

# Pat Searches

*“American criminals have a long tradition of armed violence.”*<sup>1</sup>

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

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

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

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

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

<sup>1</sup> *Terry v. Ohio* (1968) 393 U.S. 1, 23.

<sup>2</sup> Source: U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Feloniously Killed 1968-2005 (By type of weapon)*. ALSO SEE *Terry v. Ohio* (1968) 393 U.S. 1, 24 [“Virtually all of [the deaths of officers in the performance of their duties] and a substantial portion of the injuries are inflicted with guns and knives.”].

<sup>3</sup> Source: U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Feloniously Killed 1995-2004 (By circumstances at scene of incident and type of assignment)*

<sup>4</sup> See *Terry v. Ohio* (1968) 393 U.S. 1, 24 [“The easy availability of firearms to potential criminals in this country is well known.”]; *United States v. Robinson* (1973) 414 U.S. 218, 234, fn.5 [“The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty”]; *U.S. v. Holt* (10<sup>th</sup> Cir. 2001) 264 F.3d 1215, 1223 [“Resort to a loaded weapon is an increasingly plausible option for [detainees].”].

<sup>5</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1052.

<sup>6</sup> *Michigan v. Long* (1983) 463 U.S. 1032, 1051.

<sup>7</sup> *U.S. v. Reilly* (9<sup>th</sup> Cir. 2000) 224 F.3d 986, 993.

<sup>8</sup> *Terry v. Ohio* (1968) 393 U.S. 1, 24. **NOTE:** Because pat searches are permitted for the sole purpose of discovering weapons, officers may not, based on reasonable suspicion, pat search a suspect to determine whether he possesses ID. See *People v. Garcia* (2006) 145 Cal.App.4<sup>th</sup> 782, 788 [“[*Terry*] by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest.”].

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

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

Consequently, it is essential that officers understand when pat searches are, and are not, permitted. And that is the subject of the first half of this article. In the second half, we will discuss the other important limitation on pat searches: the permissible scope of the search. Taking note of these fundamental restrictions, the Court in *Terry* said, "[O]ur inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."<sup>13</sup>

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

#### **"ARMED OR DANGEROUS"**

As noted, pat searches are permitted only if officers reasonably believe that the detainee is presently armed or dangerous. But unless they actually see a weapon, or unless the detainee is outwardly hostile, this determination must be based on

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<sup>9</sup> See *U.S. v. Hawk* (10<sup>th</sup> Cir. 2005) 412 F.3d 1179, 1192 ["Police are predisposed by their instinct for self-preservation to assume that an unknown situation is dangerous. The Fourth Amendment limits officers' ability to act on this assumption, but we must take care not to restrict officers' common-sense precautions, particularly in cases involving reasonable suspicion."]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1083 ["An officer in today's reality has an objective, reasonable basis to fear for his or her life every time a motorist is stopped."].

<sup>10</sup> (1968) 393 U.S. 1, 9.

<sup>11</sup> (1968) 393 U.S. 1, 25.

<sup>12</sup> (1968) 393 U.S. 1, 16-7. **NOTE:** A pat search is both a "search" and a "seizure." *Id.* at p. 19.

<sup>13</sup> *Terry v. Ohio* (1968) 393 U.S. 1, 19-20.

<sup>14</sup> *People v. Koelzer* (1963) 222 Cal.App.2d 20, 27. ALSO SEE *People v. Dumas* (1967) 251 Cal.App.2d 613, 617 ["The realities of present day law enforcement dictate that a failure to make such a search, in many cases, might mean death to policemen."].

circumstantial evidence.<sup>15</sup> What circumstances are considered significant? And how do the courts evaluate them? These are the questions we will now examine.

### General principles

**ARMED OR DANGEROUS:** In *Terry*, the Court said that pat searches are permitted only if officers reasonably believed that the detainee was armed “and” dangerous. Almost immediately, however, the lower courts understood that the use of the conjunctive “and” was an unfortunate lapse—that pat searches would be justified whenever officers reasonably believed that a detainee was armed *or* dangerous. After all, it is apparent that every suspect who is armed with a weapon is necessarily dangerous to any officer who is detaining him, even if the detainee was cooperative and exhibited no hostility.<sup>16</sup>

Furthermore, although the courts still routinely quote *Terry*’s “armed and dangerous” language, they understand that a pat search will be justified if officers reasonably believed that a detainee constituted an immediate threat, even if there was no reason to believe he was armed.<sup>17</sup> As the Sixth Circuit put it, “The focus of judicial inquiry is

<sup>15</sup> See *People v. Thurman* (1989) 209 Cal.App.3d 817, 823 [it would be “utter folly” to require an officer “to await an overt act of hostility before attempting to neutralize the threat of physical harm”]; *People v. Samples* (1992) 11 Cal.App.4th 389, 393 [“Our courts have never held that an officer must wait until a suspect actually reaches for an apparent weapon before he is justified in taking the weapon.”].

<sup>16</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1049 [“Our past cases indicate that the protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger”]; *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 112 [“The bulge in the jacket permitted the officer to conclude that Mimms was armed *and thus* posed a serious and present danger to the safety of the officer.” Emphasis added]; *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 [“[A] pat-down search for weapons may be made predicated on specific facts and circumstances giving the officer reasonable grounds to believe that defendant is armed *or* on other factors creating a potential for danger to the officers.” Emphasis added]; *People v. Hill* (1974) 12 Cal.3d 731, 746 [pat search is permitted if officers reasonably believe a suspect “might forcibly resist an investigatory detention”]; *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074 [“[T]he crux of the issue is whether a reasonably prudent person . . . would be warranted in the belief that his or her safety was in danger.”]; *People v. Franklin* (1985) 171 Cal.App.3d 627, 635 [“The issue rather is whether a reasonably prudent man under similar circumstances would be warranted in his belief that his safety was in danger.”]; *People v. Campbell* (1981) 118 Cal.App.3d 588, 595 [“An officer is justified in making a pat-down search if he has objective cause to believe that the suspect is armed or that the search is necessary for the officer’s own safety.”]. **NOTE:** Even the Court in *Terry* acknowledged that an armed detainee is necessarily dangerous. See *Terry v. Ohio* (1968) 393 U.S. 1, 28 [“a reasonably prudent man would have been warranted in believing petitioner was armed *and thus* presented a threat”; emphasis added]. In another example of sloppy drafting in *Terry*, the Court said several times that the issue is whether the suspect is “potentially dangerous.” But, as the Court of Appeal observed, “almost everyone could be described as ‘potentially’ dangerous.” *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433, fn.4.

<sup>17</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1049 [“Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger . . . .” The *Long* Court also noted that a pat search of a suspect known to be unarmed may be permissible because such a suspect “may be able to gain access to weapons” At p. 1049, fn14]; *Sibron v. New York* (1968) 392 U.S. 40, 65 [purpose of pat search is “disarming a potentially dangerous man.”]; *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 204 [“The critical question remains, is this the kind of confrontation in which the officer can reasonably believe in the possibility that a weapon may be used against him?”]; *U.S. v. Brown* (7th Cir. 2000)

whether the officer reasonably perceived the subject of a frisk as potentially dangerous, not whether he had an indication that the defendant was in fact armed.”<sup>18</sup>

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

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

**THE NEED FOR FACTS:** A determination that a suspect was armed or dangerous must be based on specific facts.<sup>23</sup> Feelings, hunches, and unsupported conclusions are irrelevant.

**“ROUTINE” PAT SEARCHES:** Because facts are required, pat searches can never be conducted as a matter of routine.<sup>24</sup> In fact, judges will usually conclude that an officer has

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232 F.3d 589, 592 [pat search of strangely-behaving detainee upheld even though there “was the lack of specific facts indicating that [he] possessed a weapon”].

<sup>18</sup> *U.S. v. Bell* (6<sup>th</sup> Cir. 1985) 762 F.2d 495, 500, fn.7. ALSO SEE *U.S. v. Flett* (8<sup>th</sup> Cir. 1986) 806 F.2d 823, 828.

<sup>19</sup> See *Terry v. Ohio* (1968) 392 U.S. 1, 21-2 “[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?”]; *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 112 “[A]ny man of reasonable caution would likely have conducted the pat down.”]; *U.S. v. Price* (D.C. Cir. 2005) 409 F.3d 436, 441 “[In reviewing such protective searches, we apply an objective test based on the facts available to the officer at the time of the search.”]; *U.S. v. Holt* (10<sup>th</sup> Cir. 2001) 264 F.3d 1215, 1225 “[In the context of officer safety in particular, the Supreme Court has relied on an objective view of the circumstances.”]; *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 866 “[T]he test is objective, not subjective.”]. **NOTE:** The “reasonable officer” test is sometimes phrased in terms of reasonable suspicion; i.e., a pat search is permitted if officers have reasonable suspicion to believe the detainee is armed or dangerous. See *New York v. Class* (1986) 475 U.S. 106, 117 “[When a search or seizure has as its immediate object a search for a weapon . . . only on a reasonable suspicion of criminal activity [is required].”]; *U.S. v. Orman* (9<sup>th</sup> Cir. 2007) 486 F.3d 1170, 1176 [reasonable suspicion “is all that is required for a protective search”]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1083 [“The reasonable suspicion required to justify a pat-down search represents a minimum level of objective justification.”].

<sup>20</sup> *U.S. v. Hanlon* (8<sup>th</sup> Cir. 2005) 401 F.3d 926, 929.

<sup>21</sup> See *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1101 [“We know of no legal requirement that a policeman must feel ‘scared’ by the threat of danger.”].

<sup>22</sup> See *People v. Adam* (1969) 1 Cal.App.3d 486, 491 [“[S]imple good faith on the part of the arresting officer is not enough.”].

