applicable 329

  The “Special Master” 329
Documentary Evidence 329
Procedure 329
The Court Hearing 330
Other Service Conditions 331
Other Warrants:
Inspection Warrants 331
Rendition (or Extradition):
Art. IV, § 2, Clause 2, U.S. Constitution 332
The Implementing Statute 332
International Extraditions 333
Extradition Between States: The Uniform Criminal Extradition Act:
Adoption in California 333
P.C. § 1548.1 333
Procedure 334
Ignoring Extradition Treaties 335
Unlawful Flight to Avoid Prosecution (“UFAP”):
Scope 335
Purpose 335
Procedure 335
Parental Kidnappings 336
Avoiding Custody or Confinement 336
Avoiding Giving Testimony 336
Avoiding Service of Process 337

State Extradition 337

Dismissal of Federal Complaint 337

Chapter 7: Warrantless Searches:

General Rule 338

Exceptions to the Search Warrant Requirement 338

Plain Sight Observations:

Rule 338

No Search 338

Justification for Seizure 339

No Expectation of Privacy 339

Examples 340

The “Plain Sight Observation” vs. the Right To Enter a Residence 341

Plain Hearing 342

Plain Smell:

Rule 342

Examples 342

Exceptions 343

Exigent Circumstances:

Rule 344

Examples: 344

Destruction of Evidence 344

Officers’ Safety 345
Fresh or Hot Pursuit 345
Search for Additional Suspects 345
Protection of Life and Property 345
To Prevent the Escape of Suspects, or When Suspects Arm Themselves 346

Special Needs Searches:

Test 347

Examples:

Random Testing of Student Athletes 347
Suspicionless drug testing of teachers and administrators 347
Random Metal Detector Searches of Students 347
Search of a student’s computer 347
Drug Testing for United States Customs Service Employees 347
Searches of Employees’ Backpacks 347
Pre-Departure Airport Screening Procedures 347
Drug and Alcohol Testing for Railway Employees 348
Administrative Inspections of Closely Regulated Businesses 348
Administrative Inspection of Fire-Damaged Premises 348
Administrative Housing Code Inspections 348
Border Patrol Checkpoints 348
Sobriety Checkpoints 348
Entry into a Residence to Enforce a Court Order 348

Fourth Waiver Searches 348

A Search Warrant Issued Pursuant to P.C. § 1524.1 (HIV) 348

Taking of Biological Samples for DNA Databases 348

Exceptions to Exceptions: 349

A Highway Drug Interdiction Checkpoint 349

A State Hospital Blood Testing Program 349

Example where the “Special Need” fails to outweigh a person’s right to privacy 349

Closely Regulated Businesses or Activities: 350

Pervasively or Closely Regulated Businesses 350

Other California or United States Regulatory/Administrative Searches: 352

Vehicle Code 352

Penal Code 352

Fish and Game Code 352

Financial Code 353

United States Code 353

School Searches 353

Airport Searches 354

Chapter 8: Searches of Persons: 356

Privacy Rights 356

Rule 356

Search Incident to Arrest: 356
Legal Justification Under Debate 357

Transportation Requirement: 358

Anyone Who is Arrested and is to be Transported 358

Transporting a Minor 361

Contemporaneous In Time and Place 362

Other Requirements and Limitations: 364

Search Incident to a Citation 364

Searches of Containers 365

Property of Booked Person 365

Arrest in the Home 365

Arrest in a Vehicle 366

Strip Search 366

Searches with Probable Cause: 366

The Exigency 366

Probable Cause from the Defendant’s Admissions 366

P.C. § 833; Search of an Arrestee 366

Order of Search & Arrest 367

Intrusions Into the Human Body: 367

Shock the Conscience 367

Interest of Human Dignity and Privacy 368

Factors 368

Driving Under the Influence Cases 368

Other Examples of Bodily Intrusions 369
Choking: 370
Rule 370
Examples 370

Searches with Less Than Probable Cause: 370

Persons in Pervasively Regulated Industries or Sensitive Positions: 371
Government Employees 371
Railway Workers 371
Customs Officers 371
Candidates for Public Office 371
A State Hospital’s Drug Testing Policy for Expectant Mothers 371

For Students: 371

Drug Testing: Athletics and Extracurricular Activities 371
Students in General 372

Frisks (or Patdowns): 373
Defined 373
Constitutionality 373
For Weapons Only 374
Reasonable or Rational Suspicion 374
The Nature of the Crime as a Factor 375

Procedures: 375
Limited to Outer Clothing 375
Removal of Weapons 376

When Suspect Reaching for a Weapon 376

P.C. § 833.5; Detentions 376

Problems: 376

During Consensual Encounter 376

During Execution of a Search Warrant or a Fourth Waiver Search 377

Feeling a Controlled Substance 377

Frisk Based Upon Uncorroborated Anonymous Tip 379

Other Situations 380

Abandoned Property: 381

General Rule 381

The “Threatened Illegal Detention” 381

Searching for Identification 382

Fingerprint Evidence 383

Handwriting (and Other Types of) Exemplars 385

Prisoner Searches:

Inventory Searches 385

Search Incident to Arrest 385

Institutional Needs 386

Other Purposes 386

Booking (and Inventory) Searches 386

Containers 387
Impounded Property 387

Strip Searches of Prisoners 389

Misdemeanor Booking Searches:

   Due Process 392

   Restrictions:

   For Pre-Arraignment Detainees
   Arrested for Infractions
   and Misdemeanor Offenses 393

   Definitions 393

   Pat Down, Metal Detector and
   Clothing Search 394

   Limitations on “strip search” or
   “visual body cavity search” 394

   Search Warrant Requirement 395

   Touching Prohibited 395

   Physical Body Cavity Searches 395

   Sex of Searchers 395

   Location of Searches 395

   Penalties for Violations 395

   Civil Remedies for Violations 396

   Case Law 396

Jail Cells 396

Monitoring of Jail Visitations and
Telephone Calls:

   Rule 397

   Exceptions 399
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applies to All Qualified Persons Regardless of Placement</td>
<td>408</td>
</tr>
<tr>
<td>Provisions are Mandatory</td>
<td>409</td>
</tr>
<tr>
<td>Duty of a Prosecutor to Notify the Court</td>
<td>409</td>
</tr>
<tr>
<td>Duty of a Court to Inquire</td>
<td>409</td>
</tr>
<tr>
<td>Collection of Samples For Present and Past Qualifying Offenses</td>
<td>410</td>
</tr>
<tr>
<td>Retroactivity of Provisions</td>
<td>414</td>
</tr>
<tr>
<td>Procedures for Obtaining Replacement Samples</td>
<td>414</td>
</tr>
<tr>
<td>Analysis of Crime Scene Samples</td>
<td>414</td>
</tr>
<tr>
<td>Procedures for Collection of Samples</td>
<td>414</td>
</tr>
<tr>
<td>Sanctions for Failure to Provide Required Samples</td>
<td>415</td>
</tr>
<tr>
<td>Use of Force</td>
<td>415</td>
</tr>
<tr>
<td>“Reasonable Force,” Defined</td>
<td>416</td>
</tr>
<tr>
<td>Written Authorization to Use Force</td>
<td>416</td>
</tr>
<tr>
<td>Efforts to Secure Voluntary Compliance</td>
<td>416</td>
</tr>
<tr>
<td>Videotaping of “Cell Extractions”</td>
<td>416</td>
</tr>
<tr>
<td>Blood Withdrawals in a Medically Approved Manner</td>
<td>416</td>
</tr>
<tr>
<td>Expungement of Data</td>
<td>416</td>
</tr>
<tr>
<td>Confidentiality Requirements</td>
<td>416</td>
</tr>
<tr>
<td>Dissemination of Information to Law Enforcement Agencies</td>
<td>416</td>
</tr>
<tr>
<td>Disposal of Samples</td>
<td>418</td>
</tr>
</tbody>
</table>
Chapter 9: Searches of Vehicles:

General Rule:

The “Automobile Exception” to the Warrant Requirement 421

Justification for the Rule 421

Warrantless Searches of Vehicles:

Incident to Arrest:

The Rationale 422

Containers 422

Probable Cause Not Needed 422

Limitations:

The Luing Area 423

Contemporaneous in Time and Place 423

Transportation 425

Search Incident to a Citation 425

Searches where Arrestee is a “Recent Occupant:” 426

Search With Probable Cause:

General Rule: 427

Problem: Limited Amount of Contraband 428

Problem: Vehicle Already Impounded 429

Problem: Closed Containers 429

Problem: Motorhomes (and Other Vehicles) 430
Problem: Expanding the Scope of the Search 431

Evidence of Probable Cause 431

Vehicle is Itself Evidence 432

Inventory Searches 433

“Pat Down” (or “Protective Search) of a Vehicle 434

Statutory Automobile Inspections:

V.C. § 2805(a): Elements 436

V.C. § 2805(b): Elements 438

Time and Manner of Inspections 438

Penalties 438

Relevant Definitions 438

Downloading the Contents of an “Event Data Recorder” 439

Case Law 439

Searching for Driver’s License and Vehicle Documentation 441

Impounding Vehicles:

The “Community Caretaking Doctrine” 442

Driving on a Suspended License (or Never Had a License), per V.C. § 14601.1 (or V.C. § 12500) 444

Impounding a Vehicle Used for Prostitution, per Local Ordinance 444

Chapter 10: Searches of Residences and Other Buildings:

Private Residence & Expectation of Privacy 445

General Rule 445
Other Buildings and Places: 446

- Hotel & Motel Rooms 446
- Boarding House 448
- Garage 448
- Fishing Retreat 448
- Hospital Room 448
- Jail Cell 448
- Military Housing 448

Curtilage of the Home: 449

Problem: When Officers Trespass 450

Temporary or Impermanent Residences 450

Businesses 451

Workplace Searches of Government Employees: 452

- Rule 452
- Reasonableness 452

Public Restrooms, Adult Bookstores and Dressing Rooms: 453

- Pay Toilets 453
- Restroom in a Department Store 453
- Doorless Stall in a Public Restroom 453
- Curtained Booth in an Adult Bookstore 453
- Fitting Room in a Department Store 453
- Spying into Bathrooms, Etc. 454
Securing the Premises: 454

Fourth Amendment 454

General Rule 454

Limitation; Creating an Exigency: 455

With Probable Cause 455

With No Probable Cause 456

Securing Cases 456

Detention of a Residence 456

Detaining Residents Outside 457

Knock and Talk 457

The Doctrine of “Consent Once Removed” 459

Observing Contraband from Outside 459

Using a Ruse to Cause a Suspect to Open his Door: 460

Split of Authority 460

Held to be Illegal 460

Held to Legal 461

Searches Incident to Arrest: 462

In a Residence 463

The Protective Sweep: 463

Defined 463

Limitation 464

Arresting Outside 465

Detentions Outside 466
Commercial Establishment 466

Other Situations 466

Plain Sight Observations 467

Preserving the Peace 468

Preventing the Destruction of Evidence 469

Welfare Checks 470

Exigent Circumstances and Officer Safety 474

Emergency Exception and the Odor of Ether 475

Executing an Arrest Warrant 475

Sufficiency of Evidence to Believe the Suspect is Inside 477

Third Party Entries with Police 478

Knock and Notice 478

Chapter 11: New Law Enforcement Technology: 479

The Problem 479

Thermal Imaging Device 479

A Buster 480

Spike Mike 480

Aerial Surveillance 480

Electronic Tracking Devices (Transmitters) 481

Videotaping and Photographing 482

Metal Detectors 483

Dogs: 483

Used to Search 483
Chapter 12: Open Fields:

