

Post-Arrest Procedure

*The consequences of prolonged detention may be more serious than the interference occasioned by arrest.*¹

The minute a suspect is arrested and taken into custody, a clock starts ticking. It's set for 48 hours and it is counting down the time within which officers, prosecutors, and judges must do certain things. The main objectives of these time limits are to make sure there was probable cause to make the arrest and that there is an orderly and timely transfer of control of the suspect from law enforcement to the judiciary. As we will discuss, these controls include booking, cite-and-release requirements, probable cause reviews, and arraignment.

Booking

“Booking” is defined as the “recording of an arrest in official police records” and the taking of the arrestee’s fingerprints and photograph.² Although booking is not expressly mandated by the Penal Code,³ it is considered standard procedure.⁴

In conjunction with the booking process, the arrestee has a right to make completed telephone calls to an attorney, a bail bondsman, and a relative, and he has a right to make these calls “immediately upon being booked,” and in any event no later than three hours after the arrest except when “physically impossible.”⁵ Officers must also permit the arrestee to visit with an attorney if the arrestee or a relative requests such a visit.⁶

Disposition Of Arrestees

If officers have probable cause to arrest a person for any crime—felony, misdemeanor, or infraction—they may, per the Fourth Amendment, transport him to court or jail for booking.⁷ But California imposes restrictions which require that officers cite and release people who have been arrested for certain misdemeanors. For details, see page 24.

Probable Cause Review

If the arrest was made without a warrant, and if the arrestee will not be cited and released or released on bail or his own recognizance, he has a constitutional right to have a judge review the facts upon which probable cause was based to make sure that officers did, in fact, have probable cause. As the Supreme Court explained, “[A] policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate’s neutral judgment evaporate.”⁸ Consequently, if the judge determines that probable cause exists, the suspect may be detained pending further court order. If not, he must be released unless other charges or holds are pending.⁹ This procedure is commonly known as a Probable Cause Review or *Gerstein-Riverside Review*.¹⁰

¹ *Gerstein v. Pugh* (1975) 420 U.S. 103, 114.

² See *People v. Superior Court (Logue)* (1973) 35 Cal.App.3d 1, 6.

³ See Pen. Code § 853.6(g).

⁴ See 3 LaFave, *Search and Seizure* (Fourth Edition) at p. 46 [“law enforcement agencies view booking as primarily a process for their own internal administration”].

⁵ See Pen. Code § 851.5. **NOTE:** Evidence may not be suppressed on grounds it was the fruit of a violation of such a statute. See *People v. Lessie* (2010) 47 Cal.4th 1152, 1170.

⁶ See Pen. Code § 825(b).

⁷ See *Virginia v. Moore* (2008) 553 U.S. 164; *Atwater v. Lago Vista* (2001) 532 U.S. 318; 354; *People v. McKay* (2002) 27 Cal.4th 601, 607, 618.

⁸ *Gerstein v. Pugh* (1975) 420 U.S. 103, 113-14.

⁹ See *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, 1080.

¹⁰ See *Gerstein v. Pugh* (1975) 420 U.S. 103; *County of Riverside v. McLaughlin* (1991) 500 U.S. 44.

TIME RESTRICTIONS: In the past, some courts would rule that probable cause determinations must be conducted immediately after booking. The idea that a constitutional violation will result unless officers can account for every minute of their time between the arrest and Probable Cause Review was, of course, unsound. As the Supreme Court pointed out, the law requires promptness—not immediacy.¹¹ Furthermore, in determining whether the officers were sufficiently prompt, the courts “must allow for a substantial degree of flexibility.”¹²

The Court was also aware that a rule requiring a prompt probable cause review would result in lots of litigation and uncertainty because “promptness” means different things to different people. To avoid this problem, the Court ruled that when the probable cause review occurs within 48 hours of the suspect’s arrest, any delays will be presumed to be reasonably necessary.¹³ Although the suspect may attempt to rebut this presumption, the presumption is fairly strong. As the Court explained, “[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement.”¹⁴

On the other hand, if the probable case determination was made after 48 hours, the prosecution will have the burden of proving that the delay was reasonably necessary.¹⁵ Note that in calculating the time limits, no allowance is made for weekends and holidays. It’s a straight 48 hours.¹⁶

HOW PROBABLE CAUSE IS DETERMINED: To obtain a probable cause review, officers will ordinarily prepare a “Declaration of Probable Cause” in which the

arresting officer sets forth the facts upon which probable cause was based. The declaration may include attachments, such as the arrest report and witness statements. Declarations of Probable Cause may be submitted to the judge by hand or, in some counties, by means of a fax or secure email system.