<sup>23</sup> See *Terry v. Ohio* (1968) 392 U.S. 1, 21 [“[T]he police officer must be able to point to specific and articulable facts”]; *Sibron v. New York* (1968) 392 U.S. 40, 64 [the officer “must be able to point to particular facts”]; *People v. Glenn R.* (1970) 7 Cal.App.3d 558, 561 [although the officer described his belief that the defendant was armed as a “sneaky hunch,” it was actually based on specific facts]; *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1100 [“[T]he feelings or hunches of an officer are too lacking in substance to effectively guarantee protection of constitutional rights.”].

no understanding of the law if he testifies that he always or usually pat searches the people he detains.<sup>25</sup> For example, the courts have summarily invalidated pat searches when the officer, when asked why he searched the defendant, replied as follows:

- “Standard procedure, officer’s discretion and my training.”<sup>26</sup>
- “Pat down everyone that I talk to, for safety reasons.”<sup>27</sup>
- “Officer safety and because [the suspect] may have been armed.”<sup>28</sup>
- “As far as I am concerned, anybody I stop could possibly have a weapon on them.”<sup>29</sup>

In contrast, in *People v. Juarez* the court noted that the officer “testified that he was always in fear of harm when questioning a detained suspect but not that he always and without articulable reason allayed that fear by a frisk.”<sup>30</sup>

**TRAINING AND EXPERIENCE:** The courts may consider an officer’s opinion, based on training and experience, as to whether certain facts or circumstances demonstrated a legitimate threat.<sup>31</sup>

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

<sup>24</sup> See *U.S. v. Post* (9<sup>th</sup> Cir. 1979) 607 F.2d 847, 851 [“It is clear that an officer who has the right to stop a person does not necessarily have a concomitant right to search that person.”]; *U.S. v. Garcia* (10<sup>th</sup> Cir. 2006) 459 F.3d 1059, 1063-4 [pat searches are “not to be conducted as a matter of course during every investigative detention”].

<sup>25</sup> See, for example, *People v. Lawler* (1973) 9 Cal.3d 156, 162-3 [“The officer’s testimony that he felt a ‘routine’ search for weapons was in order apparently betrays the presence of [an illegal police practice].”]; *People v. Adam* (1969) 1 Cal.App.3d 486, 490 [“The People interpret *Terry* as if it stood for the proposition that simply because an officer may temporarily seize a suspect it follows automatically that he may frisk him for weapons.”].

<sup>26</sup> *Santos v. Superior Court* (1984) 154 Cal.App.3d 1178, 1181. ALSO SEE *People v. Medina* (2003) 110 Cal.App.4<sup>th</sup> 171, 176 [“standard procedure”]; *People v. Adam* (1969) 1 Cal.App.3d 486, 489 [“ordinary precautions”].

<sup>27</sup> *People v. Hubbard* (1970) 9 Cal.App.3d 827, 830 [“This indiscriminating approach does not meet the Supreme Court’s test.”].

<sup>28</sup> *People v. Dickey* (1994) 21 Cal.App.4<sup>th</sup> 952, 956 [“Without specific and articulable facts . . . these conclusions add nothing.”]. ALSO SEE *People v. Marcellus L.* (1991) 229 Cal.App.3d 134, 138 [“for safety reasons”].

<sup>29</sup> *People v. Griffith* (1971) 19 Cal.App.3d 948, 952.

<sup>30</sup> (1973) 35 Cal.App.3d 631, 637.

<sup>31</sup> See *United States v. Arvizu* (2002) 534 U.S. 266, 273 [“This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.”]; *People v. Frank V.* (1991) 233 Cal.App.3d 1232, 1240-1; *U.S. v. Barlin* (2<sup>nd</sup> Cir. 1982) 686 F.2d 81, 86 [“[W]e must view the surrounding circumstances . . . through the eyes of a reasonable and caution police officer on the scene guided by his training and experience.”]; *U.S. v. Rideau* (5<sup>th</sup> Cir. 1992) 969 F.2d 1572, 1575 [“Trained, experienced officers like Ellison may perceive danger where an untrained observer would not.”].

<sup>32</sup> *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 865. ALSO SEE *U.S. v. Barlin* (2<sup>nd</sup> Cir. 1982) 686 F.2d 81, 86 [“[W]e must view the surrounding circumstances as a whole, not as discrete and separate facts.”]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1085 [the trial court had “discounted the totality of the information known to the officers by focusing on the facts in isolation.”].



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

**POSSIBILITY OF AN “INNOCENT” EXPLANATION:** A pat search will not be invalidated merely because there might also have been an “innocent” or non-threatening explanation for the circumstances.<sup>35</sup>

**“CLOSE” CASES:** Finally, in close cases the courts are apt to uphold an officer’s determination that a detainee was armed or dangerous. As the Court of Appeal put it, “The judiciary should not lightly second-guess a police officer’s decision to perform a patdown search for officer safety.”<sup>36</sup>

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

#### **Nature of crime under investigation**

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

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

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

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<sup>33</sup> (1997) 58 Cal.App.4<sup>th</sup> 1069, 1074.

<sup>34</sup> (1978) 81 Cal.App.3d 347, 354.

<sup>35</sup> See *People v. Ledesma* (2003) 106 Cal.App.4<sup>th</sup> 857, 863 [“[The U.S. Supreme Court] has been sharply critical of lower court decisions precluding police reliance on facts consistent with an innocent as well as a guilty explanation.”];

*People v. Brown* (1989) 213 Cal.App.3d 187, 191 [“[I]t does not assist defendant that other explanations consistent with innocent activity might be equally reasonable.”]; *People v. Frank V.* (1991) 233 Cal.App.3d 1232, 1240-1.

<sup>36</sup> *People v. Dickey* (1994) 21 Cal.App.4<sup>th</sup> 952, 957. ALSO SEE *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433 [“[The U.S. Supreme Court] seemed willing to allow more leeway in the officer’s decision that a suspect is ‘armed and presently dangerous,’ even for minor offenses.”].

<sup>37</sup> See *U.S. v. Flatter* (9<sup>th</sup> Cir. 2006) 456 F.3d 1154, 1158 [“[I]ndeed, some crimes are so frequently associated with weapons that the mere suspicion that an individual has committed them justifies a pat down search.”].

<sup>38</sup> (1998) 65 Cal.App.4<sup>th</sup> 854, 862.

<sup>39</sup> (1989) 209 Cal.App.3d 817, 822.

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

**VIOLENT CRIMES:** A pat search is, of course, also warranted if the detainee was reasonably suspected of having committed a crime of violence, such as murder, assault with a deadly weapons, robbery, or carjacking.<sup>41</sup>

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<sup>40</sup> See *Richards v. Wisconsin* (1997) 520 U.S. 385, 391, fn.2 [“This Court has encountered before the links between drugs and violence.” Citations omitted]; *People v. Glaser* (1995) 11 Cal.4<sup>th</sup> 354, 367 [“In the narcotics business, firearms are as much ‘tools of the trade’ as are most commonly recognized articles of narcotics paraphernalia.” Quoting *Ybarra v. Illinois* (1979) 444 U.S. 86, 106 (dis. opn. of Rehnquist, J)]; *People v. Osuna* (1986) 187 Cal.App.3d 845, 856 [“It should come as no great surprise that those who would profit by the illicit manufacture and sale of drugs which so often destroy their customers’ very lives, are not above adopting lethal means to protect their products from seizure and themselves from apprehension.”]; *People v. Lee* (1987) 194 Cal.App.3d 975, 983 [“persons engaged in selling narcotics frequently carry firearms to protect themselves from would-be robbers.”]; *People v. Limon* (1993) 17 Cal.App.4<sup>th</sup> 524, 535 [It is not unreasonable to assume that a dealer in narcotics might be armed and subject to a pat-search.”]; *People v. Samples* (1996) 48 Cal.App.4<sup>th</sup> 1197, 1209; *People v. Gallegos* (2002) 96 Cal.App.4<sup>th</sup> 612, 629 [“It is common knowledge that drug dealers typically use firearms and ammunition in the course of their drug sale operations.”]; *People v. Wigginton* (1973) 35 Cal.App.3d 732, 737 [the officer knew that “users and sellers of narcotics more times than not have weapons readily available either on their person or on the premises”]; *U.S. v. \$109,179* (9<sup>th</sup> Cir. 2000) 228 F.3d 1080, 1084 [“Officer Jones had reasonable suspicion to believe that Maggio was involved in a narcotics operation, and thus that he might be armed.”]; *U.S. v. Hudson* (9<sup>th</sup> Cir. 1996) 100 F.3d 1409; *U.S. v. Post* (9<sup>th</sup> Cir. 1979) 607 F.2d 847 852 [“It is not unreasonable to suspect that a dealer in narcotics might be armed.”]; *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 865 [“Drug dealing is a crime infused with violence.”]; *U.S. v. Barlin* (2<sup>nd</sup> Cir. 1982) 686 F.2d 81, 87 [court notes “the violent nature of narcotics crime”]; *U.S. v. Stowe* (7<sup>th</sup> Cir. 1996) 100 F.3d 494, 499 [“[D]rug dealing is a crime infused with violence. . . . Guns and drugs together distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers—an important narrowing factor.”]; *U.S. v. Bustos-Torres* (8<sup>th</sup> Cir. 2005) 396 F.3d 935, 943 [“Because weapons and violence are frequently associated with drug transactions, it is reasonable for an officer to believe a person may be armed and dangerous when the person is suspected of being involved in a drug transaction.”]; *U.S. v. Hauk* (10<sup>th</sup> Cir. 2005) 412 F.3d 1179, 1192 [“Unlike some other crimes, involvement in the drug trade is not uncommonly associated with violence.”]; *U.S. v. Price* (D.C. Cir. 2005) 409 F.3d 436, 442 [pat search justified because officers reasonably believed the suspect was “transporting a stash of illegal drugs”]; *U.S. v. Garcia* (10<sup>th</sup> Cir. 2006) 459 F.3d 1059, 1064 [“[A] connection with drug transactions can support a reasonable suspicion that a suspect is armed and dangerous.”]. **NOTE:** In *Santos v. Superior Court* (1984) 154 Cal.App.3d 1178, 1185 and *People v. Wright* (1988) 206 Cal.App.3d 1107, 1112 the courts ruled that a pat search could not be justified merely because officers reasonably believed the detainee was selling drugs. These rulings were ludicrous in the ‘80’s and they are even more so today. Although defendant’s often cite them, the courts routinely ignore them.