General Rule 488

Observations Into Private Areas 488

Chapter 13: Searches of Containers:

General Rule 489

Exceptions to the Warrant Requirement:

Incident to Arrest 490

Incident to Arrest, in a Vehicle 490

With Probable Cause, in a Vehicle 491

When One Person in a Vehicle is Subject to a Fourth Waiver 491

Abandoned Property 492

Searches of High Tech Containers 493

Computer Cases 494

With Consent of a Third Person having Common Authority 496

The “Single Purpose Container” Theory 496

Containers Searched by Non-Law Enforcement 497

Customs Inspections 499

“Manipulating,” “Squeezing” or “Poofing” Containers: 499

At an Airport 499

At a Bus Station 499
During a Detention and Pat Down 500

Detention of a Container 500

Chapter 14: Border Searches:

General Rule 503

The statutory arrest and search authority 503

Interdiction Authority 505

Routine vs. Non-Routine Searches:

Routine Searches 506

Non-Routine Searches 507

Destructiveness of the Search 508

Reasonableness of the Search 509

The Functional Equivalent of a Border 509

The “Extended Border Search Doctrine” 510

Immigration Checkpoints, Away from the Border 510

Roving Patrols 511

The San Ysidro Port of Entry 512

Chapter 15: Fourth Waiver Searches:

“Prior Consents:” Search & Seizure (Fourth Waiver) Conditions: 514

General Rule 514

Parole: 514

Statutory Authorization 515

P.C. § 3067 vs. Cal. Code of Regs, Title 15, § 2511 515

Probation: 516
Present State of the Rule 525

Exceptions 528

Arresting and Searching in Ignorance of an Existing Warrant of Arrest 528

Parole Hearings 528

Duration of a Fourth Waiver 529

Good Faith Belief in the Existence of a Search Condition 529

Rights of Third Parties:

Common Areas 529

Private Areas 531

In a Vehicle 533

Knock and Notice 533

Detentions, Pat Downs and Arrests:

Detentions 534

Pat Downs 534

Arrests 534

Out-of-State Probationer or Parolee 534

AIDS and HIV 535

Chapter 16: Consent Searches:

Rule 536

Why People Consent 536

Limitation; Free and Voluntary Requirement:

Burden of Proof 536

Factors 537
Circumstances Affecting Voluntariness: 537

- Under Arrest 537
- Use of Firearms 537
- Threatening to Obtain a Warrant 538
- Threatening to Use a Drug-Sniffing Dog 538
- Implying Guilt 538
- Using a Ruse 538
- Threats to Take Away One’s Children 539
- Other Inducements 539
- Combination of Factors 539
- During a Consensual Encounter 540

Manner of Inquiry 540

Product of a Constitutional Violation: 540

- Illegal Entry or Arrest 540
- Illegal Search 542
- Illegal Interrogation 542
- Sixth Amendment Violation 542

Consent During a Prolonged Detention: 542

- General Rule 542
- Lawfully Prolonged Detentions 543
- After Detention Ended 543

The Scope of the Consent: 545

- Burden of Proof 545
Test 545

Express vs. Implied Consent: 546

Express Consent 547

Implied Consent 547

Examples 547

The Totality of the Circumstances 547

Issues: 547

Withdrawal of Consent 547

Limiting the Consent 548

Use of a Drug-Sniffing Dog 549

Placing Conditions on the Consent 549

Use of a Ruse or Deception 549

Suspect Under Arrest Giving Consent 549

Consent to Search a Residence with No Suspicion 549

Other Elements of a Consent Search: 550

The Right to Refuse 550

*Miranda* 550

Written Consent 551

Answering the Telephone 552

Consent by Others: 552

General Rule 552

Examples: 554

Landlord 554
Parent 555

Child 555

Co-Occupant (Husband and Wife) 556

Evidence of a Defendant’s Refusal to Consent to a Warrantless Search 559

Sanctions for Violations 559
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: Initially intended to control the actions of the federal government only, violation of the Fourth Amendment by state (which includes all county and municipal) authorities constitutes 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.”

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, supra, at p. 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].)

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].)

Evidence illegally obtained by private persons, acting in a private capacity, is not subject to the Exclusionary Rule. (See Krauss v. Superior Court (1971) 5 Cal.3rd 418, 421; People v. North (1981)

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.)

Also, 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) __ U.S. __ [129 S.Ct. 695].)

But by the same token, 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.)

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 Constitution and federal statutes. (Gonzaga University v. Doe (2002) 536 U.S. 273, 279, . . . 153 L.Ed.2nd 309.) But conduct by an official that violates only state law will not support a claim under section 1983. (Malek v. Haun (10th Cir. 1994) 26 F.3rd 1013, 1016; . . .)” (Ritschel v. City of Fountain Valley (2005) 137 Cal.App.4th 107, 116.)

See “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 other words, 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.)

But see People v. Madrid (1992) 7 Cal.App.4th 1888, 1896: 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.

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 (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 suppression of the controlled substances found on his person in a subsequent consensual search.)

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.)

**Exceptions:**

*However,* 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* (9th Cir. 2004) 376 F.3rd 997.)

*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.)

**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.)

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 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.2d 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 up 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.

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 classified under Searches and Seizures involving:

- Searches in General.
- 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].)

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

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.)

**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.)

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.3d 455, 460.)” (In re Manual G., supra, at p. 821 see also Whren v. United States (1996) 517 U.S. 806 [135 L.Ed.2d 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.3d 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 Chapter 1, 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.)

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 reasonable person to feel that he was not free to leave, does not, by itself, convert the contact into a detention. (People v. Bouser (1994) 26

*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.3d 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.


*Walking along with* (*People v. Capps* (1989) 215 Cal.App.3d 1112.), or *driving next to* (*Michigan v. Chesternut* (1988) 486 U.S. 567 [100 L.Ed.2d 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.3d 935, 941; *In re Frank V.* (1991) 233 Cal.App.3d 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.3d 1205, 1219-1227.)
“Flashlighting” or “spotlighting” a person, by itself, is not, by itself, a detention. (People v. Franklin, supra; People v. Rico (1979) 97 Cal.App.3d 124, 130;)

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. (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.

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

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.)

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 287, 328.)

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

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. (United States v. Drayton, supra; Florida v. Bostick, supra.; see below.)

© 2009 by Robert C. Phillips. All rights reserved
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. (United States v. Crapser (9th Cir. 2007) 472 F.3rd 1141, 1145-1147.)

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. (People v. Colt (2004) 118, Cal.App.4th 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.”)

Consensual Encounters vs. Detentions:

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

. . . the presence of several officers,

. . . an officer’s display of a weapon,

. . . some physical touching of the person, or

. . . the use of language or of a tone of voice indicating that compliance with the officer’s request might be compelled. [Citations]” (In re Manual G. (1997) 16 Cal.4th 805, 821.)

The Ninth Circuit Court of Appeals has added several other factors to consider (United States v. Washington (9th Cir. 2007) 490 F.3rd 765, 771-772, citing Orhorhaghe v. INS (9th Cir. 1994) 38 F.3rd 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.

In United States v. Washington, supra, 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 pat down, 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.

**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 *Bostic* (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.)

*I.e.;* 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 recently lowered the bar a little by holding that flight from a “high narcotics area” is sufficient in itself to justify a temporary detention (and pat down 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), is lawful. (In re H.M. (2008) 167 Cal.App.4th 136.)

Trying to catch a person who runs from a consensual encounter is not illegal 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.)

Note: Actions taken by the subject being chased, such as dropping contraband prior to being caught, will 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.3d 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.3d 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.”
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 [20 L.Ed.2nd 889]; Ornelas v. United States (1996) 517 U.S. 690, 693 [134 L.Ed.2nd 911, 917]; In re Tony C. (1978) 21 Cal.3rd 888.)

[An 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., supra, at p. 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.


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.)

Test: A person is detained if a reasonable person, under the circumstances, would have known that he or she is not free to leave.
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) __ F.3rd __ [2009 WL 251951]; 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. Bostic (1991) 501 U.S. 429, 434 [115 L.Ed.2nd 389, 398].)


“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 691]; “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) __ U.S. __ [127 S.Ct. 2400, 168 L.Ed.2d 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 officers 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.)*

**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.)*

**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:**


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 without probable cause.)*

© 2009 by Robert C. Phillips. All rights reserved
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.)


*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:  

| Detention + nonconsensual transportation = 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]”  


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. Holzman,** 871 F.2d 1496, 1502 (9th Cir. 1989), restraints justified by belief suspect was attempting to flee; **United States v. Buffington,** 815 F.2d 1292, 1300 (9th Cir. 1987), 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:


**Putting into a patrol car:** **People v. Natale** (1978) 77 Cal.App.3rd 568; **United States v. Parr** (9th Cir. 1988) 843 F.2nd 1228.

**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 the 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.)

*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., supra, 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, 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 unperticularized 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].)

*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].)
Reasons which an officer feels give him or her reasonable suspicion 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.

Note: 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, supra.)

“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.)

**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.

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.

**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.)

**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, 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]; 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 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 that 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) __F.3rd__ [2009 WL 1951].)

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.)

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.

But 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.)
Vehicle Code Equipment Violations:

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.)

A cracked windshield (V.C. § 26710) will also justify a traffic stop. *(People v. Vibanco, supra.)*

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 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.3rd 1146, 1150-1152.)

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.)

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.)

**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.)
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), 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 Dean* (2007) 158 Cal.App.4th 377; *People v. Nabong* (2004) 115 Cal.App.4th Supp. 1; *People v. Hernandez* (2008) 45 Cal.4th 295.)

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.)

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.)

A traffic stop for an expired registration tab, verified via radio through DMV, is lawful, even though it is discovered after the stop that there is a temporary registration sticker in the window but not visible due to the tinted window. However, citing the driver for failing to produce evidence of financial responsibility (per V.C. § 16028), after determining that the car was registered, is an illegally prolonged detention and improper. Also, citing the driver for failing to produce evidence of financial responsibility when there is no other citable offense or a traffic accident is a violation of subdivisions (b) and (c) of section 16028. (People v. Verdugo (2007) 150 Cal.App.4th Supp. 1.)

Failing to signal while changing lanes where “any other vehicle may be affected by the movement,” per V.C. § 22107, applies even when the only affected vehicle is a patrol vehicle. (People v. Logsdon (2008) 164 Cal.App.4th 741.)

However, 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) __ F.3rd __ [2009 WL 251951].)

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.” (United States v. Caseres (9th Cir. 2008) 533 F.3d 1064, 1069.)

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

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.)

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.)

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. (*United States v. Lopez-Soto*, supra; *United States v. Morales* (9th Cir. 2001) 252 F.3rd 1070, 1073, fn. 3.)

There is some authority to the contrary. *(People v. Glick* (1988) 203 Cal.App.3d 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 probably a minority opinion that most courts will not follow.

Also, *(United States v. Twilley* (9th Cir. 2000) 222 F.3d 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.)

*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.3d 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.)

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

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
type 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.
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.)

And query: Would 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 \textit{due process} violation.

The Supreme Court itself, in \textit{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.” (\textit{Whren v. United States}, \textit{supra}, at p. 813 [135 L.Ed.2\textsuperscript{nd} at p. 98].)

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

\textbf{Motor Vehicle Passengers}:

\textit{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. (\textit{In re William J.} (1985) 171 Cal.App.3\textsuperscript{rd} 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.” (\textit{Id.}, at p. 77.)

\textit{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

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.3d 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 indicated an interpretation which seems to say 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) __ U.S. __, __ [2009 WL 10434].)

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

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.” (Id., at p. __.)

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. Superior Court [Simon]* (1972) 7 Cal.3rd 186, 206, fn. 13.)
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.

