POINT of VIEW

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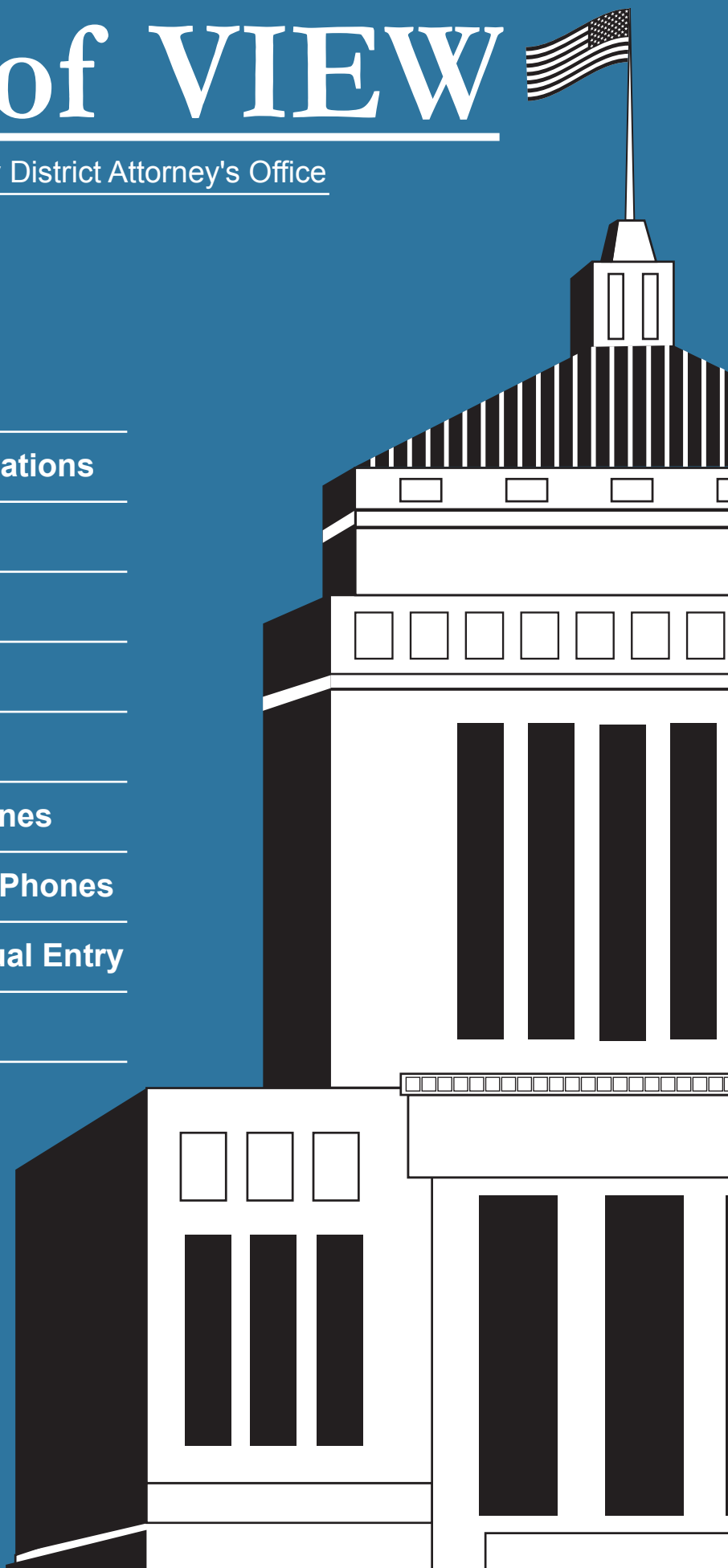

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A group of friends and I are going on a road trip in a month and I was wondering what are some of the best methods you have come across to secure our drugs? Posted on Reddit.com.

Most big- and small-time criminals have learned that the safest and most convenient place to hide their drugs, guns and other incriminating evidence is often inside their cars and trucks. This is mainly because motor vehicles are relatively secure, highly mobile and, as an added bonus, they are fully protected by the Fourth Amendment. As one website advised its criminal readership: "Forget your house—your car is your most private place."[1]

In the past, vehicles were even more attractive to criminals because the courts were suppressing a lot of evidence discovered inside them. This was because the rules pertaining to vehicle searches had become so "intolerably confusing"[2] that officers often had to guess at whether they could search a vehicle, and could only speculate as to the permissible scope and intensity of these searches.