<sup>41</sup> See *Terry v. Ohio* (1968) 392 U.S. 1, 28 [the officer reasonably believed the suspect was “contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons”]; *People v. Campbell* (1981) 118 Cal.App.3d 588, 595 [“Officer Welch articulated his belief that the appellant was armed and justified this belief by testifying that there had been killings in connection with this investigation.”]; *People v. Atmore* (1970) 13 Cal.App.3d 244, 247, fn.1 [murder]; *People v. Rico* (1979) 97 Cal.App.3d 124, 132 [ADW]; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 [strong-arm robbery]; *People v. Gonzales* (1998) 64 Cal.App.4<sup>th</sup> 432,

**BURGLARY:** A suspected burglar may be pat searched because burglars often carry weapons or tools that could serve as weapons.<sup>42</sup> As the Court of Appeal observed, “It is reasonable for an officer to believe that a burglar may be armed with weapons, or tools such as knives and screwdrivers which could be used as weapons, and that a pat-down search is necessary for the officer’s safety.”<sup>43</sup>

**CAR THEFT:** Because car thieves also frequently carry tools, they too may be pat searched.<sup>44</sup>

**VEHICLE PURSUITS:** Officers may pat search all occupants of a vehicle that has been stopped following a pursuit, regardless of the initial justification for the stop.<sup>45</sup>

**TRAFFIC VIOLATIONS:** While traffic stops are inherently dangerous, the likelihood that a violator is armed or dangerous is too remote to justify a pat search.<sup>46</sup> As the court said in

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439 [armed robbery]; *People v. Anthony* (1970) 7 Cal.App.3d 751, 761 [armed robbery]; *People v. Franklin* (1985) 171 Cal.App.3d 627, 635-6 [armed robbery]; *People v. Watson* (1970) 12 Cal.App.3d 130, 134 [armed robbery]; *People v. Craig* (1978) 86 Cal.App.3d 905, 912 [armed robbery]; *People v. Orozco* (1981) 114 Cal.App.3d 435, 445 [shots fired]; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1401 [shots fired]; *People v. Superior Court (Holmes)* (1971) 15 Cal.App.3d 806, 810 [shots fired]; *People v. Woods* (1970) 6 Cal.App.3d 832, 837 [shots fired, plus hand in pocket]; *U.S. v. Hartz* (9<sup>th</sup> Cir. 2006) 458 F.3d 1011, 1018 [carjacking]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1081 [preparing for a drive-by shooting].

<sup>42</sup> See *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230 [“burglary suspects frequently carry weapons”]; *People v. Remiro* (1979) 89 Cal.App.3d 809, 829 [“[The officer] suspected he was dealing with automobile burglars”]; *People v. Smith* (1973) 30 Cal.App.3d 277, 279 [“The officers had received a report of a possible burglary”]; *People v. Juarez* (1973) 35 Cal.App.3d 631, 636 [“appellant was a logical suspect in a recent burglary”]; *People v. Suennen* (1980) 114 Cal.App.3d 192, 199 [detention of suspect in “recent local pillowcase burglaries”]; *People v. Garcia* (1969) 274 Cal.App.2d 100, 106; *People v. Allen* (1975) 50 Cal.App.3d 896, 901 [auto burglary]; *People v. Koelzer* (1963) 222 Cal.App.2d 20, 27 [officers who had detained suspected burglars were “entitled to make a self-protective search of defendants’ persons”]; *U.S. v. Mattarolo* (9<sup>th</sup> Cir. 1999) 191 F.3d 1082, 1087 [the defendant was a suspected counterfeiter, “not a suspect caught possibly in the act of committing a nighttime burglary and therefore more likely to be armed”]; *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767 [“[I]t was appropriate for [the officers] to act on the basis of the kinds of risks burglaries normally present.”]; *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1100 [the officer “had information that the Tharpe brothers were known burglars; that they were now suspects in a recent unsolved burglary”].

<sup>43</sup> *People v. Myles* (1975) 50 Cal.App.3d 423, 430.

<sup>44</sup> See *U.S. v. Hanlon* (8<sup>th</sup> Cir. 2005) 401 F.3d 926, 929 [“[W]hen officers encounter suspected car thieves, they also may reasonably suspect that such individuals might possess weapons.”]; *People v. Vermouth* (1971) 20 Cal.App.3d 746, 753 [because the detainees were suspected of car theft, it was reasonable “to ask the two men out of the car and make a superficial search for possible weapons”]; *People v. Todd* (1969) 2 Cal.App.3d 389, 393 [the circumstances “led the officers to believe there ‘was something wrong’ and the car was stolen”]. COMPARE *U.S. v. Flatter* (9<sup>th</sup> Cir. 2006) 456 F.3d 1154, 1158 [“Mail theft by postal employees is not a crime that is frequently associated with weapons”].

<sup>45</sup> See *People v. Hill* (1974) 12 Cal.3d 731, 746, fn.13 [“It is reasonable for an investigating officer to take precautionary measures with respect to all occupants of a fleeing automobile.”]. ALSO SEE *Haynie v. County of Los Angeles* (9<sup>th</sup> Cir. 2003) 339 F.3d 1071, 1076 [failure to yield plus other circumstances].

<sup>46</sup> See *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 206 [“[T]he ordinary motorist who transgresses against a traffic regulation does not thereby indicate a propensity for violence of



*U.S. v. Brown*, “Although the confrontation between a police officer and a citizen stopped for a traffic violation can be fraught with danger, this fact alone does not justify a pat-down.”<sup>47</sup>

### A bulge

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

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

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

**LOCATION OF THE BULGE:** A suspicious bulge is even more cause for alarm if it was located in a place where weapons are commonly concealed; e.g., at the waist, in a pants or jacket pocket.<sup>50</sup> For example, in upholding a pat search in *People v. Brown*, the court

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iniquity”]; *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 830 [pat search of traffic violator unwarranted when she “promptly pulled his car to the side of the road” and was “pretty straight and admitted he was going fast”]; *People v. Lawler* (1973) 9 Cal.3d 156, 161 [“[N]o authority to pat down flowed from a mere traffic violation”]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1084 [“Although Officer Weakley could remove Rice from the car as part of a routine traffic stop, he could not perform a pat-down search for weapons unless he reasonably suspected that Rice might be carrying one.”].

<sup>47</sup> (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 864.

<sup>48</sup> *U.S. v. Flatter* (9<sup>th</sup> Cir. 2006) 456 F.3d 1154, 1157. ALSO SEE *People v. Guillermo M.* (1982) 130 Cal.App.3d 642, 647 [bulges consistent with knives]; *U.S. v. Meredith* (5<sup>th</sup> Cir. 2007) 480 F.3d 366, 370 [observation of a “handgun-like bulge” provided grounds to pat search]; *People v. Ritter* (1997) 54 Cal.App.4<sup>th</sup> 274, 277 [bulge “appeared to be the outline of a small handgun”]; *People v. Snyder* (1992) 11 Cal.App.4<sup>th</sup> 389, 393 [“[T]he visible bulge created by the bulk of the liquor bottle announced to Officer Chase the potential of a weapon.”].

<sup>49</sup> (1987) 196 Cal.App.3d 612, 618.

<sup>50</sup> See *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 107, 112 [there was a “large bulge under [Mimms] sports jacket” which “permitted the officer to conclude that Mimms was armed”]; *People v. Snyder* (1992) 11 Cal.App.4<sup>th</sup> 389, 391 [“a large bulge in the front waistband”]; *People v. Methey* (1991) 227 Cal.App.3d 349, 358 [“He was wearing a bulky outer jacket with bulging pockets.”]; *People v. Allen* (1975) 50 Cal.App.3d 896, 899, 901 [“defendant’s pockets appeared to be bulging”]; *People v. Autry* (1991) 232 Cal.App.3d 365, 367 [“He was wearing a zippered jacket which bulged around and concealed his waist.”]; *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 [the bulge was “in the waistband in the middle of his waist”]; *People v. Armenta* (1968) 268 Cal.App.2d 248, 249-50 [“[The officer] noticed a bulge in the lower portion

noted that the officer's decision to pat search the defendant "was based on his observation of a bulge under [defendant's] jacket and his experience that weapons are commonly carried under clothing in that approximate location of the waistband."<sup>51</sup>

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

**MAKING A GRAB:** A bulge takes on even more significance if the suspect suddenly reached for it.<sup>53</sup>

### **Furtive gestures**

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

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

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

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

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beneath the belt of Mr. Armenta's trousers, on the inside of the trousers."]; *People v. Guillermo M.* (1982) 130 Cal.App.3d 642, 644 [bulge "in the front pockets of appellant's pants"].

<sup>51</sup> (1985) 169 Cal.App.3d 159, 165.

<sup>52</sup> (1980) 111 Cal.App.3d 948, 957. ALSO SEE *People v. Glenn R.* (1970) 7 Cal.App.3d 558, 561 ["He continually kept his right side averted from the officer and kept his right hand in his jacket pocket in such a manner as to lead any reasonable person to believe that he was attempting to conceal something from view."].

<sup>53</sup> See *People v. Rosales* (1989) 211 Cal.App.3d 325, 330 [the suspect "suddenly put his hand into the bulging pocket," an indication that he "was or could be, reaching for a weapon."].

<sup>54</sup> See *U.S. v. Edmonds* (D.C. Cir. 2001) 240 F.3d 55, 51 ["furtive gestures are significant only if they were undertaken in response to police presence"].

<sup>55</sup> See *People v. Frank V.* (1991) 233 Cal.App.3d 1232, 1240-1 [furtive gesture may justify a pat search]. COMPARE *People v. Dickey* (1994) 21 Cal.App.4th 952, 956, fn2 [ "Just how this activity [moving around in the driver's seat] is invested with 'guilty meaning' is not explained in the record.."].

<sup>56</sup> (1989) 216 Cal.App.3d 1237.

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

### Sudden movement

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

- “When defendant [a suspected street-level drug dealer] turned toward the patrol car and placed his hand inside his jacket, [the officer] believed that he was reaching for a weapon.”<sup>66</sup>
- “When defendant [a suspected heroin dealer] suddenly put his hand into the bulging pocket, [the officer] reasonably believed he was, or could be, reaching for a weapon.”<sup>67</sup>

<sup>57</sup> *People v. Clayton* (1970) 13 Cal.App.3d 335, 337 [“When he observed Clayton's unusual movements within the car it became reasonable for him to make a weapon search of his person; failure to take similar precautions has resulted in the death of many law enforcement officers.”].

<sup>58</sup> *U.S. v. Price* (D.C. Cir. 2005) 409 F.3d 436, 442.

<sup>59</sup> *U.S. v. Raymond* (4<sup>th</sup> Cir. 1998) 152 F.3d 309, 311.

<sup>60</sup> *U.S. v. Edmonds* (D.C. Cir. 2001) 240 F.3d 55, 61.

<sup>61</sup> *Haynie v. County of Los Angeles* (9<sup>th</sup> Cir. 2003) 339 F.3d 1071, 1076.