**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. *(People v. Britton* (2001) 91 Cal.App.4th 1112, 1118-1119.)

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.) 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 Criminal Offense:

Stopping and detaining a suspect in a criminal offense, when balancing law enforcement’s interest 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.)
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].)

Absent a constitutional **Fourth Amendment** violation, evidence that is the product of a state statutory violation is not subject to suppression. (*People v. McKay* (2002) 27 Cal.4th 601, 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.)

The issue becomes whether holding onto a defendant beyond the time it would have taken to cite him is (1) merely a statutory violation of the requirement that one cited for a Vehicle Code infraction be released (See P.C. § 853.5) without arrest or booking, or (2) a Constitutional **Fourth Amendment** violation. *Gomez supra*, makes an argument for the former.

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 unreasonable, even though the officer never wrote the ticket.

*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].)*

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.3d 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.)

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].)

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.)


**Driving Under the Influence (“DUI”) (alcohol and/or drug) 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.3d 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.3d 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.

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

• License and registration inspection checkpoints.  

• Border Patrol checkpoint inspections.  (United States v. Martinez-Fuerte (1976) 428 U.S. 543 [49 L.Ed.2nd 1116].)

• Airport security searches.  (People v. Hyde (1974) 12 Cal.3rd 158.)
• To regulate hunting licenses.  (People v. Perez (1996) 51 Cal.App.4th 1168.)

• Agricultural inspection checkpoints.  (People v. Dickinson (1980) 104 Cal.App.3rd 505.)

• Vehicle mechanical inspection checkpoints.  (People v. De La Torre (1967) 257 Cal.App.2nd 162.)

• 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.)

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.)

**V.C. § 2814.1**: A County Board of Supervisors to authorized by statute to establish a combined vehicle-inspection and sobriety-checkpoint program, to check for violations of **V.C. §§ 27153** and **27153.5** (exhaust and excessive smoke violations), **V.C. § 23140** (person under the age of 21 driving with a blood-alcohol level of 0.05% or more), and **V.C. § 23152** (driving under the influence of alcohol and/or drugs).

*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 discovery “ordinary criminal wrongdoing,” as condemned in *Indianapolis v. Edmond*, supra.

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

Field interviews are 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 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 pat down 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].)

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 under *Terry v. Ohio* (1968) 392 U.S. 1 (See *United States v. Place* (1983) 462 U.S. 696 [77 L.Ed.2nd 110].).

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.

**Anonymous Information:**

Pat Down for Weapons: An anonymous tip concerning a person carrying a firearm does not justify a pat down 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 pat down 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 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. (*Id.*, 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 pat down 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.)

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.)

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 pat down 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” 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*

**Examples:**

Sufficient corroboration was found, justifying a pat down 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*, supra, at pp. 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.

**In a 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 based upon no more than a “reasonable suspicion.”
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.

A “school resource officer,” although employed by a municipal police department, need only comply with the relaxed search and seizure standards applicable to school officials, when working on campus helping to enforce school rules as well as Penal Code violations. (In re William V. (2003) 111 Cal.App.4th 1464; see also In re Alexander B. (1990) 220 Cal.App.3rd 1572, 1577-1578.)

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 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.3rd 888, 895; *In re Gregory S.* (1980) 112 Cal.App.3rd 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.2nd 443, 455-456].), or whether it involved an undue invasion of privacy. (*Franklin v. Foxworth* (9th Cir. 1994) 31 F.3rd 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.)

© 2009 by Robert C. Phillips. All rights reserved
Even when the detention is illegal, every person has a legal duty to submit \textit{(Evans v. City of Bakersfield) (1994) 22 Cal.App.4th 321.}, although declining to do so is \textit{not} a violation of \textit{P.C. § 148} in that a peace officer is \textit{not} acting in the “performance of his (or her) duties” by unlawfully detaining someone.

The use of firearms, handcuffs, putting a person into a \textit{locked patrol car}, or simply a “\textit{show of force},” may, under the circumstances, cause the court to later find that an attempted detention was in fact \textit{an arrest}, and, if made without “probable cause,” illegal. \textit{(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 (1969) 394 U.S. 324 [22 L.Ed.2nd 311]; force; United States v. Ricardo D. (9th Cir. 1990) 912 F.2nd 337, 340; “Detention in a patrol car exceeds permissible \textit{Terry} (v. Ohio (1968) 392 U.S. 1 [20 L.Ed.2nd 889]) limits absent some reasonable justification.”}

But there are exceptions: See “\textit{Detentions vs. Arrests},” above.

\textit{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. \textit{(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. \textit{(Ibid.)}

See also \textit{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.”

\textit{Deadly Force:} Deadly force (i.e., \textit{force likely to cause death or great bodily injury}) may \textit{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.3d 470, 478; *Tennessee v. Garner* (1985) 471 U.S. 1, 12-15 [85 L.Ed.2d 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.2d 903]; *Brown v. Texas* (1979) 443 U.S. 47, 52 [61 L.Ed.2d 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.3d 1103.)

A passenger in a lawfully stopped vehicle may be “asked” for his identification. (*United States v. Diaz-Castaneda* (9th Cir. 2007) 494 F.3d 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.2d 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. (“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.”) (*Id.,* at p. 187.)

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.)

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.


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 Employees in the Workplace (or Students 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.

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.

**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),

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 admittedly 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 to be not 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 a 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.)
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.” (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.)

**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.

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.) 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].)

“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.)

Except perhaps for a “specific intent” element, “an officer need not have probable cause for every element of the offense.” (Id., 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 or 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.2nd 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].)

“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. SDI Future Health, Inc. (9th Cir. 2009) __ F.3rd __, __ [2009 WL 174910]; quoting United States v. Gourde (9th Cir. 2006) 440 F.3rd 1065, 1069.)

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.3d 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.3d 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.3d 1026; narcotics officers commanding a patrol officer to make a traffic stop: The stop, detention, arrest and search all upheld.)

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.3d 463, 469; see also Hart v. Parks (9th Cir. 2006) 450 F.3d 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.)

**Examples:**

Probable cause 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 sufficient to establish probable cause for the past possession of a controlled substance. 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].)

The possessing and passing of a counterfeit $100 bill is not a crime (18 U.S.C. § 472) absent evidence tending to show at least a “fair probability” that the suspect knew it was fake and passed (or attempted to pass) the bill with an intent to defraud. (Rodis v. City and County of San Francisco (9th Cir. 2007) 499 F.3rd 1094.)

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.)

“‘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].)
**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].)


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) ___ U.S. ___ [170 L.Ed.2nd 559].)

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]; *People v. Salcido* (2008) 44 Cal.4th 93, 119-126.)

**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 effect 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 effect 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.)

“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 effect 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 effect 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.)

*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.)

*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.)

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.)

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 Fountain Valley* (2005) 137 Cal.App.4th 107; a misdemeanor case.)

See *Tatum v. City and County of San Francisco* (9th Cir. 2006) 441 F.3rd 1090, where the Ninth Circuit Court of Appeal meticulously discussed the issue of law enforcement’s use of force:

> 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.)

See “Deadly Force,” below.
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.”

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.

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

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 effect 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.3d 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.3d 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.)

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.

See People v. Velez (1983) 144 Cal.App.3rd 558, 566-568, People v. Frye (1992) 7 Cal.4th 1148, 1155; and CALCRIM # 505-509 (Justifiable) and # 510-511 (Excusable) Homicide

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.3rd 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.3d 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.3d 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.3d 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.”))

*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.2d 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. § 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. § 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.)

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.2d 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.3d 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. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1043-1047.)

*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 effect 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.3rd 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
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.2nd 1]; P.C. §§ 196.3, 197.4, above.)

See CALCRIM # 507: “Justifiable Homicide: By Public Officer.”

A “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.” (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. (Forrett v. Richardson (9th Cir. 1997) 112 F.3rd 416; deadly force used to stop a “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 not justification for using deadly force “on sight.” (Harris v. Roderick (9th Cir. 1997) 126 F.3rd 1189, 1203.)

See also 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 “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. *(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.)*

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. Freland* (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. Capobrianco** (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.)

**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.)

*However,* the mere fact alone that a person possesses a deadly weapon 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 unreasonable when the suspect had already dropped his gun.

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 suit.)

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.)

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].)

See CALCRIM # 500 et seq.

See *Price v. Sery* (9th Cir. 2008) 513 F.3rd 962, where it was held that the use of deadly force is lawful whenever an officer has a “reasonable belief” that defendant poses a threat of death or serious harm, noting that 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.

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.3d 202, 206-207; [Tomlinson v. Pierce](1960) 178 Cal.app.2nd 112, 116.)

P.C. § 150: “Posse Comitatus:” Further, 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.

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 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.

While taking a citizen’s arrestee when not supported by probable cause, as it was widely believed P.C. § 142 as previously written required, would 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.), the Ninth Circuit Court of Appeal was of the opinion that the officer in such a situation would be 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) eliminates that conflict.

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.)

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.”

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).”

P.C. § 852.3

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.

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;
- 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.

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 effect 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 42 U.S.C. § 1983 federal civil rights suit. (Ouzts v. Maryland National Insurance Co. (9th Cir. 1974) 505 F.2d 547.)

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: Its 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 away from fugitive. (*Golt v. City of Signal Hill* (C.D.Cal. 2001) 132 F.Supp.2nd 1271.)

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))

Note also that all persons released on a misdemeanor citation must be booked and fingerprinted at the arresting agency at some point prior to appearing in court, and should be so notified of their responsibility to do so. (P.C. § 853.6(g))

- **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 (1947) 79 Cal.App.2nd 174, 176.)

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):

   - The person was involved in a traffic accident.
   - The person is observed in or about a vehicle that is obstructing a roadway.
   - The person will not be apprehended unless immediately arrested.
   - The person may cause injury to himself or herself or damage property unless immediately arrested.
   - 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.3rd 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.

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.  


3. **Battery on School Grounds** during school hours.  
(P.C. § 243.5)

(P.C. § 12031(a)(5)(A))

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*);
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. 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.”

**Vehicle Code Parking Citations:** Parking violations are “civil infractions” only, enforceable under a separate civil administrative scheme, and subject to civil penalties. (V.C. §§ 40200 et seq.) (See *Tyler v. County of Alameda* (1995) 34 Cal.App.4th 777;

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 Whren 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 occurred in the officer’s presence. (People v. Craig (1907) 152 Cal. 42, 47.) 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.3d 536; arrest made some 35 to 40 minutes after the observation held to be lawful; see also Ogulin v. Jeffries (1953) 121 Cal.App.2d 211; 20 minute delay, arrest lawful.)

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 taking someone into physical custody, does not require the suppression of any evidence, in that these rules are statutory, or non-constitutionally based case law, only, and evidence is suppressed only when it’s discovery is the direct product of a constitutional violation. (People v. Donaldson (1995) 36 Cal.App.4th 532; People v. Trapane (1991) 1 Cal.App.4th Supp. 10; see also Jackson v. Superior Court, supra; and People v. McKay (2002) 27 Cal.4th 601, 607-619, a violation of V.C. § 21650.1 (riding a bicycle in the wrong direction); and People v. Gomez (2004) 117 Cal.App.4th 531, 539, seat belt violation, citing Atwater v. City of Lago Vista (2001) 532 U.S. 318 [149 L.Ed.2nd 549]; United States v. Miranda-Guerena (9th Cir. 2006) 445 F.3rd 1233.)

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) ___ U.S. ___ [170 L.Ed.2nd 559; 128 S.Ct. 1598].)


“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.3d 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 summit 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.)