Who caused this important area of the law to fall into disorder? The prime suspects were members of the United States Supreme Court who had consistently failed to resolve the recurring conflict between the privacy rights of vehicle occupants and the needs of law enforcement.

But then one day in 1981, the Court issued an opinion named *New York v. Belton* in which it announced—or so we thought—that it was going to fix these problems.[3] After acknowledging that officers needed vehicle search rules that were "straightforward," "easily applied," and "predictably enforced," it announced just such a rule: Whenever officers make a custodial arrest of the driver or any occupant of a vehicle, they may, as a matter of routine, conduct a full search of the passenger compartment and its contents.

Many criminals and their attorneys were, of course, disappointed that the Court would choose such a coherent rule when it could have devised one that kept everyone guessing. But *Belton* became the law, and suddenly the subject of vehicle searches was much easier to understand and apply in the field.

But then in 2009, the Court—for reasons that are still bewildering—overturned *Belton* and replaced it with precisely the type of rule that *Belton* was designed to eliminate: one that was "highly sophisticated," "qualified by all sorts of ifs, ands, and buts," and "literally impossible of application by the officer in the field."[4] The case was *Arizona v. Gant,*[5] and it was such a shifty opinion that the five justices who signed it claimed they had not actually overturned *Belton* when, in fact, that was exactly what they had done, and it was exactly what they had intended to do. As Justice Alioto said in his dissenting opinion, "Although the Court refuses to acknowledge that it is overruling *Belton* there can be no doubt that it does so."

Although *Gant* was a regrettable opinion, it was not as devastating as first predicted. While probable cause to arrest an occupant of a vehicle would no longer justify a warrantless search of it, prosecutors discovered that in many cases in which officers had probable cause to arrest an occupant, they also had probable cause to search the vehicle for evidence of the crime. And because the Supreme Court has consistently upheld the rule that probable cause *to search* a vehicle will, in and of itself, justify a warrantless search of it, the rules pertaining to vehicle searches has remained fairly stable.

In this article, we will discuss the various types of vehicle searches, starting with the one we have just been discussing. Although it is sometimes called "The Automobile Exception," it is more commonly known simply as a "probable cause search."

[1] http://jalopnik.com. April 17, 2013.
[2] See *Robbins v. California* (1981) 453 U.S. 420, 430 [conc. opn. of Powell, J.].
[3] (1981) 453 U.S. 454.
[4] *New York v. Belton* (1981) 453 U.S. 454, 458 [quoting from LaFave, "Case-By-Case Adjudication versus Standardized Procedures: The *Robinson* Dilemma," (1974) S.Ct.Rev. 127, 141].
[5] (2009) 556 U.S. 332.

Probable Cause Searches

The rule pertaining to probable cause searches is as straightforward as they come: *Officers may search a vehicle without a warrant if they have probable cause to search it.* Or, in the words of the Supreme Court, a warrantless vehicle search is legal if it was "based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."[6]

Significantly, these searches are permitted even if officers had plenty of time to obtain a warrant,[7] or if there were no exigent circumstances that required an immediate search,[8] or even if the vehicle had already been towed and was sitting securely in a police garage or impound yard.[9] As the Supreme Court observed in *Michigan v. Thomas*, "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized."[10]

Although the existence of probable cause is the main requirement, as we will now explain, there are actually four of them:

(1) **"VEHICLE"**: The thing that was searched must fall within the definition of a "vehicle" which, in the context of probable cause searches, includes cars, SUVs, vans, motorcycles, bicycles, and boats.[11] It also includes RVs and other motor homes except those that were being used solely as residences; e.g., on blocks.[12] Furthermore, a vehicle may be searched even though it was immobile as the result of a traffic accident, a mechanical failure, a fire or, as noted earlier, because the vehicle was in police custody.[13]

(2) **PUBLIC PLACE**: A probable cause search of a vehicle is permitted only if the vehicle was located in a public place or on private property over which the suspect could not reasonably expect privacy. For example, a car parked in the suspect's garage could not be searched without a warrant or consent. What about cars parked on private driveways? In the past, they could be searched because it was generally agreed that people could not reasonably expect privacy in a driveway which is, by necessity, readily accessible from the street. In 2013, however, the Supreme Court rejected this reasoning and ruled that any nonconsensual entry onto a private driveway would require a warrant or consent if the officers' objective was to obtain information.[14] And because that is precisely the objective of conducting a vehicle search, an officer's warrantless entry onto a driveway to search a car will ordinarily require a warrant.

(3) **PROBABLE CAUSE**: See "Probable cause to search," below.