<sup>62</sup> *People v. Armenta* (1968) 268 Cal.App.2d 248, 249.

<sup>63</sup> *People v. John C.* (1978) 80 Cal.App.3d 814, 819.

<sup>64</sup> *U.S. v. Yamba* (3d Cir. 2007) \_\_ F.3d \_\_ [2007 WL 3054387].

<sup>65</sup> *U.S. v. Flatter* (9<sup>th</sup> Cir. 2006) 456 F.3d 1154, 1158.

<sup>66</sup> *People v. Lee* (1987) 194 Cal.App.3d 975, 983.

<sup>67</sup> *People v. Rosales* (1989) 211 Cal.App.3d 325, 330. COMPARE *People v. Valdez* (1987) 196 Cal.App.3d 799, 807 [“Torres’s act of turning away from the police is at best mildly suspicious.”]; *Ybarra v. Illinois* (1979) 444 U.S. 85, 93 [“[Ybarra] made no gestures or other actions indicative of an intent to commit an assault”].

- After the detainee produced an ID card from his rear pocket, the officer saw him “make a sudden gesture with his right hand to his left T-shirt pocket.”<sup>68</sup>
- The officer testified that “all three suspects alighted from the vehicle almost simultaneously. They all got out on us . . . ”<sup>69</sup>
- “Just after [the officer] started the search around defendant’s waistband, defendant abruptly grabbed for his outside upper jacket pocket.”<sup>70</sup>
- “Upon the officers’ approach, defendant lunged forward thrusting his right hand into one of the bag’s open pockets.”<sup>71</sup>
- “When the officer approached the defendant he reached into his right rear pocket and appeared to be trying to get something out, and it was a jerking motion as though he were trying desperately to get something out of his pocket.”<sup>72</sup>
- “Appellant was combative and reached towards the front of his pants several times.”<sup>73</sup>

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

### **Refusal to comply**

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

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

- After twice ignoring the officer’s command to raise his hands, the defendant “turned his back” and started to walk away.<sup>76</sup>

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<sup>68</sup> *People v. McLean* (1970) 6 Cal.App.3d 300, 306.

<sup>69</sup> *People v. Hubbard* (1970) 9 Cal.App.3d 827, 830. ALSO SEE *U.S. v. Mattarolo* (9<sup>th</sup> Cir. 1999) 191 F.3d 1082, 1087 [“[D]efendant got out of his car swiftly and walked quickly toward the squad car before the officer had the chance to get out of his car.”].

<sup>70</sup> *People v. Atmore* (1970) 13 Cal.App.3d 244, 246.

<sup>71</sup> *People v. Flores* (1979) 100 Cal.App.3d 221, 226.

<sup>72</sup> *People v. Superior Court (Holmes)* (1971) 15 Cal.App.3d 806, 808-9.

<sup>73</sup> *People v. Lopez* (2004) 119 Cal.App.4<sup>th</sup> 132, 134.

<sup>74</sup> (1980) 111 Cal.App.3d 948, 954-5.

<sup>75</sup> *Adams v. Williams* (1972) 407 U.S. 143, 148. Edited.

<sup>76</sup> *People v. Wigginton* (1973) 35 Cal.App.3d 732, 735. ALSO SEE *U.S. v. Rideau* (5<sup>th</sup> Cir. 1992) 969 F.2d 1572, 1575 [detainee’s act of backing away from the officer could, under the circumstances, be construed as an attempt to “gain[] room to use a weapon”]; *U.S. v. Bell* (6<sup>th</sup> Cir. 1985) 762 F.2d 495, 501 [“Bell’s failure to follow [the FBI agent’s] instructions would significantly and immediately heighten the level of concern upon the part of the officer.”].

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

### **Detainee’s mental state**

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

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

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

<sup>77</sup> *People v. John C.* (1978) 80 Cal.App.3d 814, 819.

<sup>78</sup> *People v. Glenn R.* (1970) 7 Cal.App.3d 558, 560.

<sup>79</sup> *Haynie v. County of Los Angeles* (2003) 339 F.3d 1071, 1076.

<sup>80</sup> *U.S. v. Bell* (6<sup>th</sup> Cir. 1985) 762 F.2d 495, 497. Edited.

<sup>81</sup> *People v. Frank V.* (1991) 233 Cal.App.3d 1232, 1241. ALSO SEE *U.S. v. Michelletti* (5<sup>th</sup> Cir. 1994) 13 F.3d 838, 842 [suspect’s right hand was “concealed precisely where a weapon could be located. That Officer Perry took special note of the location of Michelletti’s right hand is a fact whose importance cannot be overstated.”].

<sup>82</sup> *People v. Ritter* (1997) 54 Cal.App.3d 274, 277.

<sup>83</sup> (1983) 141 Cal.App.3d 814, 816-7. ALSO SEE *People v. Lopez* (2004) 119 Cal.App.4<sup>th</sup> 132, 135 [“Appellant was combative”]; *U.S. v. Brown* (7<sup>th</sup> Cir. 2000) 232 F.3d 589, 594 [“Brown was acting erratically and somewhat aggressively throughout the late afternoon to the early evening period and therefore posed some concern.”].

<sup>84</sup> (5<sup>th</sup> Cir. 1994) 13 F.3d 838, 842.

<sup>85</sup> (1969) 1 Cal.App.3d 150, 154.



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

**UNDER THE INFLUENCE:** A detainee who is under the influence of alcohol or drugs may be considered dangerous if his behavior was unpredictable, or if he was otherwise unable to control himself.<sup>88</sup>

### **Criminal history, gang affiliation**

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

It is also relevant that the detainee was a known gang member or affiliate.<sup>91</sup> For example, in *U.S. v. Flett* the court ruled that a pat search was warranted because, among other things, the officer knew that the detainee was a member of "a national motorcycle gang which had violent propensities, including charges of using firearms, assault and

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<sup>86</sup> See *People v. Lawler* (1973) 9 Cal.3d 156, 162 ["Many individuals who are accosted and queried by a police officer become [upset]."]; *People v. Brown* (1985) 169 Cal.App.3d 159, 164 ["He began turning pale and his hands began to shake."]; *U.S. v. Hanlon* (8<sup>th</sup> Cir. 2005) 401 F.3d 926, 929 ["extreme nervousness, profuse shaking, and refusal to look [the officer] in the eye"]; *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 865 ["Nervousness or refusal to make eye contact alone will not justify a [pat search], but such behavior may be considered"].

<sup>87</sup> (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 865.

<sup>88</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1050 [Long "appeared to be under the influence of some intoxicant"]; *People v. Avila* (1997) 58 Cal.App.4<sup>th</sup> 1069, 1074; *People v. Wigginton* (1973) 35 Cal.App.3d 732, 737 [some of the detainees were "under the influence of narcotics"]; *U.S. v. Salas* (9<sup>th</sup> Cir. 1989) 879 F.2d 530, 535 ["It was also reasonable for the officers to suspect that Salas might be dangerous if he had recently used cocaine."]; *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1100 [the detainees "had evidently been drinking"].

<sup>89</sup> See *People v. Methy* (1991) 227 Cal.App.3d 349, 352 ["[The officer] recognized Methy from numerous prior police contacts and arrests for drug-related crimes."]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1084 ["the computer check identified Rice as 'known to be armed and dangerous'"]; *People v. Allen* (1975) 50 Cal.App.3d 896, 899 ["[D]efendant admitted that he had been released from prison just three weeks earlier."]; *People v. Autry* (1991) 232 Cal.App.3d 365, 367 ["Autry told the officer he had recently done time for robbery."]; *U.S. v. Jackson* (7<sup>th</sup> Cir. 2002) 300 F.3d 740, 746 [the officer recognized defendant "from the two previous arrests in which he recovered drugs and a firearm from Jackson"]. COMPARE *Ybarra v. Illinois* (1979) 444 U.S. 85, 83 [the officers did not recognize the suspect "as a person with a criminal history"].

<sup>90</sup> (2001) 88 Cal.App.4<sup>th</sup> 1048, 1050.

<sup>91</sup> See *People v. King* (1989) 216 Cal.App.3d 1237, 1241 ["[D]etention of a known gang member would increase the likelihood of harm to an officer and further justify a search for weapons."]; *People v. Guillermo M.* (1982) 130 Cal.App.3d 642, 644 ["The agent knew that appellant had been in trouble before and associated with a gang."]; *People v. William V.* (2003) 111 Cal.App.4<sup>th</sup> 1464, 1472; *U.S. v. Osbourne* (1<sup>st</sup> Cir. 2003) 326 F.3d 274, 278 [defendant "was a member of a violent street gang"]. **NOTE:** The court in *People v. King* (1989) 216 Cal.App.3d 1237, 1241 noted it is not necessary for officers or prosecutors to prove the suspect was, *in fact*, a member of a gang.

resisting arrest.”<sup>92</sup> Similarly, in *U.S. v. Garcia* one of the reasons the court upheld the pat search of the defendant was that he was a known gang member, and the officer had testified that, “based on his training and experience he knew that guns are often part of the gang environment.” The court added, “In our society today this observation resonates with common sense and ordinary human experience.”<sup>93</sup>

### **Presence during execution of drug warrant**

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

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

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

<sup>92</sup> (8<sup>th</sup> Cir. 1986) 806 F.2d 823, 827.

<sup>93</sup> (10<sup>th</sup> Cir. 2006) 459 F.3d 1059, 1066.

<sup>94</sup> See *Michigan v. Summers* (1981) 452 U.S. 692, 702 [“[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence”]; *People v. Valdez* (1987) 196 Cal.App.3d 799; *People v. Roach* (1971) 15 Cal.App.3d 628, 632 [“Defendant’s self-induced presence at an apartment where dangerous drugs were sold provided rational support for [the officer’s belief that the occupants were dangerous].”]; *U.S. v. Fountain* (9<sup>th</sup> Cir. 1993) 2 F.3d 656 [officers may detain residents and people who are on the premises when officers arrive]; *U.S. v. Stowe* (7<sup>th</sup> Cir. 1996) 100 F.3d 494, 499 [“Guns and drugs together distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers—an important narrowing factor.”]. ALSO SEE *People v. Samples* (1996) 48 Cal.App.4<sup>th</sup> 1197 [detainee was driving a car which officers had stopped to search a passenger for drugs pursuant to a search warrant].

<sup>95</sup> (1989) 209 Cal.App.3d 817.