**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.

The exceptions to the requirement that the subject be released on his written promise to appear 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) ___ U.S. ___ [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 inquires 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.)

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.3rd 723, amended and superseded on denial of rehearing at 341 F.3rd 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) ___ U.S. ___ [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.

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.3d 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].)

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 are not also a Fourth Amendment violation, does not invoke the Fourth Amendment’s exclusionary rule. (Virginia v. Moore (2008) ___ U.S. ___ [170 L.Ed.2nd 559]
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)

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(c) for the step-by-step procedures, and 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. (See People v. Ramey (1976) 16 Cal.3rd 263.)

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 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].)

This issue is presently pending before the California Supreme Court. (See People v. Robinson (2007) 156 Cal.App.4th 506; Review Granted 2/13/08.)

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].)

However the failure to get an arrest warrant when the person to be arrested is in his own home and there are no exigent circumstances justifying the lack of a warrant is a Fourth Amendment violation. (Fisher v. City of San Jose (9th Cir. 2007) 509 F.3rd 952: Failure to obtain an arrest warrant for an armed, barricaded, drunk in his own home, threatening to shoot police officers, during a standoff that lasts for over 12 hours, held to be a Fourth Amendment violation.)

En banc hearing granted, March 14, 2008, making this case no longer citable pending a new decision by a full panel of the Ninth Circuit Court of Appeal.

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 (981) 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.” (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.)

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.)

An Invalid Warrant: 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.)

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.Atty.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).

Necessity of Having Probable Cause: 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. (*People v. Jacobs* (1987) 43 Cal.3d 472; *United States v. Gorman* (9th Cir. 2002) 314 F.3d 1105; *United States v. Diaz* (9th Cir. 2007) 491 F.3d 1074; *People v. Phillips* (9th Cir. 1974) 497 F.2d 1131; *United States v. Gooch* (9th Cir. 2007) 506 F.3d 1156, 1159, fn. 2; *Cuevas v. De Roco* (9th Cir. 2008) 531 F.3d 726; *United States v. Mayer* (9th Cir. 2008) 530 F.3d 1099, 11-3-1104.)

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 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 *People v. Phillips*, supra; see “Sufficiency of Evidence to Believe the Suspect is Inside,” below.)

“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).*).

Extensions: Arrest warrants do not expire, and therefore do not need to be renewed or extended. They will remain in the system until purged, served, or recalled by the court.

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.)

**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].)

**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.3d 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. (See examples, below.)

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].)

Failure to obtain an arrest warrant for an armed, barricaded, drunk suspect in his own home, threatening to shoot police officers during a standoff that lasts for over 12 hours, held
to be a **Fourth Amendment** violation. *(Fisher v. City of San Jose* (9th Cir. 2007) 509 F.3rd 952.)

En banc hearing granted on March 14, 2008, setting aside this split (2 to 1) decision pending further review, making this case no longer citable as authority.

**Exceptions:** There are numerous exceptions to this rule:

- **Consent:** When the occupant of a house *consents* to the police officers’ entry of his or her home. *(People v. Superior Court [Kenner] (1977) 73 Cal.App.3rd 65, 68; People v. Peterson (1978) 85 Cal.App.3rd 163, 171; see also People v. Ramey, supra, at p. 275; and Payton v. New York, supra, at p. 583 [63 L.Ed.2nd at p. 649]; and People v. Newton (1980) 107 Cal.App.3rd 568, 578.)*

  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 a *Ramey* violation. (*People v. Evans* (1980) 108 Cal.App.3d 193, 196.)

“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.3d 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.3d 768.)

But the reentry must be simultaneous with, or immediately after, the undercover officer’s exit. (*People v. Ellers* (1980) 108 Cal.App.3d 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.3d 800, 809-810; *In re Lavoyne M.*
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. Daughheetee* (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.)

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.)
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.)

- 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.)


- 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.3rd 975, 979-
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.3d 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.3rd 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.3rd 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, 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 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. 2007) 475 F.3rd 1049, 1057-1058.)

En banc hearing granted on March 14, 2008, in Fisher v. City of San Jose, setting aside this split (2 to 1) decision pending further review.

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 *People 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.)

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.)

See “Necessity of Having Probable Cause,” above.

*Within a Third Person’s Home:* Probable cause justifying an arrest warrant for one person does not authorize entry into to 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.”}

© 2009 by Robert C. Phillips. All rights reserved
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 to contest an allegedly illegal entry of a third person’s home. (**People v. Stewart** (2003) 113 Cal.App.4th 242.)

**Hamilton** and **Stewart** have some support in **Minnesota v. Olson** (1990) 495 U.S. 91 [109 L.Ed.2nd 85]; and **People v. Tillery** (1979) 99 Cal.App.3rd 975, 978-979.

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.)

The California Supreme Court is in apparent agreement. (**People v. Jacobs** (1987) 43 Cal.3rd 472, 478-478.)
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. 

“**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 
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 recently 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 vs. 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 Gasho 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.)

However, an arrest for what the officer believes to be a felony, and which did not occur in the officer’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 “stale misdemeanor” 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) ___ U.S. __ [129 S.Ct. 695].)

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. __.)

Law Enforcement vs. Non-Law Enforcement Source: After the decision in Arizona v. Evans (1995), and before Herring v. United States (2009), 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.3d 541, 543-544; People v. Armstrong (1991) 232 Cal.App.3d 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 Wavier. 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.3d 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.”

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.)

See In re Arron, below.

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 exists 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.)

*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 by 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)
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 polices 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, a 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) ___ U.S. ___ [170 L.Ed.2nd 190; 128 S.Ct. 1346].)

A case on these issues is also pending before the California Supreme Court and has been awaiting the U.S. Supreme Court’s decision in Medellin. (See In re Omar Martinez, S141480)

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.”


The California Supreme Court is also considering the consequences of violating the provisions of this statute and the Vienna Convention. (People v. Mendoza, S067678.)

**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.3d 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
purposful delay in allowing an in-custody suspect to consult with his attorney. (See People v. Stroble (1951) 36 Cal.2d 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.3d 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.

**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. **(1):** Attempt to verify the legal immigration status of such person through questioning that person and demanding documentation.

2. **(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. **(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.)

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.3rd 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.2nd 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.2nd 290, 298-299]; In re Tyrell J. (1994) 8 Cal.4th 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

**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.2nd 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.)*

**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.)

Bail bondspersons and “Bounty Hunters,” although allowed to take a defendant into custody (P.C. §§ 847.5, 1300, 1301), they are acting as private citizens and are not subject to the Exclusionary Rule. (People v. Houle (1970) 13 Cal.App.3rd 892, 895; Landry v. A-Able Bonding, Inc. (1996) 75 F.3rd 200, 203-205.)

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.)


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;” and

- 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. (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.

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.)
See also *Virginia v. Moore* (2008) ___ U.S. ___ [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 145.)

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.
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.)

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.)

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.)

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) __ F.3rd __ [2009 WL 174911].)

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; United States v. $40,955 in United States Currency, supra., at p. __ [2009 WL 174911].)

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.)

“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].)

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].)


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.)

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:


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.

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) ___ U.S. ___ [127 S.Ct. 2400; 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) __ U.S. __ [127 S.Ct. 2400; 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.)

Residential Visitors:


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.)


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) ___ F.3rd ___, ___ [2009 WL 174911].)

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 in defendant’s bedroom. (*Id.*, at p.__.)
Personal Property:


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 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.)

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 expectation of privacy in that hole. (People v. Shaw (2002) 97 Cal.App.4th 833.)

Businesses:

“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.2nd 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.2nd 665, 671.)

However, 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.3rd 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, challenging the legality of a search in a large business is much more complicated. 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) __ F.3rd __ [2009 WL 174910].)

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.)

But see *United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584, where the Ninth Circuit Court of Appeal 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.

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.) This case may perhaps be differentiated from *Bautista* because in the later, the hotel manager was still trying to work out some method of payment.

But 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

**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.)

**Reasonableness:** Evaluating for Purposes of Search & Seizure: “The touchstone of the Fourth Amendment is reasonableness. [Citation] The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.” *(Florida v. Jimeno* (1991) 500 U.S. 248, 250 [114 L.Ed.2nd 297].)

*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].)

**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].)

*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.)

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.

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.

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.)

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.)

*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.)

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”

**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.)

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].)

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 (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), involve an analysis of the reasonableness of an officer’s actions.

“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.3rd 215, 228.)

Case Law:

In People v. Blend, supra., at pp. 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, supra, at pp. 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. Wolffe (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: 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 (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. \( \text{Franks v. Delaware} \) (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 \text{People v. Wilson} \ (1986) 182 Cal.App.3rd 742, 747; \text{Theodor v. Superior Court} \ (1972) 8 Cal.3rd 77, 103; \text{People v. Cook} \ (1978) 22 Cal.3rd 67, 78; and \text{People v. Bradford} \ (1997) 15 Cal.4th 1229, 1297; \text{People v. Lewis et al.} \ (2006) 39 Cal.4th 970, 989; \text{United States v. Craighead} \ (9th Cir. 2008) 539 F.3rd 1073, 1080-1082); or

The affidavit contains information that is the direct product of a \text{Fourth Amendment} violation. (See \text{People v. Weiss} \ (1999) 20 Cal.4th 1073.)

\textit{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. \( \text{People v. Bradford} \) (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. \( \text{United States v. Reeves} \) (9th Cir. 2000) 210 F.3rd 1041.)

Omitting facts which would have \text{supported} a finding of probable cause had it been included is not grounds to traverse a warrant. \( \text{People v. Lim} \) (2001) 85 Cal.App.4th 1289.)
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.)

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,
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.

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.2nd 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
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:**


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 H&S § 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; 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.)

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 H&S § 5150 only. The Court suggested that the Legislature should fix the problem with a legislative amendment to Section 1524.

But see 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 . . . .”

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 or a computer e-mail system, 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 an 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. 1993) 985 F.2nd 946, 950; United States v. Hogoboom (10th Cir. 1979) 112 F.3rd 1081, 1086-1087.)

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.

  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.2nd 1451; *United States v. Johns* (9th Cir. 1998) 851 F.2nd 1131, 1134-1135.)

The federal courts are concerned that a “sneak and peek” 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.2nd 1324, 1327.)

The Supreme Court, however, although never directly discussing the issue, has intimated that notice may be delayed if it might otherwise 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].)

*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 governmental 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 (8)):

(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)

See also P.C. §§ 1524.2(b) and 1524.3(a), re: Records of Foreign Corporations Providing Electronic Communications or Remote Computing Services.

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.3d 992, 1008.)

Although the 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.)

The Sweig Court found, however, that a search warrant is not permitted under P.C. § 1524 when the defendant is detained pursuant to H&S § 5150 only. The Court suggested that the Legislature should fix the problem with an amendment to Section 1524.

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.3d 1140, 1145.)
California follows the Gates “totality of the circumstances” test. (People v. Spears (1991) 228 Cal.App.3d 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.)

“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” 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.3d 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.3d 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.)

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.)
• 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;
Facts connecting the property to be seized to the location(s), vehicle(s), and/or person(s) to be searched;

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 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 drew 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 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.)

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.)

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.)

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.

And, 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 a person may have one domicile but several residences, is proper. (United States v. Crews (2007) 502 F.3rd 1130, 1139; citing Martinez v. Bynum (1983) 461 U.S. 321, 339 [75 L.Ed.2nd 879].)
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.3d 69, 77; providing a complete discussion of cases approving and disapproving certain descriptions.)

The description must “place a meaningful restriction on the objects to be seized . . .” (People v. Murray (1978) 89 Cal.App.3d 809, 832.)