(4) **SCOPE OF SEARCH**: Officers must have restricted their search to places and things in which the evidence could reasonably be found. See "Scope and intensity of the search," below.

Probable cause to search

In the context of vehicle searches, probable cause exists if officers were aware of facts that established a "fair probability" that contraband or other evidence of a crime was currently located inside the vehicle.[15] This can be established by direct evidence

[6] *United States v. Ross* (1982) 456 U.S. 798, 809. Also see *People v. Carpenter* (1997) 15 Cal.4th 312, 365.
[7] See *People v. Superior Court (Valdez)* (1983) 35 Cal.3d 11, 16.
[8] See *Maryland v. Dyson* (1999) 527 U.S. 465, 467 ["the automobile exception does not have a separate exigency requirement"]; *Pennsylvania v. Labron* (1996) 518 U.S. 938, 940 ["unforeseen circumstances" are not required].
[9] See *California v. Acevedo* (1991) 500 U.S. 565, 570; *United States Johns* (1985) 469 U.S. 478, 486; *People v. Panah* (2005) 35 Cal.4th 395, 469.
[10] (1982) 458 U.S. 259, 261.
[11] See *California v. Carney* (1985) 471 U.S. 386, 392-93 [the "automobile exception" applies only "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use"]; *People v. Needham* (2000) 79 Cal.App.4th 260, 267; *People v. Allen* (2000) 78 Cal.App.4th 445 [bicycle].
[12] See *California v. Carney* (1985) 471 U.S. 386, 394, fn.3; *People v. Black* (1985) 173 Cal.App.3d 506, 510 [Winnebago]; *U.S. v. Navas* (2nd Cir. 2010) 597 F.3d 492, 499 [trailer "with its legs dropped" was sufficiently mobile].
[13] See *California v. Carney* (1985) 471 U.S. 386, 391; *People v. Overland* (1988) 203 Cal.App.3d 1114, 1118.
[14] See *Florida v. Jardines* (2013) __ US __ [133 S.Ct. 1409, 1414].
[15] See *Illinois v. Gates* (1983) 462 U.S. 213, 238.

(e.g., officer sees the evidence inside) or circumstantial evidence, such as the following.

PC TO ARREST > PC TO SEARCH: As discussed earlier, officers are no longer permitted to search a vehicle merely because they have probable cause to arrest the driver or other occupant. However, if they have probable cause to arrest an occupant for a crime that occurred recently, they will often have probable cause to search the car for the fruits and instrumentalities of that crime. In the words of the Supreme Court, "[A]s will be true in many cases, the circumstances justifying the arrest are also those furnishing probable cause for the search."[16] Here are two examples:

GETAWAY CAR: Probable cause to arrest an occupant of a car for a crime that occurred recently will ordinarily establish probable cause to search the vehicle for the fruits and instrumentalities of the crime. This often occurs when officers stop a car that had recently been used in a robbery or burglary, in which case they may have probable cause to search for weapons or tools that were used in the commission of the crime, stolen property, and clothing similar to that used by the perpetrator.[17]

DRUG SALES: Probable cause to arrest an occupant for drug sales will ordinarily provide probable cause to search for weapons and items that are commonly used to package and sell drugs.[18]

THE VEHICLE IS AN "INSTRUMENTALITY": If officers have probable cause to believe that a vehicle, itself, was the means by which a crime was committed (e.g., hit-and-run, vehicular manslaughter, kidnapping) they may search it under an exception to the warrant requirement known as the "instrumentality exception."[19] As a practical matter, however, it is seldom necessary to rely on the instrumentality exception because, as discussed earlier, officers with probable cause to believe that a vehicle was an instrumentality of a crime will usually have probable cause to search it. Nevertheless, California courts continue to cite the instrumentality exception, especially in cases in which officers are looking for trace evidence such as DNA.[20]

INFERENCE BASED ON CLOSE ASSOCIATION: Probable cause to search for certain evidence in a vehicle may be based on the discovery of a thing or condition that is closely associated with such evidence. In other words, if items A and B are commonly found together, and if officers find A in the suspect's possession, it may be reasonable to infer that he also possesses B. Thus, in discussing this principle, the court in *People v. Simpson* observed, "Illegal drugs and guns are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons."[21] Some other examples:

DRUG CONTAINER > DRUGS: Seeing a distinctive container that is commonly used to store drugs will ordinarily warrant a search of it; e.g., bindles, tied balloons.[22] But containers that are commonly used for a legitimate purpose will not satisfy this requirement; e.g., film canisters.[23]

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[16] *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48, fn.6. Also see *People v. Senkir* (1972) 26 Cal.App.3d 411, 421 ["reasonable inferences may be indulged as to the presence of articles known to be usually accessory to or employed in the commission of a specific crime"].