<sup>96</sup> See *People v. Glaser* (1995) 11 Cal.4<sup>th</sup> 354, 365 [detainee “appeared to be more than a stranger or casual visitor”]; *People v. Huerta* (1990) 218 Cal.App.3d 744, 750 [“It was reasonable to believe a person entering a residence of illicit drug activity might be armed.”]; *U.S. v. Bohannon* (6<sup>th</sup> Cir. 2000) 225 F.3d 615, 616 [officers may detain people who arrive at the scene after officers arrived]; *Burchett v. Kiefer* (6<sup>th</sup> Cir. 2002) 310 F.3d 937, 943-4 [officers may detain a person “who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down.”]; *People v. Roach* (1971) 15 Cal.App.3d 628, 632..

**Nature of location**

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

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

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<sup>97</sup> See *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.2 [“in high crime areas . . . the possibility that any given individual is armed is significant”]; *Illinois v. Wardlow* (2000) 528 U.S. 119, 124 [“But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.”]; *Adams v. Williams* (1972) 407 U.S. 143, 147 [“a high-crime area”]; *People v. Limon* (1993) 17 Cal.App.4<sup>th</sup> 524, 534 [“The connection between weapons and an area can provide further justification for a pat-search.”]; *People v. Frank V.* (1991) 233 Cal.App.3d 1232, 1241; *People v. King* (1989) 216 Cal.App.3d 1237, 1241 [“[T]he fact that an area involves increased gang activity may be considered if it is relevant to an officer’s belief the detainee is armed and dangerous. While this factor alone may not justify a weapon search, combined with additional factors it may.”]; *People v. Hill* (1974) 12 Cal.3d 731, 746, fn.13 [“high incidence of crime” was “another factor” which supported the pat search]; *People v. Stephen L.* (1994) 162 Cal.App.3d 257, 260 [“Failure to cursorily search suspects for weapons in a confrontation situation in an area where gang activity usage is known from the officers’ past experience would be most careless.”]; *People v. Barnes* (1983) 141 Cal.App.3d 854, 856; *People v. Allen* (1975) 50 Cal.App.3d 896, 901; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1084 [“a high crime area”]; *U.S. v. Rideau* (5<sup>th</sup> Cir. 1992) 969 F.2d 1572, 1575 [“But when someone engages in suspicious activity in a high crime area, where weapons and violence abound, police officers must be particularly cautious in approaching and questioning him.”]; *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 865 [“the exchange took place in a high crime area where there had been drug activity, shootings, and gang violence.”].

<sup>98</sup> See *Maryland v. Buie* (1990) 494 U.S. 325, 334, fn.2 [“Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.”]; *People v. Marcellus L.* (1991) 229 Cal.App.3d 134, 138, fn.2; *People v. Medina* (2003) 110 Cal.App.4<sup>th</sup> 171, 178 [pat search unlawful because it “was based solely on his presence in a high crime area late at night”].

<sup>99</sup> *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 865.

<sup>100</sup> (1989) 216 Cal.App.3d 1237, 1241.

<sup>101</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1050 [“The hour was late and the area rural.”]; *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433 [“late at night in a rural area”]; *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 [the area “was all but deserted of traffic with only a few cars passing through the intersection”]; *People v. Allen* (1975) 50 Cal.App.3d 896, 901 [officer “was alone at 2:30 in the morning”]; *U.S. v. Mattarolo* (9<sup>th</sup> Cir. 2000) 209 F.3d 1153, 1158 [the detention occurred “on a remote section of road at midnight”]; *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1100 [“[Officer] was alone, at night, in a poorly lit area, facing three men who had evidently been drinking.”]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1084 [“there were no other cars or people around”].

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

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

### Tips from citizens, informants

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

<sup>102</sup> See *People v. Stone* (1981) 117 Cal.App.3d 15, 19 ["a poorly lit alley"]; *People v. Suennen* (1980) 114 Cal.App.3d 192, 199 ["it was dark"]; *U.S. v. Salas* (9<sup>th</sup> Cir. 1989) 879 F.2d 530, 535 [it was "10:30 p.m., when a hand movement to a weapon may be masked by the night's shadows"]; *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1100 [the officer "was alone, at night, in a poorly lit area"]; *Michigan v. Long* (1983) 463 U.S. 1032, 1050 ["It was 3:30 in the morning and fairly dark"]. COMPARE *Ybarra v. Illinois* (1979) 444 U.S. 85, 93 ["the lighting was sufficient for [the officers] to observe the customers."]; *People v. Samples* (1996) 48 Cal.App.4<sup>th</sup> 1197, 1210-1.

<sup>103</sup> (1978) 81 Cal.App.3d 347, 354.

<sup>104</sup> See *People v. Superior Court (Brown)* (1980) 111 Cal.App.3d 948, 956 ["It was dark, and any preparatory movements of defendant for possible violence most likely would go unnoticed because of the officers' preoccupation with writing citations for defendant and his companion."]; *People v. Barnes* (1983) 141 Cal.App.3d 854, 856; *People v. Satchell* (1978) 81 Cal.App.3d 347, 354; *People v. Suennen* (1980) 114 Cal.App.3d 192, 199 ["Moreover, it was dark, and two officers did not outnumber the suspects so as to negate any threat or danger."]; *People v. Hubbard* (1970) 9 Cal.App.3d 827, 830; *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1100.

<sup>105</sup> See *Adams v. Williams* (1972) 407 U.S. 143, 147 ["a high-crime area at 2:15 in the morning"]; *People v. Frank V.* (1991) 233 Cal.App.3d 1232, 1241; *People v. Barnes* (1983) 141 Cal.App.3d 854, 856 [detention occurred in "early morning hours" but at a "well-lighted gas station"]. COMPARE: *People v. Hana* (1970) 7 Cal.App.3d 664, 669 [pat search not justified because, among other things, it was broad daylight].

<sup>106</sup> See *People v. Medina* (2003) 110 Cal.App.4<sup>th</sup> 171, 177 [nighttime, in and of itself, has, at most, "minimal importance"].

<sup>107</sup> (1972) 407 U.S. 143. ALSO SEE *People v. Richard C.* (1979) 89 Cal.App.3d 477, 488 ["[T]he officer was advised by a private citizen that the minor had exhibited and attempted to load a pistol in the citizen's driveway."]; *U.S. v. Poms* (4<sup>th</sup> Cir. 1973) 484 F.2d 919, 921 ["Here, the officers had received information from a reliable informant that Poms *always* carried a weapon in his shoulder bag."].

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

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

### Other circumstances

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

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

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<sup>108</sup> (2000) 529 U.S. 266. COMPARE *People v. Superior Court (Saari)* (1969) 2 Cal.App.3d 197, 201 [officers "verified the accuracy of this report in several particulars"].

<sup>109</sup> See *U.S. v. Berryhill* (9<sup>th</sup> Cir. 1971) 445 F.2d 1189, 1193 ["All companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory pat-down reasonably necessary to give assurance that they are unarmed."].

<sup>110</sup> See *Ybarra v. Illinois* (1979) 444 U.S. 85, 93-4 ["[Terry] does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked"]; *U.S. v. Bell* (6<sup>th</sup> Cir. 1985) 762 F.2d 495, 498 ["We decline to adopt an 'automatic companion' rule, as we have serious reservations about the constitutionality of such a result under existing precedent."]; *U.S. v. Flett* (8<sup>th</sup> Cir. 1986) 806 F.2d 823, 829, fn.9 [[T]his court in no way condones the policy of the sheriff's office which provides that all males present at arrests such as these are to be subjected to cursory pat-down search."]. ALSO SEE *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1101 ["We need not go so far as the Ninth Circuit's rule of general justification conferring categorical reasonableness upon searches of all companions of the arrestee"]. **NOTE:** California courts have not yet ruled on the validity of the automatic companion rule. See *People v. Samples* (1996) 48 Cal.App.4<sup>th</sup> 1197, 1212 ["We need not decide whether such an 'automatic companion' rule is appropriate under Terry"].

<sup>111</sup> See *People v. Wright* (1988) 206 Cal.App.3d 1107, 1112 ["[D]efendant's companion, Reed, had a history of carrying concealed weapons."]; *U.S. v. Bell* (6<sup>th</sup> Cir. 1985) 762 F.2d 495, 498, 499, fn.4 ["We do not read *Ybarra* as holding that 'mere propinquity' cannot be considered as a factor in determining the legitimacy of a frisk; rather, the case held that proximity cannot be the sole legitimizing factor."]; *U.S. v. Barlin* (2<sup>nd</sup> Cir. 1982) 686 F.2d 81, 87 ["Fantauzzi was not innocuously present in a crowd at a public place. Instead, she entered in tandem with Frank and Gleckler, whose involvement in an ongoing narcotics transaction seemed apparent."]; *U.S. v. Rice*



**POSSESSION OF OTHER WEAPON:** If officers seize a gun, knife, or other conventional weapon from the detainee—even a legal weapon<sup>112</sup>—they may pat search him to determine if he has any more.<sup>113</sup>

The question arises whether such a search would be justified if the detainee possessed a virtual weapon; i.e., an object that could conceivably be used as a weapon, such as a baseball bat or a hammer. Although this issue has not been resolved,<sup>114</sup> it seems likely that a pat search would be upheld if, based on the nature of the object, its location or other circumstances, there was reason to believe it was being used as a weapon; e.g., baseball bat located between bucket seats. In one case, the court upheld a search based mainly on an officer’s observation of a “long black metal object” similar to a Mag flashlight in the detainee’s truck, and the object was “within eight or ten inches of [his] left hand.”<sup>115</sup>

**DETAINEE’S SIZE:** Although a pat search would not be justified merely because the detainee was “big,” his size would be a relevant circumstance if he was bigger than the officer.<sup>116</sup>

**OFFICERS’ OUTNUMBERED:** The courts often note whether the number of detainees was greater than the number of officers on the scene, the relevance being the increased danger to officers who are outnumbered.<sup>117</sup>

(10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1085 [“A reasonable officer can infer from the behavior of one of a car’s passengers a concern that reflects on the actions and motivations of the other passengers.”].

<sup>112</sup> See *Adams v. Williams* (1972) 407 U.S. 143, 146 [“[T]he frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law.”]; *Michigan v. Long* (1983) 463 U.S. 1032, 1052, fn.16 [“[W]e have expressly rejected the view that the validity of a *Terry* search depends on whether the weapon is possessed in accordance with state law.”]; *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433.