Factors to consider in determining whether there is sufficient specificity include:

• Whether there was probable cause to seize particular items in the warrant;

• Whether the warrant sets out objective standards by which executing officers can determine which items are subject to seizure; and

• Whether the government could have described the items more particularly when the warrant was issued. (United States v. Spilotro (9th Cir. 1986) 800 F.2d 959, 963; United States v. Wong (9th Cir. 2003) 334 F.3d 831.)

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.3d 618; People v. Nicolaus (1991) 54 Cal.3d 551, 575.)

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.)

“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. (People v. Warner (1969) 270 Cal.App.2nd 900, 907, bookmaking case; People v. Nealy (1991) 228 Cal.App.3rd 447, 452, narcotics case.)

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 (1991) 228 Cal.App.3rd 447; 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.)
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 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.)

*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].)

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.* (9th Cir. 2009) __ F.3rd __, __ [2009 WL 174910].

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) __ F.3rd __, __ [2009 WL 174910]; *United States v. Smith* (9th Cir. 2005) 424 F.3rd 992, 1004-1006.)

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.)

Supplementing the Affidavit: To be legally effective, the affidavit may be supplemented by an examination, under oath, of the affiant by the magistrate. (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. (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. (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. (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

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. (*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) __ F.3rd __, __ [2009 WL 174910].)

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. *(People v. Hulland* (2003) 110 Cal.App.4th 1646.)

While “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. *(People v. Mikesell* (1996) 46 Cal.App.4th 1711; sometimes called an “historical warrant;” see also *People v. Medina* (1985) 165 Cal.App.3rd 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. *(People v. Gibson* (2001) 90 Cal.App.4th 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 United States v. Lacy* (9th Cir. 1997) 119 F.3rd 742; 10-month old information concerning the receiving of child pornography.)

But see *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.

**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 042; 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.

See also City of Santa Cruz v. Municipal Court (1989) 49 Cal.3rd 74, 87-88; People v. Smith (1976) 17 Cal.3rd 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.3rd 725; People v. Love (1985) 168 Cal.App.3rd 104.)

Miranda: Statements taken in violation of the defendant’s Miranda rights (Miranda v. Arizona (1966) 384 U.S. 436 [16 L.Ed.2nd 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 825, 828.)

Fourth Amendment Violations: 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 146; Attorney-Client information supplied by the attorney in violation of E.C. §§ 950 et seq.; see also *United States v. White* (7th Cir. 1992) 970 F.2nd 328.)

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.)

*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 *Rodríguez 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)*
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.3d 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.3d 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.3d 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.3rd 731, 761; People v. Ramirez (1997) 59 Cal.App.4th 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.2nd 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.3d 435.)

This is sometimes referred to as the “Harvey/Madden rule,” based upon authority in *People v. Harvey* (1958) 156 Cal.App.2d 516, and *People v. Madden* (1970) 2 Cal.3d 1017, or an “Ojeda motion,” based upon *Ojeda v. Superior Court* (1970) 12 Cal.App.3d 909.)

*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.3d 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.3d 218; and *People v. Hogan* (1969) 71 Cal.2d 888, 890.)

The victim of a crime will usually qualify. *(People v. Griffin* (1967) 250 Cal.App.2d 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 held to be not credible. “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 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.

**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.3rd 338, 345; People v. Dumas (1973) 9 Cal.3rd 871; People v. McFadin (1982) 127 Cal.App.3rd 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.3rd 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.3rd 662; People v. Murphy (1974) 42 Cal.App.3rd 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.3rd 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.3rd 614, 621.)

See “Corroboration,” below, under “Anonymous Informants.”

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.]” (<em>People v. Johnson</em> (1990) 220 Cal.App.3d 742, 749; <em>People v. Gotfried</em> (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. (<em>People v. Mardian</em> (1975) 47 Cal.App.3d 16, 33; <em>Ming v. Superior Court</em> (1970) 13 Cal.App.3d 206, 214; <em>United States v. Todhunter</em> (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 <em>Illinois v. Gates</em> (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.)

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.3d 836, 843.)

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. (*Ibid.*)

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.3d 6, 12-13; *People v. Thomas* (1970) 12 Cal.App.3d 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.3d 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.3d 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.3d 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.

**Probable Cause Issues:**


See “*Anonymous Information,*” under “*Detentions,*” above.

**The Cleland Warrant:**

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 therefrom. 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 computer. (*People v. Nicholls* (2008) 159 Cal.App.4th 703.)

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.)

See “*Container Searches,*” 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.)

• “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:”


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 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.)

See “Administrative/Regulatory Searches,” below.

Crime Scene Searches: Generally, once any exigencies no longer justify an immediate entry, 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.3rd 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)):


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.)

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.3d 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.2d 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.3d 1005, 1015; People v. Martino (1985) 166 Cal.App.3d 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.3d 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.3d 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 “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 landline 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 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.)

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](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](Art. I, § 13), as well as [Art. I, § 1](Art. I, § 13)), 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)](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](86 Opinion of Attorney General Bill Lockyer 198 (2003).)

The California Attorney General, in this same opinion, also noted that [Gov’t. Code § 11180](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.


Because a search warrant, if used, is only good for 10 days ([P.C. § 1534](P.C. § 1534)), a new warrant must be obtained for each succeeding 10-day period.
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.

**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 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.)

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))

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, 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.3d 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.

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 se tout 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 (1972))

Both the California Invasion of Privacy Act and the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510 et seq.) proscribe only intentional, as opposed to inadvertent, overhearing or intercepting of communications. (People v. Buchanan (1972) 26 Cal.App.3rd 274.)

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.3d 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. § 632.5: 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. §§ 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,

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 electronic cellular telephone communications 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.)

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.)

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)ny 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

© 2009 by Robert C. Phillips. All rights reserved
(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 cellular telephone communications;

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. §§ 12303, 12303.1, 12303.2, 12303.3, 12303.6, 12308, 12309, 12310 or 12312,
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 wepons 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 cellular telephone communications 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
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. (People v. Zepeda (2001) 87 Cal.App.4th 1183, 1205.)

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 it’s 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 wiretap order to be lawful. *United States v. Staves* (2004) 383 F.3rd 977.

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 cellular telephone communications.

**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, within *48 hours* of 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.

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 the intervals that the judge may require, but not less than one for each period of six (6) days, and

- Be made by any reasonable and reliable means, as determined by the judge.

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 approximate nature and frequency of incriminating communications intercepted,
  - The approximate nature and frequency of other communications intercepted,
  - The approximate number of persons whose communications were 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 a 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.
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.
- 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 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 cellular telephone communications, 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), or
- Any investigative or law enforcement officer defined in 18 U.S.C. § 2510(7);

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 cellular telephone communications 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 *United States v. McGuire* (9th Cir. 2002) 307 F.3rd 1192, 1199-1203, discussing the “minimization” of intercepted fax communications under the federal statutes.

**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 cellular telephone communications pursuant to this Chapter;

Intercepts wire, electronic pager, or electronic cellular telephone communications 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.

For *other than* P.C. § 629.52(a) crimes or P.C. § 667.5(c) violent felonies:

If a peace officer or federal law enforcement officer, while engaged in the intercepting of wire, electronic pager, or electronic cellular telephone communications pursuant to this Chapter;
Intercepts wire, electronic pager, or electronic cellular telephone communications 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 tape. (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 cellular telephone
communications.

**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 cellular telephone communications 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 cellular telephone communications, 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, 2012, 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-Shoshone 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.)

Retention of the Documents: The search warrant and affidavit, including any sealed portions, must all be retained by the trial court. Allowing the law enforcement agency to retain the sealed portion of an affidavit (and, arguably, any other related documents) violates Government Code sections (Gov’t. Code §§ 69846, 68151(a)(1), and 68152(j)(18)), that
require “court documents” to be held by the court and for search warrants to be retained for at least 10 years. (People v. Galland (2006) 146 Cal.App.4th 277.)

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)

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.)

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.3rd 690; People v. Fleming (1981) 29 Cal.3rd 698, 707; People v. Easely (1983) 34 Cal.3rd 858, 869-870; People v. Ruiz (1990) 217 Cal.App.3rd 574.)
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.)

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.3rd 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.2nd 818, 830]; Hanlon v. Berger (1999) 526 U.S. 808 [143 L.Ed.2nd 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.

(People v. Schad (1971) 21 Cal.App.3rd 201, 207; People v. Murphy (2005) 37 Cal.4th 490, 495.)

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.)


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.3d 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.3d 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.3d 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.3d 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 effecting 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.

(United States v. Peterson (9th Cir. 2003) 353 F.3rd 1045, 1048; citing Richards v. Wisconsin (1997) 520 U.S. 385, 394 [137 L.Ed.2nd 613, 624].)

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].)

See also United States v. Banks (2003) 540 U.S. 31, 43 [157 L.Ed.2nd 343, 356]: “But in a case like 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.)


Officers see one suspect attempting to dispose of narcotics and defendant slammed the door on the officers. (*People v. Newell* (1969) 272 Cal.App.2nd 638, 644.)

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 wee 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
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.2d 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.2d 554; *People v. Miller* (1967) 248 Cal.App.2d 731; *United States v. Bosse* (9th Cir. 1990) 898 F.2d 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 Cal.3d 263, 276; *Payton v. New York* (1980) 445 U.S. 573 [63 L.Ed.2d 639].  (See above)

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.3rd 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.3rd 472, 478-479; and *United States v. Gorman* (2002) 314 F.3rd 1105; interpreting “reasonable grounds” or “a reason to believe” to be the equivalent of “probable cause.”)

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. \textit{(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. \textit{(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 \textit{Hudson} (a search warrant case) is applicable as well as in a warrantless, yet lawful, arrest case, pursuant to \textbf{P.C. § 844}. \textit{(In re Frank S.} (2006) 142 Cal.App.4th 145.)

However, \textit{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. \textit{(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.)

\textit{Not Necessarily a Fourth Amendment Violation;} And in any case, a knock and notice violation, violating the terms of \textbf{P.C. § 844} and/or \textbf{P.C. § 1531}, does not necessarily also violate the \textbf{Fourth Amendment}. \textit{(Wilson v. Arkansas} (1995) 514 U.S. 927 [131 L.Ed.2nd 976]; \textit{People v. Zabelle} (1996) 50 Cal.App.4th 1282.)

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.)

Seizure of massive amounts of confidential medical information is not a Fourth Amendment violation when it is so intermingled with records that are listed in the search warrant that they cannot reasonably be separated during the search.  (*United States v. Comprehensive Drug Testing, Inc.* (9th Cir. 2008) 513 F.3rd 1085.)

**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 and eliminating some difficult legal issues later in the inevitable suppression hearings.  (*See People v. Albritton* (1982) 138 Cal.App.3rd 79.)

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

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.2d 900, 907; People v. Sandoval (1966) 65 Cal.2d 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.)

© 2009 by Robert C. Phillips. All rights reserved
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.3d 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 included in the calculation. (*People v. Clayton* (1993) 18 Cal.App.4th 440, 444-445.)

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,
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. 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) __ F.3rd __, __ [2009 WL 174910], 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
[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.)

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:

“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 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.

• 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:* The search warrant and affidavit, including any sealed portions, must all be retained by the trial court. Allowing the law enforcement agency to retain the sealed portion of an affidavit (and, arguably, any other related documents) violates Gov’t. Code §§ 69846, 68151(a)(1), and 68152(j)(18), that require “court documents” to be held by the court and for search warrants to be retained for at least 10 years. *(People v. Galland (2006) 146 Cal.App.4th 277.)*

*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, 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 Board (1989) 214 Cal.App.3rd 625.)*

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.3d 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: “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.3d 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, 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 usually 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

338
public.” (United States v. Garcia (9th Cir. 1993) 997 F.2nd 1273, 1279; People v. Ortiz (1994) 32 Cal.App.4th 286, 291.)