In determining whether probable cause exists, judges do not examine the facts hypercritically; nor do they conduct extensive examinations of the weight of the evidence or the credibility of witnesses.¹⁷ Instead, they apply the same standards they use in deciding whether to issue a search or arrest warrant;¹⁸ i.e., does a commonsense reading of the documents demonstrate a “fair probability” that the suspect committed the crime for which he was arrested.¹⁹

CONSEQUENCES OF VIOLATION: There is some uncertainty as to whether evidence may be suppressed if it was obtained as the result of a tardy probable cause determination. While there is one California case in which suppression was ordered,²⁰ there were some usual circumstances. Moreover, at least three circuit courts, including the Ninth Circuit, have ruled that suppression is not always required.²¹

Furthermore, it is arguable that evidence should not be suppressed as the result of a violation if the court at the motion to suppress ruled that probable cause to arrest did, in fact exist;²² or if the court finds that, pursuant to the Fruit of the Poisonous Tree Rule, the taint from the delay had been attenuated. In any event, it is clear that an arrestee may not be released from custody based on a tardy probable cause determination, nor may his charges be dismissed.²³

¹¹ See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 54.

¹² *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.

¹³ See *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1070.

¹⁴ See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.

¹⁵ See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 57.

¹⁶ See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56-58.

¹⁷ See *Gerstein v. Pugh* (1975) 420 U.S. 103, 120-21.

¹⁸ See *Gerstein v. Pugh* (1975) 420 U.S. 103, 120-21.

¹⁹ See *Illinois v. Gates* (1983) 462 U.S. 213, 238; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.

²⁰ *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1166-67.

²¹ See *New York v. Harris* (1990) 495 U.S. 14, 18; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1071.

²² See *Powell v. Nevada* (1994) 511 U.S. 79, 90 (conc. opn. of Thomas, J.).

²³ See *Gerstein v. Pugh* (1975) 420 U.S. 103, 123; *People v. Valenzuela* (1978) 86 Cal.App.3d 427, 431.

Arraignment

If prosecutors charged the arrestee with the crime for which he was arrested or some other crime, he must be arraigned. An arraignment is usually the first court appearance during which, among other things, a defense attorney is appointed or is present; the defendant is served with a copy of the complaint and is advised of the charges against him; the defendant pleads to the charge or requests a continuance for that purpose; and the judge sets bail, denies bail, or releases the defendant on his own recognizance.

A defendant must be arraigned within 48 hours of his arrest unless (1) he was released from custody, or (2) he was being held on other charges or a parole hold. Unlike the time limit for probable cause reviews, the 48-hour countdown does not include Sundays and holidays. If time expires when court is in session, the defendant may be arraigned any time that day. If court was not in session, he may be arraigned the following day.²⁴

CHARGING DELAYS: Arraignments will sometimes be delayed because prosecutors needed additional time to make a charging decision and otherwise cope “with the everyday problems of processing suspects through an overly burdened criminal justice system.”²⁵ Delays for these purposes might be even longer on Mondays because the number of weekend arrests “is often higher and available resources tend to be limited.”²⁶

Although prosecutors can usually perform these duties on time, delays happen. In most cases, however, brief delays for charging are usually viewed as reasonable if officers and prosecutors were diligent. This is because it is in the best interests of the

arrestee, that the charging process not be rushed—that charges be filed only after careful review.²⁷ As with probable cause reviews, in determining whether a delay was reasonably necessary, the courts allow some flexibility, especially for the following reasons.

DEFENDANT INJURED OR SICK: The defendant was unable to appear in court because he was sick or injured. As the California Supreme Court observed, “[I]t would be an unreasonable application of [the arraignment statute] to require that a hospitalized defendant be taken before a magistrate until it was possible to do so without jeopardy to his health.”²⁸

DEFENDANT IN CUSTODY ON PENDING CHARGES IN ANOTHER COUNTY: The defendant was in custody in another county as a result of charges filed in that county. In such cases, the defendant need not be arraigned until the out-of-county prosecution has concluded.²⁹

INVESTIGATIVE DELAYS: A delay for further investigation will usually be considered justifiable if (1) the crime was serious; (2) officers were at all times diligently engaged in actions they reasonably believed were required to obtain necessary evidence or apprehend additional perpetrators; and (3) officers reasonably believed that these actions could not be postponed without risking the loss of necessary evidence, the identification or apprehension of additional suspects, or otherwise compromising the integrity of their investigation.³⁰ On the other hand, delays have been deemed unjustified when their purpose was to allow the arresting officer to get some sleep, the delay occurred because the arresting officer’s shift had ended, the delay was “not unusual,” and the delay was “motivated by ill will” against the defendant.³¹

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²⁴ See Pen. Code §§ 825(a); *People v. Gordon* (1978) 84 Cal.App.3d 913, 922; *People v. Turner* (1994) 8 Cal.4th 137, 175.

²⁵ *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 55. Also see *People v. Williams* (1977) 68 Cal.App.3d 36, 43 [delay “for the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading”].

²⁶ *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 55.

²⁷ See *People v. Turner* (1994) 8 Cal.4th 137, 175; *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.

²⁸ See *In re Walker* (1974) 10 Cal.3d 764, 778.

²⁹ See *Ng v. Superior Court* (1992) 4 Cal.4th 29, 36.

³⁰ See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 54; *People v. Bonillas* (1989) 48 Cal.3d 757, 788.

³¹ See *Riverside v. McLaughlin* (1991) 500 U.S. 44, 55-56; *People v. Thompson* (1980) 27 Cal.3d 303, 329.