<sup>113</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1050 [officer saw “a large knife in the interior of the car”]; *People v. Brown* (1989) 213 Cal.App.3d 187, 191 [“Because defendant was carrying two weapons, it was prudent to suspect defendant might be carrying other weapons as well.”]; *People v. Britton* (1968) 264 Cal.App.2d 711, 715 [“When the officer saw the barrel of the .22 rifle protruding from under the front seat, they were indeed justified in making a frisk”]; *People v. Castaneda* (1995) 35 Cal.App.4<sup>th</sup> 1222, 1230 [“And once the magazine was found, the fear of further weapons and ammunition was increased”]; *People v. Methy* (1991) 227 Cal.App.3d 349, 358 [detainee was carrying a “pry bar or billy club”]; *U.S. v. Hartz* (9<sup>th</sup> Cir. 2006) 458 F.3d 1011, 1018 [the officer “had already observed a knife, a gun, and ammunition in the truck”].

<sup>114</sup> See *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433, fn.5 [“Just how far this rule extends is unclear. As Justice Brennan pointed out, a baseball bat or hammer can be a lethal weapon; does this mean a policeman could reasonably suspect a person is dangerous because these items are observed in his or her car?”].

<sup>115</sup> *People v. Avila* (1997) 58 Cal.App.4<sup>th</sup> 1069, 1073. ALSO SEE *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433 [knife “resting on the open glove box door, with the handle extended over the edge toward the driver’s seat”].

<sup>116</sup> See *People v. Michael S.* (1983) 141 Cal.App.3d 814, 817 [“The officers were here faced with a suspect who was nearly six feet tall and weighed approximately 190 pounds.”]; *People v. Methy* (1991) 227 Cal.App.3d 349, 352 [“He was larger than [the officer]”]; *U.S. v. Michelletti* (5<sup>th</sup> Cir. 1994) 13 F.3d 838, 842 [“Michelletti, a large and imposing man”].

<sup>117</sup> See *People v. Limon* (1993) 17 Cal.App.4<sup>th</sup> 524, 531 [“[The officers] were outnumbered not only by the three suspects but also by the other people in the immediate area” which was “known for gang activity, violence, and drugs.”]; *People v. Stephen L.* (1984) 162 Cal.App.3d 257; *People v. Samples* (1996) 48 Cal.App.4<sup>th</sup> 1197, 1210; *People v. Suennen* (1980) 114 Cal.App.3d 192, 199

**HAND IN POCKET:** It is relevant that the detainee was keeping a hand inside a pocket, even though he did not do so suddenly or furtively.<sup>118</sup>

**ASSUMING THE POSITION:** A detainee's act of spontaneously "assuming the position" for a pat search is a suspicious circumstance.<sup>119</sup>

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

### **SEARCH PROCEDURE**

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

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["two officers did not outnumber the suspects"]; *People v. Remiro* (1979) 89 Cal.App.3d 809, 829; *People v. Smith* (1973) 30 Cal.App.3d 277, 280 ["there were four adult males . . . and only two police officers"]; *People v. Wigginton* (1973) 35 Cal.App.3d 732, 737 [the officer was "guarding five male adults"]; *People v. Hubbard* (1970) 9 Cal.App.3d 827, 830; *People v. Satchell* (1978) 81 Cal.App.3d 347, 354 ["One of the officers would soon be preoccupied with paperwork, which left only one officer to guard against possible violence from three separate sources."]; *People v. Allen* (1975) 50 Cal.App.3d 896, 901 ["he was alone"]; *People v. Barnes* (1983) 141 Cal.App.3d 854, 856; *U.S. v. Tharpe* (5<sup>th</sup> Cir. 1976) 536 F.2d 1098, 1100 ["[The officer] was alone, at night, in a poorly lit area, facing three men who had evidently been drinking."].

<sup>118</sup> See *People v. Woods* (1970) 6 Cal.App.3d 832, 837 [suspect in a "shots fired" call had "one of his hands in a jacket pocket"]; *People v. Wigginton* (1973) 35 Cal.App.3d 732, 737-8 [detainee's "right hand remain[ed] near the right hand pocket of his jacket"]; *People v. Glenn R.* (1970) 7 Cal.App.3d 558, 561 [detainee "kept his right hand in his jacket pocket in such a manner as to lead any reasonable person to believe that he was attempting to conceal something from view"]; *U.S. v. Michelletti* (5<sup>th</sup> Cir. 1994) 13 F.3d 838, 842 [the detainee kept "his right hand concealed precisely where a weapon could be located"].

<sup>119</sup> See *People v. Avila* (1997) 58 Cal.App.4<sup>th</sup> 1069, 1074 [[D]efendant immediately assumed a standard search position.]; *U.S. v. Rice* (10<sup>th</sup> Cir. 2007) 483 F.3d 1079, 1085 ["Rice immediately assumed the position for a weapons search upon exiting the car."].

<sup>120</sup> See *People v. Tobin* (1990) 219 Cal.App.3d 634, 641 ["The appellate courts of this state have long recognized that the need to transport a person in a police vehicle in itself is an exigency which justifies a pat search for weapons."]; *People v. Ramos* (1972) 26 Cal.App.3d 108, 112 ["[P]olicemen have been attacked and killed by back seat passengers with concealed guns and knives."]; *U.S. v. Madrid* (10<sup>th</sup> Cir. 1994) 30 F.3d 1269, 1277.

<sup>121</sup> See *People v. Scott* (1976) 16 Cal.3d 242.

<sup>122</sup> *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 866. ALSO SEE *Terry v. Ohio* (1968) 392 U.S.1 28 ["The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all."]; *U.S. v. Hanlon* (8<sup>th</sup> Cir. 2005) 401 F.3d 926, 930 ["Because safety is the sole justification for a pat-down search for weapons, only searches reasonably designed to discover concealed weapons are permissible."]; *People v. Garcia* (1969)

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

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

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

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

### **Step 1: “Any needles?”**

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

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

### **Step 2: Patdown**

The United States Supreme Court has explained that the search begins with a “careful exploration” of the outside surfaces of the detainee’s clothing, “all over his or her

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274 Cal.App.2d 100, 106-7 [“[T]he manner of conducting an otherwise justified precautionary search is of vital importance.”]; *Byrd v. Superior Court* (1968) 268 Cal.App.2d 495, 496 [“The manner of the search for weapons, however, is important.”].

<sup>123</sup> *Terry v. Ohio* (1968) 392 U.S.1 29.

<sup>124</sup> See *People v. Atmore* (1970) 13 Cal.App.3d 244, 248.

<sup>125</sup> See *New York v. Quarles* (1984) 467 US 649, 658-9; *People v. Simpson* (1998) 65 Cal.App.4th 854, 861, fn.3 [“It is settled that the public safety exception applies even when police questioning is designed solely to protect the lives of police officers and the lives of other are not at stake.”]; *U.S. v. Carrillo* (9th Cir. 1994) 16 F.3d 1046, 1049; *People v. Cressy* (1996) 47 Cal.App.4th 981, 986-8. ALSO SEE *Johnetta J. v. Municipal Court* (1990) 218 Cal.App.3d 1255, 1278 [“[T]he governmental interests behind [the mandatory AIDS testing procedure] including the assaulted officer’s fear that he or she has in fact been infected, outweighs the psychological impact of the assailant’s receipt of a positive test for HIV.”]; *Love v. Superior Court* (1990) 226 Cal.App.3d 736, 746.

<sup>126</sup> **NOTE:** If the syringe was not in a container that met federal and state standards, the detainee would be arrestable for possession of drug paraphernalia, in which case officers could dispense with the pat search procedure and conduct a full search incident to the arrest. See Health & Safety Code § 11364(b).

body.”<sup>127</sup> The Court added, “A thorough search must be made of the [detainee’s] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.”<sup>128</sup>

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

Recognizing that the purpose of the pat-down is to dispel the suspicion that a person is armed, it seems to us that something more is contemplated than a gingerly patting of the clothing. [I]n order to rule out the presence of a weapon the officer may have to determine an object’s weight and consistency. We fail to see how this can be accomplished without using some sort of gripping motion.<sup>129</sup>

Officers may also manipulate any container in the detainee’s possession if it is, (1) large enough to hold a weapon, and (2) sufficiently pliable to permit officers to feel some or all of its contents; e.g., a purse or backpack.<sup>130</sup> If, however, the container is not pliable, it appears that officers may not open it to determine its contents unless there was reason to believe it contained a weapon. This occurred in *People v. Hill* in which the court noted, “The box was much heavier than an ordinary matchbox and the rattling sounds indicated that it contained metallic objects other than matches.”<sup>131</sup> Note that a container may be pat searched even if the detainee had been separated from it after he was detained; e.g. officers had taken possession of it, or the detainee had put it on the ground.<sup>132</sup>

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<sup>127</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 16.

<sup>128</sup> *Terry v. Ohio* (1968) 392 U.S. 1, 17, fn.13. ALSO SEE *People v. Avila* (1997) 58 Cal.App.4<sup>th</sup> 1069, 1075, fn.4 [“It is not unreasonable to pat the legs when searching for a concealed weapon.”].

<sup>129</sup> (1987) 194 Cal.App.3d 975, 985. ALSO SEE *U.S. v. Yamba* (3d Cir. 2007) \_\_ F.3d \_\_ [2007 WL 3054387] [“[The officer] is allowed to slide or manipulate an object in a suspect’s pocket, consistent with a routine frisk, until the officer is able reasonably to eliminate the possibility that the object is a weapon.”]. **NOTE:** The need to manipulate an object is especially strong if the detainee’s clothes were so rigid that it was difficult to determine the nature of the object by feeling the outside of the clothes. See *People v. Watson* (1970) 12 Cal.App.3d 130, 135 [“The leather-type material of the jacket would make it difficult to feel the outline of the object”]; *People v. Allen* (1975) 50 Cal.App.3d 896, 902 [“[T]he heavy levis worn by the defendant made it difficult for the officer to feel the outline of the hard object and prevented him from immediately determining what it actually was.”].

<sup>130</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1050; *People v. Ritter* (1997) 54 Cal.App.4<sup>th</sup> 274, 280 [fanny pack]; *U.S. v. Vaughan* (9<sup>th</sup> Cir. 1983) 718 F.2d 332, 335 [“The briefcase was soft and thin. Any weapons could have been felt through the cover.”]; *U.S. v. Barlin* (2<sup>nd</sup> Cir. 1982) 686 F.2d 81, 87 [“a lady’s handbag is the most likely place for a woman to conceal a weapon.”].