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:

- 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.

- The evidence must not have been discovered as the result of any invasion, intrusion, or illegal entry other than purely formal trespass.

- 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.

- 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.

- 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 through 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.3d 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.)

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.3d 421; see also People v. St Amour (1980) 104 Cal.App.3d 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.2d 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 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.  


“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.”  


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].)*

**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.  


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.  


The odor of beer noted during a traffic stop supplied probable cause to search the car for alcohol.  

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 volatiliy of ether, to justify an immediate warrantless entry to “neutralize” the dangerous situation. (People v. Messina (1985) 165 Cal.App.3rd 931; People v. Osuna (1987) 187 Cal.App.3rd 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.3rd 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.3rd 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.3d 1188, 1192-1193, quoting Bailey v. Newland (9th Cir. 2001) 263 F.3d 1022, 1033; United States v. Brooks (9th Cir. 2004) 367 F.3d 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.2d 374, 377 . . . )” (People v. Duncan (1986) 42 Cal.3d 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.


- *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.3d 1052, 1059; citing *Ferguson v. City of Charleston* (2001) 532 U.S. 67, 78 [149 L.Ed.2nd 205].)

*Examples* (each of which is covered in detail, elsewhere throughout this outline):


- **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.3d 813, 823-832.)

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.2d 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.3d 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].)

**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, 74, 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.)

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.)


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. § 171e: 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.)

**People v. Perez** (1996) 51 Cal.App.4th 1168, upheld a highway checkpoint used to implement hunting regulations.

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.)

**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.

*(United States v. Davis* *(9th Cir. 1973)* 482 F.2nd 893, 913; **Torbet v. United Airlines, Inc.** *(9th Cir. 2002)* 298 F.3rd 1087, 1089; *United States v. Marquez*, *supra*, at p. 616; *United States v. Aukai* *(9th Cir. 2007)* 497 F.3rd 955.)*

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.

*Note:* *United States v. Aukai* (9th Cir. 2007) 497 F.3rd 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, 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].)

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]; People v. Lead (2008) 160 Cal.App.4th 701, 708.)

Note: Review granted on June 11, 2008, in People v. Lead by the California Supreme Court, making this case no longer citable pending further review.

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.)

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 it is irrelevant that the person arrested had already been moved from the immediate location where the arrest is first made.

*Legal Justification Under Debate:*

The Ninth Circuit Court notes in *United States v. Weaver* (9th Cir. 2006) 433 F.3rd 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].)

Also, California’s Sixth District Court of Appeal has ruled that, at least when the search takes place in a residence, where there is a higher expectation of privacy than in vehicles or on the street, removing the arrestee from the scene before the search occurs negates the legal justifications for a search incident to arrest, and is not lawful. (*People v. Leal* (2008) 160 Cal.App.4th 701; search some 2 to 3 minutes after defendant arrested and removed to a patrol car in front of the residence.

*Note:* On June 11, 2008, the California Supreme Court granted review in this case, making it unavailable for citation.

But, see the dissenting opinion in *Leal*, reviewing *Chimel* and a long list of subsequent cases, state and federal, while reaching the conclusion that if an officer could have searched the person and the “grabbing area” upon arresting him, taking the safer route by removing him from the scene
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.*  
*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,’ . . . .”  

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.  

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 “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.

*Moto* is questionable authority in light of more recent pronouncements from both the United States and California Supreme Courts (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [149 L.Ed.2nd 549]; *Virginia v. Moore* (2008) ___ U.S. ___ [170 L.Ed.2nd 559]; *People v. McKay* (2002) 27 Cal.4th 601, 607; and see also *United States v. McFadden* (2nd Cir. 2001) 238 F.3rd 198, 204; *People v. Gomez* (2004) 117 Cal.App.4th 531.) have ruled that 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
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

See also United States v. McLaughlin (9th Cir. 1999) 170 F.3d 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-Saboor (D.C. Cir. 1996) 85 F.3d 664, 668; see also United States v. Hudson (9th Cir. 1996) 100 F.3d 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.3d 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.2d 633; People v. Adams (1985) 175 Cal.App.3d 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, supra, 175 Cal.App.3rd at p. 961, . . .)” (In re Lennies H., supra.)

Exception: Property Immediately Associated with the Defendant’s Person:

When a person is arrested and transported to the police station and there is property in his immediate possession (i.e., on his person), that property may be seized and searched (and/or 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.2d 771, 775-776]; In re Charles C. (1999) 76 Cal.App.4th 420, 425.)
“[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.” (United States v. Finley (5th Cir. 2007) 477 F.3rd 250, 254, 255, fn. 2, 259-260, fn. 7; citing United States v. Edwards, supra.

More on point is People v. Diaz (2008) 165 Cal.App.4th 732, where it was specifically held that a warrantless search incident to arrest, even though delayed until after the arrestee is transported to the police station, is still lawful so long as it is of personal property that is “immediately associated with the arrestee’s person.” This would include a cell phone found on the defendant’s person when arrested. The search, however, must occur before the stationhouse processing of the arrestee is completed.

Review was granted in Diaz by the California Supreme Court on October 28, 2008, making this case no longer available for citation.

However, Diaz cites other cases, in addition to Finley, supra., where this theory has been applied: Wallets (United States v. Passaro (9th Cir. 1980) 624 F.2nd 938, 944.); purses (People v. Decker (1986) 176 Cal.App.3rd 1247, 1252.); address books (United States v. Rodriguez (7th Cir. 1993) 995 F.3rd 776, 77-778.); and pagers (United States v. Chan (N.D.Cal. 1993) 830 F.Supp. 531, 536.).

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) ___ U.S. ___ [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.)
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.)


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.)

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.)

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.)

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].)

See “Searches of a Vehicle,” below.

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 with Probable 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 “Pat Down 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) 214 Cal.App.3rd 430, 435; People v. Deltoro (1989) 214 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.3\textsuperscript{rd} 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.4\textsuperscript{th} 210.)

\textit{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.2\textsuperscript{nd} 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.3\textsuperscript{rd} 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.2\textsuperscript{nd} 662, 668-671].)

This is not to say, however, that surgery would never be lawful. As the Supreme Court pointed out in \textit{Winston \ v. \ Lee}, supra, at p. 760 [84 L.Ed.2\textsuperscript{nd} 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 \textit{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.3d 555, 563.)

**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.3d 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.)

**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.3d 1048)


*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.)*

**Extracurricular activities:** *(Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls (2002) 536 U.S. 822 [153 L.Ed.2nd 735].)*

**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].)*

**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.”

In *Redding v. Safford Unified School District #1* (9th Cir. 2008) 531 F.3rd 1071, the Ninth Circuit Court of Appeal ruled, in a close 6-to-5 en banc ruling, that the strip search of the 13-year-old female middle school student, after finding no drugs in her pockets or backpack, was unreasonable and illegal.

**Note:** The above California Education Code search restriction is inapplicable in that this is an Arizona case.

Certiorari was granted on January 16, 2009, by the United States Supreme Court making this case unavailable for citation pending further review.

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-sniiff 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.)

*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.)

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 pat down 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.

The “nature of the crime” suspected is a factor in determining whether a frisk for weapons is lawful:

Mail theft: No. *(United States v. Flatter, supra.)*


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.)

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.)

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.)

**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. § 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 (1987) 194 Cal.App.3d 975, 982-983; People v. Rosales, supra, at p. 330.)

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 pat down. (People v. Samples 1996) 48 Cal.App.4th 1197.)

Note Ybarra v. Illinois (1979) 444 U.S. 85 [62 L.Ed.2d 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.3d 975; People v. Thurman (1989) 209 Cal.App.3d 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, 1075-1077.)

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 pat down 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 pat down 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 pat down 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 pat down 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.)*

*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. Aug. 17, 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, 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. *(Virgie 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. *(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. (Davis v. Mississippi (1969) 394 U.S. 721 [22 L.Ed.2
nd 676]; Hayes v. Florida (1985) 470 U.S. 811 [84 L.Ed.2
nd 705]; United States v. Beltran (9th Cir. 389 F.3
nd 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. (United States v. Garcia-Beltran (9th Cir. 2006) 443 F.3
nd 1126; United States v. Parga-Rosas (9th Cir. 2001) 238 F.3
nd 1209; United States v. Ortiz-Hernandez (9th Cir. 2005) 427 F.3
nd 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. (See People v. Quiroga (1993) 16 Cal.App.4
th 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 Schmerber v. California (1966) 384 U.S. 757, 764 [16 L.Ed.2
nd 908, 916.], an arrestee has no right to refuse to provide them at his or her booking. (United States v. Kelly (2
nd Cir. 1932) 55 F.2
nd 67; People v. Jones (1931) 112 Cal.App. 68.)

While excessive force is not permissible (People v. Mattesom (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. (People v. Williams (1969) 71 Cal.2
nd 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
nd 676]; Hayes v. Florida (1985) 470 U.S. 811 [84 L.Ed.2
nd 705]; Virgle v. Superior Court, supra; Kaupp v. Texas (2003) 538 U.S. 626, 630, fn. 2 [155 L.Ed.2
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.2nd 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.4th 274; held to be “harmless error” in light of other evidence and because defendant created the situation causing the force to be used.)

*Handwriting* (and other types of) 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.2nd 908, 918]; *Gilbert v. California* (1967) 388 U.S 263 [18 L.Ed.2nd 1178]; *People v. Graves* (1966) 64 Cal.2nd 208.)

The same legal theory applies to a “voice exemplar” (*United States v. Dionisio* (1973) 410 U.S. 1 [35 L.Ed.2nd 67].), as well as submitting to being photographed. (*Schmerber v. California*, supra.)

*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.2nd 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.3d 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.3d 257, 263; and *United States v. Edwards* (1974) 415 U.S. 800, 803 [39 L.Ed.2d 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.3d 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.3d 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.3d 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.3d 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.3d 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.2d 328, 332.)

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.2nd 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.)

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 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.)

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, violates a prisoner’s due process rights.  (*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.)

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.)
The same rule holds true for a person arrested on minor misdemeanor arrest warrants, with no prior criminal history or any relationship to drugs or weapons. *(Giles v. Ackerman* *(9th Cir 1984) 746 F.2nd 614.)*

The fact that the arrestee is to be put into the general population, by itself, does not make constitutional a policy of strip searches. *(Id., at p. 618.)*

*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(e):** “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 *pat down 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.3d 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.3d 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.3d 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.2d 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.3d 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 Cal.3d 865 [183 Cal.Rptr. 866, 647 P.2d 142] (see *People v. Valenzuela* (1984) 151 Cal.App. 3d 180, 189 [198 Cal.Rptr. 469] and cases there cited). 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.*

© 2009 by Robert C. Phillips. All rights reserved
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 Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) to the monitoring and recording of jail conversations over external telephone lines.

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.

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.3d 930, 937-938, fn. 3; People v. Lopez (1963) 60 Cal.2d 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.3d 301, 311; People v. Loyd (2002) 27 Cal.4th 997, 1002.)


Monitoring Jail Mail: It is constitutionally permissible to monitor inmate mail coming into a jail facility. (People v. Dinkins (1966) 242 Cal.App.2d 892, 903; People v. Jones (1971) 19 Cal.App.3d 437, 449.)

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.
“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.3d 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 related to “legitimate penological interests.” (Overton v. Bazzetta (2003) 539 U.S. 126 [156 L.Ed.2nd 162].)
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 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].)

**Retained Constitutional Rights:**

**Infringement on 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(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 polices 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).