[17] See *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48 ["there was probable cause to search the car for guns and stolen money"]; *People v. Chavers* (1983) 33 Cal.3d 462, 467; *People v. Varela* (1985) 172 Cal.App.3d 757, 762; *People v. Le* (1985) 169 Cal.App.3d 186, 190-91; *People v. Weston* (1981) 114 Cal.App.3d 764, 774-75.

[18] See *People v. Glaser* (1995) 11 Cal.4th 354, 367 ["In the narcotics business, firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia." Quoting *Ybarra v. Illinois* (1979) 444 U.S. 86, 106 (dis. opn. of Rehnquist, J)]; *People v. Lee* (1987) 194 Cal.App.3d 975, 983 ["persons engaged in selling narcotics frequently carry firearms to protect themselves against would-be robbers"].

[19] See, for example, *People v. Teale* (1969) 70 Cal.2d 497,511; *People v. Griffin* (1988) 46 Cal.3d 1011, 1024-25; *North v. Superior Court* (1972) 8 Cal.3d 301; *People v. Braun* (1973) 29 Cal.App.3d 949, 970; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1076; *People v. Wolf* (1978) 78 Cal.App.3d 735, 741; *People v. Rice* (1981) 126 Cal.App.3d 477.

[20] See, for example, *People v. Bittaker* (1989) 48 Cal.3d 1046; *People v. Diaz* (2013) 213 Cal.App.4th 743.

[21] (1998) 65 Cal.App.4th 854, 862.

[22] See *Texas v. Brown* (1983) 460 U.S. 730, 743; *People v. Parra* (1973) 30 Cal.App.3d 729, 735.

[23] See *People v. Holt* (1989) 212 Cal.App.3d 1200, 1205; *People v. Valdez* (1987) 196 Cal.App.3d 799, 806-7 [film canister].

DRUG PARAPHERNALIA > DRUGS: The presence of drug use or sales paraphernalia in a vehicle may establish probable cause to search it for drugs.[24]

ODOR OF DRUGS > DRUGS: A distinctive odor of drugs from inside the vehicle may establish probable cause to search it for drugs.[25]

K-9 ALERT > DRUGS: A K-9's alert to the vehicle will ordinarily establish probable cause to search it for drugs.[26]

DUI DRUGS > DRUGS: If officers have probable cause to believe that the driver is under the influence of drugs, it is usually reasonable to infer he possesses drugs and paraphernalia.[27]

ALCOHOL ODOR > OPEN CONTAINER: Officers who smell fresh beer in a vehicle may infer there is an open container in the vehicle.[28]

AMMUNITION > FIREARMS: If officers see ammunition in the passenger compartment of a car, it is often reasonable to infer there is also a firearm inside.[29]

BURGLAR TOOLS > STOLEN PROPERTY: If officers saw burglar tools in a burglary suspect's vehicle shortly after a burglary occurred, it may be reasonable to infer that property stolen in the burglary will also be found in the vehicle.[30]

SUSPICIOUS CIRCUMSTANCES: Although probable cause to search a vehicle will seldom be based on a single suspicious circumstance, there are several circumstances that will ordinarily convert reasonable suspicion to detain into probable cause to search.[31] Some examples:

SECRET COMPARTMENT: Officers who had stopped a suspected drug trafficker saw indications of a secret compartment in the vehicle.[32]

SUSPICIOUS SPARE TIRE: In one case, a court ruled that grounds to search existed when, after officers stopped a car because they reasonably believed it was being used to transport drugs, they found an unusually heavy spare tire with a "flopping" sound coming from the inside.[33]

MASKING ODOR: Another indication that a car is being used to transport drugs is the presence of multiple air fresheners.[34]

STOLEN PROPERTY INDICATORS: In the vehicle of a suspected burglar, robber, or fence, officers saw property with obliterated serial numbers, store tags or anti-shoplifting devices, clipped wires, pry marks or other signs of forced removal.[35] Another indication that property in a vehicle was stolen is that there was an unusually high quantity of it. This is especially significant if the property was of a type that is commonly stolen; e.g., TVs, cell phones, jewelry.[36]

STOLEN CAR INDICATIONS: Probable cause to believe that a car was stolen may be based in part—or sometimes entirely—on combinations of sus-

[24] See *Wyoming v. Houghton* (1999) 526 U.S. 295, 300 [because officers saw a hypodermic syringe in the driver's shirt pocket, they reasonably believed there were drugs in the vehicle].