<sup>131</sup> (1974) 12 Cal.3d 731, 747. COMPARE *Amacher v. Superior Court* (1969) 1 Cal.App.3d 150, 154 [insufficient reason to open a cigarette package]; *People v. John C.* (1978) 80 Cal.App.3d 814, 820 [insufficient reason to open a cigarette package].

<sup>132</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1048 [“[S]uspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed.”]; *People v. Ritter* (1997) 54 Cal.App.4<sup>th</sup> 274, 280 [“the deputy’s prudence should not be faulted for a failure to pat down the fanny pack while defendant was wearing it.”].

**“EMPTY YOUR POCKETS”:** In the absence of an emergency, officers may not bypass the patdown procedure by, for example, reaching inside the detainee’s clothing or pockets, by lifting up his clothing, or ordering him to empty his pockets.<sup>133</sup>

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

### Step 3: Reaching inside

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

<sup>133</sup> See *People v. Lennies H.* (2005) 126 Cal.App.4<sup>th</sup> 1232, 1237 [“As a general rule, an officer may not search a suspect’s pockets during a patdown unless he or she encounters an object there that feels like a weapon.”]; *People v. Mosher* (1969) 1 Cal.3d 379, 394 [“Unless the officer feels an object which a prudent man could believe was an object usable as an instrument of assault, the officer may not remove the object from the inside of the suspect’s clothing, require the suspect to take the object out of his pocket, or demand that the suspect empty his pockets.”]; *People v. Britton* (1968) 264 Cal.App.2d 711, 717 [“By requiring defendant to empty his pockets . . . the search exceeded the bounds of a permissible ‘frisk.’”]; *People v. Aviles* (1971) 21 Cal.App.3d 230, 234 [“[The officer] flipped open appellant’s coat: ‘I didn’t know what I was going to find. I knew he put something in there but I didn’t know what.’ The search clearly was exploratory, and not justified under the law.”]; *Byrd v. Superior Court* (1968) 268 Cal.App.2d 495, 496 [“[The officer] grabbed petitioner’s sweater and pulled it up.”]. **NOTE:** The courts are aware that patdowns are “not an infallible method of locating concealed weapons,” but they are sufficiently trustworthy to justify the intrusion. *People v. Carlos M.* (1990) 220 Cal.App.3d 372, 385; *Minnesota v. Dickerson* (1993) 508 U.S. 366, 376.

<sup>134</sup> See *Minnesota v. Dickerson* (1993) 508 U.S. 366 [“[T]he officer’s continued exploration of respondent’s pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search, the protection of the police officer and others nearby.”]; *People v. Valdez* (1987) 196 Cal.App.3d 799, 804; *People v. John C.* (1978) 80 Cal.App.3d 814, 820; *People v. Dickey* (1994) 21 Cal.App.4<sup>th</sup> 952.

<sup>135</sup> See *People v. Avila* (1997) 58 Cal.App.4<sup>th</sup> 1069, 1075 [“Officer Jones felt a bulky and somewhat hard object, and did not know if it was a weapon or not. He then asked defendant what the object was, *without* removing it. Defendant told the officer that it was ‘meth’”]. COMPARE *People v. Valdez* (1987) 196 Cal.App.3d 799, 807 [“The question [‘What is this?'] was not justified by the pat-search for weapons since [the officer] knew it was not a weapon.”]. ALSO SEE *Terry v. Ohio* (1968) 392 U.S. 1, 33 (conc. opn. by Harlan, J.) [“There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.”].

<sup>136</sup> See *People v. Limon* (1993) 17 Cal.App.4<sup>th</sup> 524, 536 [“The police are not required to grab blindly after a frisk reveals a possible weapon.”].

<sup>137</sup> See *People v. Watson* (1970) 12 Cal.App.3d 130, 135 [“Where it is found that an object feels reasonably like a knife, gun or club to the searcher, he may properly withdraw the item from the clothing of the suspect.”]; *People v. Collins* (1970) 1 Cal.3d 658, 662 [officers may remove an object only if “he discovers specific and articulable facts reasonably supporting his suspicion.”].



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

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

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

**CONVENTIONAL WEAPONS:** If the object felt like a conventional weapon, such as a gun or knife, officers may of course remove it.<sup>142</sup> The following are examples:

- “a hard, rectangular object,” maybe a knife, “either folded or in a case” (hide-a-key box containing heroin)<sup>143</sup>
- “a hard object which [the officer] thought was a knife” (gun clip with live rounds)<sup>144</sup>

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<sup>138</sup> See *Michigan v. Long* (1983) 463 U.S. 1032, 1052 [“[W]e have not required that officers adopt alternate means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter.”]; *People v. Lafitte* (1989) 211 Cal.App.3d 1429, 1433; *People v. Ritter* (1997) 54 Cal.App.4th 274, 280.

<sup>139</sup> See *People v. Thurman* (1989) 209 Cal.App.3d 817, 826 [officers may expand the search if “an outside clothing search reveals the presence of an object of a size and density that reasonably suggests the object might be a weapon”]; *People v. Rosales* (1989) 211 Cal.App.3d 325, 329 [“A police officer is entitled to reach inside the suspect’s clothing and remove objects therefrom only if the officer has reason to believe the object is usable as a weapon.”].

<sup>140</sup> *People v. Mosher* (1969) 1 Cal.3d 379, 393. ALSO SEE *People v. Thurman* (1989) 209 Cal.App.3d 817, 826 [“We can impose a condition that an officer’s belief that the object is a weapon be reasonably grounded and not a mere subterfuge for a random search.”].

<sup>141</sup> See *People v. Willie L.* (1976) 56 Cal.App.3d 256, 262 [“The only logical reason a person would place items in boots is for concealment; it is not unusual for weapons to be concealed there.”].

<sup>142</sup> See *People v. Watson* (1970) 12 Cal.App.3d 130, 135 [“Where it is found that an object feels reasonably like a knife, gun or club to the searcher, he may properly withdraw the item from the clothing of the suspect.”].

<sup>143</sup> *People v. Limon* (1993) 17 Cal.App.4th 524, 535-6. ALSO SEE *U.S. v. Hanlon* (8th Cir. 2005) 401 F.3d 926, 930 [“small object” that “could have been a pocketknife”]; *People v. Wright* (1988) 206 Cal.App.3d 1107, 1111 [“[It] felt like it was a knife.” Ten baggies of methamphetamines]; *People v. Hana* (1970) 7 Cal.App.3d 664, 670 [“[It] “felt like a pocket knife.” Harmonica].

- “[s]ome type of heavy object, possibly a gun” (loaded revolver)<sup>145</sup>
- “a sharp object like a knife blade” (watch and bracelet)<sup>146</sup>
- “a hard object,” maybe a knife (straight-edge razor)<sup>147</sup>
- “a long hard object which could have been a knife” (long stem pipe)<sup>148</sup>
- “a bulge and a lump near the right jacket pocket,” maybe “the butt of a hand gun” (baggie containing 14 grams of rock cocaine)<sup>149</sup>
- “a cylindrical object several inches long in the defendant’s pocket . . . large enough that it could have been a knife” (drugs)<sup>150</sup>

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

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

<sup>144</sup> *People v. Orozco* (1981) 114 Cal.App.3d 435, 445.

<sup>145</sup> See *People v. Miles* (1987) 196 Cal.App.3d 612, 618. ALSO SEE *U.S. v. Brown* (7<sup>th</sup> Cir. 1999) 188 F.3d 860, 866 [“Even if [the officer] would have been more reasonable to think the hard object was drugs rather than a gun, that does not mean he would have been unreasonable to conclude that it was a gun.”].

<sup>146</sup> *People v. Mosher* (1969) 1 Cal.3d 379, 393.

<sup>147</sup> *People v. Donald L.* (1978) 81 Cal.App.3d 770, 774.

<sup>148</sup> *People v. Watson* (1970) 12 Cal.App.3d 130, 135.

<sup>149</sup> *U.S. v. Salas* (9<sup>th</sup> Cir. 1989) 879 F.2d 530, 533.

<sup>150</sup> *U.S. v. Mattarolo* (9<sup>th</sup> Cir. 1999) 191 F.3d 1082, 1088.

<sup>151</sup> See *People v. Snyder* (1992) 11 Cal.App.4<sup>th</sup> 389, 393 [“A full liquor bottle carries significant weight and the neck of the bottle may serve as a handle, two characteristics of a club.”]; *People v. Autry* (1991) 232 Cal.App.3d 365, 369 [“It hardly takes the imagination of Alfred Hitchcock to think up any number of nasty ways a hypodermic needle and syringe can do grievous injury, at least in close combat.”]; *People v. Franklin* (1985) 171 Cal.App.3d 627, 636 [“There is case authority to the effect that a shotgun shell could be used as a detonator. As a consequence, the shotgun shell may qualify as a [weapon].”]; *People v. Atmore* (1970) 13 Cal.App.3d 244, 247 [shotgun shell]; *People v. Anthony* (1970) 7 Cal.App.3d 751, 763 [bullets].

<sup>152</sup> See *People v. Collins* (1970) 1 Cal.3d 658, 663; *People v. Brisendine* (1975) 13 Cal.3d 528, 543-4; *People v. Mack* (1977) 66 Cal.App.3d 839, 849.

<sup>153</sup> *People v. Collins* (1970) 1 Cal.3d 658, 663. ALSO SEE *People v. Brisendine* (1975) 13 Cal.3d 528, 543 [“Nor can the People’s burden be discharged by the assertion that the bottle and envelopes might possibly contain unusual or atypical weapons.”].

<sup>154</sup> (1976) 16 Cal.3d 868, 876.

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

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

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

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

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<sup>155</sup> See *People v. Limon* (1993) 17 Cal.App.4<sup>th</sup> 524, 535 [“When a police officer’s frisk of a detainee reveals a hard object that might be a weapon, the officer is justified in removing the object into view.”]; *People v. Allen* (1975) 50 Cal.App.3d 896, 902 [“Any hard object which feels like a weapon may be removed from pockets of clothing.”]; *People v. Mack* (1977) 66 Cal.App.3d 839, 849; *People v. Brown* (1989) 213 Cal.App.3d 187, 192 [“they were hard objects which he was justified in removing”]. COMPARE *U.S. v. Holmes* (D.C. Cir. 2007) \_\_ F.3d \_\_ [2007 WL 3071629] [But there is no claim here that the keys constituted contraband, and the officer had no right to take them from Holmes’s pocket during the patdown.”].