(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.)

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 P.C. § 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.)

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.)
Chapter 9

Searches of Vehicles:

**General Rule:** Search warrants are not needed to lawfully 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.3d 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 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 “Pat Down” (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. (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 arrests 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].)

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 other 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 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, supra.)
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.  \textit{(Preston v. United States} (1964) 376 U.S. 364 [11 L.Ed.2nd 777]; \textit{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.  \textit{(United States v. Weaver, supra.)}

But note the Ninth Circuit in \textit{Weaver} (pg. 1107) calling upon the Supreme Court to “reexamine” the issue of the legality of a search incident to arrest when the arrestee has been already removed from the vehicle and has been secured in a nearby patrol car.  The Court notes that searches incident to arrest have gone well beyond the “\textit{rational underpinnings}” of the Supreme Court’s original approval of such searches without a warrant. (see \textit{New York v. Belton} (1981) 453 U.S. 454.)  More specifically, they note how “officer safety and preservation of evidence” (see \textit{Chimel v. California} (1969) 395 U.S. 752 [23 L.Ed.2nd 685].) are no longer major concerns after the arrestee has been handcuffed and put into a nearby patrol car.  And they quote a Supreme Court Justice (O’Conner) who has noted 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 \textit{Chimel} . . . [This is] a direct consequence of \textit{Belton}’s shaky foundation.” (See concurring opinion in \textit{Thornton v. United States} (2004) 541 U.S. 615, 624 [158 L.Ed.2nd 905].\)

This issue is presently before the United States Supreme Court in a case from the Arizona Supreme Court (\textit{State v. Gant} (2002) 202 Ariz. 240.) where the defendant’s vehicle was searched incident to his arrest.  The issue is whether the “search incident to arrest” exception to the warrant requirement is applicable when the defendant is already in custody.
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.)

**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* (2008) 165 Cal.App.4th 250, 260, fn. 7; *People v. Diaz*. (2008) 165 Cal.App.4th 732.)

**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
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].)

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. Osife, supra, reaffirming the rule of New York v. Belton (1981) 453 U.S. 454, 460 [69 L.Ed.2nd 768, 775], defendant arguing that a
minority, concurring opinion in Thornton to this effect should be accepted as a new rule.)

**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]; *Maryland v. Dyson* (1999) 527 U.S. 465 [144 L.Ed.2nd 442]; *People v. Superior Court [Nasmeh]* (2007) 151 Cal.App.4th 85, 100-102; *United States v. Davis* (9th Cir. 2008) 530 F.3rd 1069, 1084.)

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 “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].), or is transporting contraband. (United States v. Alvarez-Tejeda (9th Cir. 2007) 491 F.3rd 1013.)

**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.3rd 557; People v. Gregg (1974) 43 Cal.App.3rd 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.4th 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.3d 707; United States v. Johns (1985) 469 U.S. 478 [83 L.Ed.2d 890]; United States v. Garcia (9th Cir. 2000) 205 F.3d 1182.)

“(T)he passage of time between the seizure and the search of [a] car is legally irrelevant.” (People v. Superior Court [Nasmeht] (2007) 151 Cal.App.4d 85, 100-102; citing United States v. Gastiaburo (4th Cir. 1994) 16 F.3d 582, 587.)

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.2d 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.2d 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.)

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 “pat down” of the container (i.e., the purse) may be appropriate. (See “Frisks,” above.)

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 defendant’s residence, and which was found parked on the street within 1000 feet of an elementary school, was held not to come within the “residence” exception of 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.)

*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.2d 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.)

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.)

This includes closed containers in the vehicle (South Dakota v. Opperman (1976) 428 U.S. 364 [49 L.Ed.2nd 1000]; People v. Salcero (1992) 6 Cal.App.4th 720.), at least if the department’s standardized procedures include closed containers. (Florida v. Wells, supra, citing Colorado v. Bertine (1987) 479 U.S. 367 [93 L.Ed.2nd 739].)

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.)

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.

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 “Pat Down” (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.)
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 a 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.


Such a warrantless “search” is justified as an administrative search of a “closely regulated business,” and must be done in a reasonable manner. (People v. Potter (2005) 128 Cal.App.4th 611; see also People v. Lopez (1981) 116 Cal.App.3rd 600.) (See “Closely Regulated Businesses or Activities,” under “Warrantless Searches,” above.)

“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.)

**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.”

**(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.

**Case Law:**

**General Rule:** The **Fourth Amendment** prohibition on unreasonable searches and seizures applies to commercial premises as well as private homes.  (**New York v. Burger** (1987) 482 U.S. 691, 699 [96 L.Ed.2nd 601, 612]; **People v. Doty** (1985) 165 Cal.App.3rd 1060, 1066.)

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. 439

© 2009 by Robert C. Phillips.  All rights reserved
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, supra.)

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
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.3rd 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.3rd 444, 447.)


- 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.)

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.3d 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.)

*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.)

*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.4th 1061.)
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.3d 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.3d 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). [Citation]” ([*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.


After a hotel (or motel) guest’s rental period has expired, or has been lawfully terminated, 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 163, 172.)
But see *United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584, where the Ninth Circuit Court of Appeal 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.

Also see *United States v. Cunag* (9th Cir. 2004) 386 F.3rd 888, where the Ninth Circuit, straining to differentiate the facts of *Bautista*, held that the occupant of a hotel room has no reasonable expectation of privacy when the occupancy is achieved through credit card fraud.

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.)

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.2d 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.2d 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].)

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.”)*

**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.

**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; 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.)


**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.2d 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.3d 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.3d 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.2d 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.2d at p. 722].)

“(R)asonableness 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.3d 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.)

*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.:

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.

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)

Limitation; Exigency of the Officers’ Own Making: Although a police officer may, with exigent circumstances, secure a residence (or other protected place) pending the obtaining of a warrant or consent to search, the law will not allow a warrantless entry and securing of the premises if the exigency is 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.3\textsuperscript{rd} 835; see also United States v. Driver (9\textsuperscript{th} Cir. 1985) 776 F.2\textsuperscript{nd} 807.)

However, 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.2\textsuperscript{nd} 599]; People v. Angulo (1988) 199 Cal.App.3\textsuperscript{rd} 370; People v. Lamas (1991) 229 Cal.App.3\textsuperscript{rd} 560, 571.)

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.3\textsuperscript{rd} 581.)

If it is not, the evidence must be suppressed. (People v. Machupa (1994) 7 Cal.4\textsuperscript{th} 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.3d 475.)

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.3d 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.3d 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.3d 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.)

**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* (2001) 531 U.S. 326 [148 L.Ed.2nd 838].)

**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 back up officers may then lawfully make a warrantless entry. (United States v Bramble (9th Cir. 1966) 103 F.3d 1475, 1478-1479; United States v. Yoon (6th Cir. 2005) 398 F.3d 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 7, 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. *(Alexander v. City and County of San Francisco* (1994) 29 F.3rd 1355.)

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.3rd 454.)


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.3rd 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.4th 1404; *United States v. Crapser* (9th Cir. 2007) 472 F.3rd 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.3d 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.3d 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.3d 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.2d 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.

Searches Incident to Arrest: Whenever a person is arrested, officers may search the person and the area within that person’s immediate reach. (Chimel v. California (1969) 395 U.S. 752 [23 L.Ed.2d 685].)
**In a Residence:** This includes within a house, and may involve 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].)

But note People v. Leal (2008) 160 Cal.App.4th 701 [Review Granted], holding that where a defendant has already been removed to a patrol car, a search of the area where he was first taken into custody, occurring 2 to 3 minutes after his arrest, does not meet the purposes of Chimel, and is not lawful.

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].)

See “The ‘Protective Sweep’,” below.

**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
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.)

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.)

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 1282, 1284; United States v. Paopao (9th Cir. 2006) 469 F.2rd 760, 765.)

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.2nd 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.3d 1239, 1242, fn. 4; United States v. Reid (9th Cir. 2000) 226 F.3d 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.3d 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.3d 239, 243; North v. Superior Court (1972) 8 Cal.3d 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.)

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.

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.)
Preventing the destruction of evidence: A warrantless entry into a residence for the purpose of preventing the destruction of evidence is lawful. (*People v. Huber* (1965) 232 Cal.App.2nd 663.)

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].)

However, 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 and the “Emergency Aid” Doctrine:** 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*.

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, 1081-1083; *United States v. Martinez* (9th Cir. 2005) 406 F.3rd 1160; *United States v. Russell* (9th Cir. 2006) 436 F.3rd 1086.)*

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.)
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.

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 they same result would be applicable if analyzed under the “emergency aid doctrine.”

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.)
Most recently, 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.

**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 is 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.)

**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 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, 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.3rd 882.)

*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 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.3rd 931; *People v. Osuna* (1987) 187 Cal.App.3rd 845.)

**Executing an Arrest Warrant:**

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.)

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. (*People v. Lewis* (1999) 74 Cal.App.4th 662, 671; *In re Frank S.* (2006) 142 Cal.App.4th 145, 151.)

As a general rule, an arrest warrant is needed in order to lawfully arrest a person in his own home. Failure to get an arrest warrant when the person to be arrested is in his own home and there are no exigent circumstances justifying the lack of a warrant is a **Fourth Amendment** violation.
(Fisher v. City of San Jose (9th Cir. Jan. 16, 2007) 509 F.3rd 952: Failure to obtain an arrest warrant for an armed, barricaded, drunk in his own home, threatening to shoot police officers, during a standoff that lasts for over 12 hours, held to be a Fourth Amendment violation.)

En banc hearing granted on Marcy 14, 2008, setting aside this decision pending reanalysis of the issues.

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 “probable cause” to believe the person who is the subject of the arrest warrant is actually inside at the time. (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 (981) 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 been interpreted by both state and federal authority to require full-blown “probable cause.” (See People v. Jacobs, supra; United States v. Gorman, supra; and People v. Phillips, supra; see “Sufficiency of Evidence to Believe the Suspect is Inside,” below.)

“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
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))

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 People v. Phillips (9th Cir. 1974) 497 F.2nd 1131; a locked commercial establishment, at night; and United States v. Gorman (9th Cir. 2002) 314 F.3rd 1105; defendant in his girlfriend’s house with whom he was living.)

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.)

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.)

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.”

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. Gotfried* (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].)

© 2009 by Robert C. Phillips. All rights reserved
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. Cirao lo (1984) 161 Cal.App.3rd 1081.) was overruled in California v. Cirao lo, 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. (United States v. Knotts (1983) 460 U.S. 276 [75 L.Ed.2nd 55].)

However, 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].)

But, 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 Jones or 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.)

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.

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.

**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.3d 335; United States v. Diaz (6th Cir. 1994) 25 F.3d 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.2d 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.3d 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.3d 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.3d 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.3d 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.”)

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. (83 *Opn.Cal.Atty.Gen.* 257 (2000))

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.” (People v. Gonzales (1990) 218 Cal.App.3rd 403, 414.)

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.)
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.2nd 214].)

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.3rd 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.3rd 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.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; and People v. Joubert (1981) 118 Cal.App.3rd 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.2nd 326].)

California expressly follows the federal rule. (People v. Channing (2000) 81 Cal.App.4th 985.)
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.)

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.)

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.)

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].)

Property in the possession of a subject who is booked into custody is subject to search:

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 “pat down” of the container may be appropriate.


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.)
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].)

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.)

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, 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.)

**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:


  **Note:** A petition for hearing before the California Supreme Court was granted in *People v. Diaz*, making this case not available for citation until decided by the Supreme Court.

- 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 [Nasmeh] (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.)

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].) But as of now, the law in the area of searching high tech devices is still in its infancy.