<sup>156</sup> *People v. Allen* (1975) 50 Cal.App.3d 896, 902. ALSO SEE *People v. Brown* (1989) 213 Cal.App.3d 187, 192 [“hard object”]; *Amacher v. Superior Court* (1969) 1 Cal.App.3d 150, 152 [“a hard object in a front jacket pocket [cigarette package].

<sup>157</sup> *People v. Mack* (1977) 66 Cal.App.3d 839, 851.

<sup>158</sup> *People v. Roach* (1971) 15 Cal.App.3d 628, 633.

<sup>159</sup> *People v. Lacey* (1973) 30 Cal.App.3d 170, 176.

<sup>160</sup> *People v. Willie L.* (1976) 56 Cal.App.3d 256, 262.

<sup>161</sup> *People v. Hill* (1974) 12 Cal.3d 731, 747.

<sup>162</sup> See *People v. Collins* (1970) 1 Cal.3d 658, 663 [“[A]n officer who exceeds a pat-down without first discovering an object which feels reasonably like a knife, gun, or club must be able to point to specific and articulable facts which reasonably support a suspicion that the particular suspect is armed with an atypical weapon which would feel like the object felt during the pat-down.”].

<sup>163</sup> *People v. Collins* (1970) 1 Cal.3d 658, 662. ALSO SEE *People v. Dickey* (1994) 21 Cal.App.4<sup>th</sup> 952, 957.

<sup>164</sup> *People v. Hana* (1970) 7 Cal.App.3d 664.

<sup>165</sup> *People v. Britton* (1968) 264 Cal.App.2d 711.

<sup>166</sup> *People v. Leib* (1976) 16 Cal.3d 869.

<sup>167</sup> *Kaplan v. Superior Court* (1971) 6 Cal.3d 150.

**DRUGS:** Under the “plain feel” rule, officers may remove an object that does not feel like a weapon if, (1) they have probable cause to believe it is an illegal drug or other contraband, and (2) probable cause existed at or before the time they determined it was not a weapon.<sup>168</sup> The theory here is that, because probable cause gives officers a right to arrest the suspect, their seizure of the object is permitted as a search incident to arrest.<sup>169</sup> For example, in *People v. Thurman* the court upheld the removal of drugs because, “simultaneous with the [officer’s] verification that the object was not a weapon” the officer realized that “the objects were pieces of rock cocaine contained in a baggie.”<sup>170</sup>

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

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

Another application of the “plain feel” rule is found in *People v. Lee*.<sup>173</sup> Here, an Oakland police officer on patrol in an area known for “high narcotic activity” lawfully detained a suspected drug dealer. While pat searching him, the officer felt some balloons

<sup>168</sup> See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 376 [“[T]he Fourth Amendment’s requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.”]; *People v. Lennies H.* (2005) 126 Cal.App.4<sup>th</sup> 1232, 1237 [“[U]nder what has been termed the ‘plain-touch’ exception to the warrant requirement, the officer may seize an object that is not a weapon if its incriminating character is immediately apparent.”]; *People v. Avila* (1997) 58 Cal.App.4<sup>th</sup> 1069, 1075 [“However, if contraband is found while performing a permissible *Terry* search, the officer cannot be expected to ignore that contraband.”]; *People v. Armenta* (1968) 268 Cal.App.2d 248, 253 [“The officer was not required to blind himself to the heroin simply because it was disconnected from the initial purpose of the search.”]. ALSO SEE *Arizona v. Hicks* (1987) 480 U.S. 321, 326.

<sup>169</sup> See *People v. Dibb* (1995) 37 Cal.App.4<sup>th</sup> 832, 837; *People v. Valdez* (1987) 196 Cal.App.3d 799, 806; *People v. Holt* (1989) 212 Cal.App.3d 1200, 1204 [“[A]n officer’s entry into a person’s pocket for narcotics can be justified only if the officer had probable cause to arrest the defendant for possession of narcotics *before* the entry into the pocket.”].

<sup>170</sup> (1989) 209 Cal.App.3d 817, 826. ALSO SEE *U.S. v. Mattarolo* (9<sup>th</sup> Cir. 1999) 191 F.3d 1082, 1088 [officer was “alerted immediately to the presence of drugs by the familiar sensation of plastic sliding against a granular substance”].

<sup>171</sup> *People v. Dibb* (1995) 37 Cal.App.4<sup>th</sup> 832, 836-7. ALSO SEE *U.S. v. Yamba* (3d Cir. 2007) \_\_ F.3d \_\_ [2007 WL 3054387] [the officer felt “a plastic bag containing a soft, spongy-like substance” plus some “small buds and seeds”].

<sup>172</sup> (1995) 37 Cal.App.4<sup>th</sup> 832.

<sup>173</sup> (1987) 194 Cal.App.3d 975.

in his jacket pocket. The officer testified that, as soon as he felt them, he recognized them as the heroin-filled variety and, just as important, he was able to articulate why: he had felt and seized heroin-filled balloons on at least 100 other occasions, and these balloons had an “unmistakable” feel associated with them; specifically, “each balloon has about the size and shape of a pea, with a textured rubber feeling and a bounce or bend that bounces back to its original shape.”

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

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

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

Similarly, in *U.S. v. Bustos-Torres*<sup>177</sup> a sheriff’s deputy felt a large amount of currency (\$10,000) in the pockets of a suspected drug dealer. In ruling that the seizure of the money was lawful, the court asked rhetorically, “Were the bills, by their mass and contour, immediately identifiable to the Sergeant’s touch as incriminating evidence? Pondering the question with a dose of common sense, we believe they were.”

### **Emergency procedure**

As noted earlier, officers are not required to follow the standard pat search procedure if they reasonably believe that an attack is imminent or if they have probable cause (as

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<sup>174</sup> (1987) 196 Cal.App.3d 799, 806. ALSO SEE *Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 153 [officer merely “had an idea” the objects he felt were pills]; *Remers v. Superior Court* (1970) 2 Cal.3d 659, 663-4 [possession of a foil-wrapped package in high-drug area did not establish probable cause]; *People v. Holt* (1989) 212 Cal.App.3d 1200, 1206-7 [possession of foil-wrapped container]; *People v. Nonnette* (1990) 221 Cal.App.3d 659, 666-8 [baggies].

<sup>175</sup> See *People v. Donald L.* (1978) 81 Cal.App.3d 770, 775 [the officer “could have reasonably believed that the assorted objects of jewelry, including women’s jewelry, were probably stolen.”]; *U.S. v. Bustos-Torres* (8<sup>th</sup> Cir. 2004) 396 F.3d 935, 944 [“[W]e do not doubt the plain-touch doctrine extends to the lawful discovery of any incriminating evidence, not just contraband such as drugs.”]; *People v. Chavers* (1983) 33 Cal.3d 462, 471 [“[T]he knowledge [gained by the officer through sense of touch] was as meaningful and accurate as if the container had been transparent and he had seen the gun within the container.”].

<sup>176</sup> (2005) 126 Cal.App.4<sup>th</sup> 1232.

<sup>177</sup> (8<sup>th</sup> Cir. 2005) 396 F.3d 935. COMPARE *U.S. v. Garcia* (6<sup>th</sup> Cir. 2007) \_\_ F.3d \_\_ [2007 WL 2254435] [officers lacked probable cause to believe a pager was evidence].



opposed to reasonable suspicion) that the detainee possesses a concealed weapon.<sup>178</sup> Instead, they may take preemptive action, such as immediately going inside the clothing to locate and remove any weapons. This is permitted mainly because, as one court put it, “any other course of action would have been foolhardy and quite possibly suicidal.”<sup>179</sup> The following are examples of circumstances that were found to justify an immediate search:

- The detainee jerked away when the officer started to pat search a bulge in the detainee’s pocket; then he told the officer, “You cannot search me without a warrant even if I have a gun.”<sup>180</sup>
- During a pat search, the detainee “abruptly grabbed for his outside upper jacket pocket; the officer could feel a “round cylindrical object” in the pocket.”<sup>181</sup>
- During a contact, a suspected drug dealer “suddenly put his hand into [his] bulging pocket.”<sup>182</sup>
- A suspect who was detained in connection with a “shots fired” call, kept his left hand concealed in a jacket pocket; when the officer asked what he had had in the pocket, the suspect would not answer.<sup>183</sup>
- An officer who had detained a suspect for making threats saw what appeared to be the outline of a small handgun in the fanny pack he had been carrying.<sup>184</sup>

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

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

<sup>178</sup> See *Adams v. Williams* (1972) 407 U.S. 143, 147-9 [based on reliable informant’s tip and some corroboration, the officer had probable cause to believe the suspect was carrying a concealed gun]; *U.S. v. Orman* (9<sup>th</sup> Cir. 2007) 486 F.3d 1170, 1172 [officer had probable cause because the detainee admitted he was carrying a gun].

<sup>179</sup> *People v. Superior Court (Holmes)* (1971) 15 Cal.App.3d 806, 813.

<sup>180</sup> *People v. Todd* (1969) 2 Cal.App.3d 389, 393-4.

<sup>181</sup> *People v. Atmore* (1970) 13 Cal.App.3d 244, 248.

<sup>182</sup> *People v. Rosales* (1989) 211 Cal.App.3d 325, 330.

<sup>183</sup> *People v. Woods* (1970) 6 Cal.App.3d 832, 838.

<sup>184</sup> *People v. Ritter* (1997) 54 Cal.App.4<sup>th</sup> 274, 280.

<sup>185</sup> See *People v. Jonathan M.* (1981) 117 Cal.App.3d 530, 536 [“Once there is probable cause for an arrest it is immaterial that the search preceded the arrest.”]; *People v. Limon* (1993) 17 Cal.App.4<sup>th</sup> 524, 538 [“An officer with probable cause to arrest can search incident to the arrest before making the arrest.”].

<sup>186</sup> See *People v. Lopez* (2004) 119 Cal.App.4<sup>th</sup> 132, 136 [suspect was “lawfully arrested for violating section 148” mainly because he “refused to keep his hands visible, and refused to submit to a patdown.”].

<sup>187</sup> (2003) 111 Cal.App.4<sup>th</sup> 1464, 1472.