Computer Cases:

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.)

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.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.)


*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.*

© 2009 by Robert C. Phillips. All rights reserved
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.)

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.)*

*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.3rd 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.3rd 1141; United States v. Young, supra.)

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.3rd 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.2nd 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.3rd 311,
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.3rd 883, 893; off-duty police trainee searching a container in his apartment house garage out of concern for his own safety.

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 Pat Down: If a police officer feels what might be a controlled substance in the pocket of a suspect during a pat down 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
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* (6th 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.)

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.)

*How long* a container may be detained (i.e., a “reasonable time”) depends upon the circumstances. *(United States v. Van Leeuwen* (1970) 397 U.S. 249, 252 [25 L.Ed.2nd 282, 285]; 29 hours okay.)

*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.

A two-day detention of two letters was acceptable because it was supported by probable cause. *(United States v. Mayomi* (7th Cir. 1989) 873 F.2nd 1049, 1053-1054.)

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.
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].)

“‘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 a 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.3d 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.2d 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.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.)

*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* (1978) 575 F.2nd 721.)

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 Cal.App.4th 791, 794-795; citing *United States v. Ramsey* (1977) 431 U.S 606, 619-622 [52 L.Ed.2nd 617, 628-630]; and *United States v. Ani* (9th Cir. 1998) 138 F.3rd 390, 392.)

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.3d 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.2d 311]; overruling the Ninth Circuit’s conclusion to the contrary in United States v. Molina-Tarazon (2002) 279 F.3d 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.3d 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, pat downs and involuntary x-ray searches. (United States v. Montoya De Hernandez, supra; United States v. Vance (9th Cir. 1995) 62 F.3d 1152.)

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*, supra.)

*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. \textit{(United States v. Cortez-Rocha} (9\textsuperscript{th} Cir. 2004) 383 F.3\textsuperscript{rd} 1093, citing \textit{United States v. Flores-Montano}, supra.)

In \textit{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. \textit{(United States v. Flores-Montano} (2004) 541 U.S. 149 [158 L.Ed.2\textsuperscript{nd} 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. \textit{(United States v. Chaudhry} (9\textsuperscript{th} Cir. 2005) 424 F.2\textsuperscript{nd} 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. \textit{(United States v. Hernandez} (9\textsuperscript{th} Cir. 2005) 424 F.3\textsuperscript{rd} 1056.)

\textit{Reasonableness of the Search}: Even a border search which may be conducted with no suspicion must be reasonable in its manner and scope. \textit{(United States v. Seljan} (9\textsuperscript{th} Cir. 2007) 497 F.3\textsuperscript{rd} 1037, 1042-1045; a currency interdiction search, as authorized by \textit{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.)

\textit{The “Functional Equivalent of a Border:”}

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 \textit{reasonable suspicion}, to be lawful. \textit{(United States v. Okafor} (9\textsuperscript{th} Cir. 2002) 285 F.3\textsuperscript{rd} 842.)

The first port where a vessel docks on arrival from a foreign country is the functional equivalent of an international border. \textit{(People v. Laborde} (2008) 163 Cal.App.4\textsuperscript{th} 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.)

This rule applies to packages that are being sent from the United States to a foreign country, even thought 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.)

**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.2d 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.2d 381, 391-392]; United States v. Ramsey (1977) 431 U.S. 606, 616 [52 L.Ed.2d 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.2d 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.2d 596]; United States v. Brignoni-Ponce (1975) 422 U.S. 873 [45 L.Ed.2d 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.2d 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.

(United States v. Brignoni-Ponce, supra, at pp. 884-885 [45 L.Ed.2nd at pp. 618-619].)

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. (*Mena v. City of Semi Valley* (9th Cir. 2003) 332 F.3rd 1255, 1264-1265.)

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.2nd 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.4th 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.3d 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.3d 600, 610; In re York (1995) 9 Cal.4th 1133, 1150.)

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 parolees, 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. 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: Any inmate released on parole 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))

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.3d 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 **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 wavier 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.3rd 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.)

© 2009 by Robert C. Phillips. All rights reserved
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, supra, at p. 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; Vandenberg 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 re Binh L. (1992) 5 Cal.App.4th 194, 203-205.)

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 safety of the public. (In re York (1995) 9 Cal.4th 1133.)

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.3rd 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.)

© 2009 by Robert C. Phillips. All rights reserved
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, supra.

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; and United States v. Follette (S.D.N.Y. 1968) 282 F.Supp. 10, 13.)

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 substituted 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. (People v. Sardinas (2009) ___ Cal.App.4th ___ [87 Cal.Rptr.3rd 896].)

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.)

Need to Seek Permission:

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.3d 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.)


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 wavier. (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. § 3067, so long as he knew that the subject was on parole. (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1030-1032; citing *People v. Middleton* (2005) 131 Cal.App.4th 732.)

But 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.

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.)

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 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.)
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 “good faith” of a police officer, erroneously believing that a subject is on probation or parole and subject to a Fourth Waiver, may still be valid, depending upon the source (law enforcement source vs. court or legislative source) of the erroneous information and if from a law enforcement source, so long as the error was based upon non-reoccurring negligence only (Herring v. United States (2009) ___ U.S. __ [129 S.Ct. 695].)

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.3d 841, 856 . . . People v. Viega (1989) 214 Cal.App.3d 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.3d 1257; see also Motley v. Parks (9th Cir. 2005) 432 F.3d 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 Wavier 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.2d 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.3d 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.3d 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.)

*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.3d 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.3d 736, 746-750; see also United States v. Davis (9th Cir. 1991) 932 F.2d 752, 760.)

In a Vehicle:

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.)

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.3d 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.3d 49, 56-58.)
**Detentions, Pat Downs 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.)

*Pat Downs:*

*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 pat down (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.3rd 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* (1999) 74 Cal.App.4th 662.)

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 Law. (*People v. Reed* (1994) 23 Cal.App.4th 135.)
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.)

**Limitation:** A consent, to be lawful, must be “freely and voluntarily” given. *(Bumper v. North Carolina* (1969) 391 U.S. 543, 548 [20 L.Ed.2nd 797, 802].)

**Burden of Proof:** The prosecution bears the burden of showing that the defendant’s consent to search is voluntary and unaffected by coercion. *(Schneckloth v. Bustamonte, supra; Estes v. Rowland* (1993) 14 Cal.App.4th 508, 527; *United States v. Bautista* (9th Cir. 2004) 362 F.3rd 584.)

“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.3d 839, 846; see also United States v. Bautista (9th Cir. 2004) 362 F.3d 584, 589.)

“On appeal, evidence regarding the question of consent must be viewed in the light most favorable to the factfinder’s decision.” (United States v. Kaplan (9th Cir. 1990) 895 F.2d 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.3d 1118, 1126; United States v. Crapser (9th Cir. 2007) 472 F.3d 1141, 149; United States v. Rodriguez (2006) 464 F.3d 1072, 1077.)

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.3d 972, 976; *Amos v. United States* (1921) 255 U.S. 313, 317 [65 L.Ed.2d 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.2d 282, 286; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 188; *Bumper v. North Carolina* (1968) 391 U.S. 543 [20 L.Ed.2d 797] *United States v. Soriano* (9th Cir. 2003) 361 F.3d 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* (2006) 464 F.3d 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.3d 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.3d 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)mplcit 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.)

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.3rd 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.)*

- **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.)

After Detention Ended: 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’Scannlaim 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. 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].)

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.)

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.3rd 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].)

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 pat down 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.3rd 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.4th 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.3rd 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.3rd 1118, 1131, as amended at 416 F.3rd 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.3rd 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.4th 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.3rd 765, 770-771.)

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.”

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.)

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.)

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.)

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.  
(\textit{People Clark} (1993) 5 Cal.4\textsuperscript{th} 950, 977-980.)

- May a \textit{drug-sniffing dog} be used without obtaining any more than a general consent to search? \textit{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. (\textit{People v. Bell} (1996) 43 Cal.App.4\textsuperscript{th} 754.)

  See also \textit{People v. $48,715 United States Currency} (1997) 58 Cal.App.4\textsuperscript{th} 1507, 1515-1516: “A “\textit{sniff}” by a trained drug-sniffing dog in a public place is not a “\textit{search}” within the meaning of the Fourth Amendment’ at all. Accordingly, no consent is needed for participation of the dog. (Citation)”  
  (See also \textit{United States v. Todhunter} (9\textsuperscript{th} Cir. 2002) 297 F.3\textsuperscript{rd} 886, 891.) (See “\textit{Dogs Used to Search},” above.)

- May a suspect \textit{place conditions} on the search? (E.g.; “Yes officer, but only if I may be present.”) Arguably; \textit{Yes}. If a person may limit the areas to be searched, it would seem that he could also impose any conditions he chooses.  
  (See \textit{People Clark}, \textit{supra}, recognizing the validity of a conditional consent even though not discussing the issue.)

- May an officer \textit{use a ruse or deception} in obtaining a consent? Generally, \textit{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 \textit{People v. Reeves} (1964) 61 Cal.2\textsuperscript{nd} 268, 273; \textit{People v. Mesaris} (1970) 14 Cal.App.3\textsuperscript{rd} 71.)

  \textit{But}, a ruse is but one factor to consider. If, under the totality of the circumstances, a suspect is \textit{not} materially misled as to the privacy rights he is giving up by consenting, the search will be held to be valid. (\textit{People v. Avalos} (1996) 47 Cal.App.4\textsuperscript{th} 1567.)

- Can a suspect who is \textit{under arrest} validly consent to being searched? \textit{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. (\textit{United States v. Crapser} (9\textsuperscript{th} Cir. 2007) 472 F.3\textsuperscript{rd} 1141, 1149.)

- Does a consensual search of a residence have to be based upon some level of suspicion? \textit{No}.

© 2009 by Robert C. Phillips. All rights reserved
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.)


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. Shlacter* (7th Cir. 1996) 85 F.3rd 1251, 1255-1256.)

Requesting a consent to search is not an interrogation, does not implicate the Fifth Amendment, and does not require a Miranda admonishment. (*People v. Ruster* (1976) 16 Cal.3rd 690, 700;

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 (2000) 530 U.S. 428, 441 [147 L.Ed.2nd 405, 418]; United States v. Patane (2004) 542 U.S. 630 [159 L.Ed.2nd 667].)

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 consent. (United States v. Rodriguez (2006) 464 F.3rd 1072, 1078.)
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.3d 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:


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. Nov. 7, 2005) 428 F.3rd 877.)

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.)

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.)

Child: 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.3d 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-Occupant (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:

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.3d 841, 855-857; with defendant outside in a police car, objecting, but his wife, in the residence, saying okay, the entry is 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 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* (9\textsuperscript{th} Cir. Feb. 20, 2008) 516 F.3\textsuperscript{rd} 1117, 1124-1125.)

Several other federal circuits disagree with the *Murphy* on this issue. (See *United States v. Hudspeth* (8\textsuperscript{th} Cir. 2008) 518 F.3\textsuperscript{rd} 954; *United States v. Henderson* (7\textsuperscript{th} Cir. 2008) 536 F.3\textsuperscript{rd} 776.)

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. *(Tomkins v. Superior Court* (1959) 59 Cal.2\textsuperscript{nd} 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.3\textsuperscript{rd} 817.)

And also note *United States v. Rith* (10\textsuperscript{th} Cir. 1999) 164 F.3\textsuperscript{rd} 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.3\textsuperscript{rd} 247, 276; *United States v. Davis* (9\textsuperscript{th} Cir. 2003) 332 F.3\textsuperscript{rd} 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.4\textsuperscript{th} 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.”

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.)