[25] See *United States Johns* (1985) 469 U.S. 478, 482; *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1240 [plain smell "is well established by cases that have found the smell of contraband sufficient to establish probable cause necessary for police to obtain a search warrant"]; *People v. Waxler* (2014) 224 Cal.App.4th 712, 719.

[26] See *Illinois v. Caballes* (2005) 543 U.S. 405, 410; *Indianapolis v. Edmond* (2000) 531 U.S. 32, 40; *Florida v. Royer* (1983) 460 U.S. 491, 505-6 ["The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage"]; *People v. Stillwell* (2011) 197 Cal.App.4th 996, 1005-1006; *Estes v. Rowland* (1993) 14 Cal.App.4th 508, 529 ["[O]nce a dog alerts to the presence of narcotics the search [becomes] a probable cause search"].

[27] See *People v. Guy* (1980) 107 Cal.App.3d 593, 598; *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189, 1191; *People v. Decker* (1986) 176 Cal.App.3d 1247, 1250.

[28] See *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042; *People v. Evans* (1973) 34 Cal.App.3d 175; Veh. Code §§ 23222-23226.

[29] See *People v. DeCosse* (1986) 183 Cal.App.3d 404, 411; *U.S. v. Doward* (1st Cir. 1994) 41 F.3d 789, 793 [gun cleaning kit].

[30] See *People v. Suennen* (1980) 114 Cal.App.3d 192, 203.

[31] See *United States Sokolow* (1989) 490 U.S. 1, 9; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.

[32] See *People v. Crenshaw* (1992) 9 Cal.App.4th 1402, 1415; *U.S. v. Ewing* (9th Cir. 2011) 638 F.3d 1226, 1233, fn.6.

[33] See *U.S. v. Strickland* (11th Cir. 1990) 902 F.2d 937.

[34] See *People v. Russell* (2000) 81 Cal.App.4th 96, 103; *U.S. v. Anderson* (9th Cir. 1997) 114 F.3d 1059, 1066-67; *U.S. v. Leos-Quijada* (10th Cir. 1997) 107 F.3d 786.

[35] See *People v. Gorak* (1987) 196 Cal.App.3d 1032, 1039; *In re Curtis T.* (1989) 214 Cal.App.3d 1391, 1398.

[36] See *People v. Martin* (1973) 9 Cal.3d 687, 696; *People v. Williams* (1988) 198 Cal.App.3d 873, 890; *In re Curtis T.* (1989) 214 Cal.App.3d 1391 [large quantity of car stereo equipment on floor].

picious circumstances such as the following: failure to produce vehicle registration or driver's license; missing or improperly attached license plate, indications of VIN plate tampering, switched plates, side window broken out, evasive driving, failure to stop promptly when lit up, evidence of ignition tampering, use of makeshift ignition key, driver gave false or inconsistent statements about his ownership or possession of the car, driver did not know the name of the registered owner.[37]

WHERE THERE'S SOME, THERE'S PROBABLY MORE: When officers find contraband (e.g., stolen property, illegal weapons or drugs) in a vehicle, it is usually reasonable to believe there is more of it in the passenger compartment and the trunk. As the court said in *People v. Stafford*, "Being possessed of probable cause that the automobile contained stolen property and dangerous weapons, the officers were reasonably justified in continuing their search for other property that might have been stolen or other dangerous instrumentalities."[38]

Scope and intensity of the search

If officers have probable cause to search a vehicle for evidence, they may search for it in the passenger compartment, the trunk, and all containers in which such evidence could reasonably be found.[39] As the Supreme Court explained, when officers are conducting a probable cause vehicle search, "nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages" must "give way to the interest in the prompt and efficient completion of the task at hand."[40] Thus, in upholding a search in *People v. Gallegos* the court observed, "The officers did not seek an elephant in a breadbox, but limited their search to areas that reasonably might have contained the [evidence]."[41] Officers are not, however, required to confine their search to places and things in which the listed evidence is *usually* or *commonly* found; what is required is a *reasonable possibility*.[42]

SEARCHING OCCUPANTS: Officers may not search the clothing worn by the occupants. Instead, a search is permitted only if officers had probable cause to believe that the evidence was located in the person's clothing.[43] Thus, in *U.S. v. Soyland* the Ninth Circuit said, "There was not a sufficient link between Soyland [a passenger] and the odor of methamphetamine or the marijuana cigarettes, and his mere presence did not give rise to probable cause to arrest and search him."[44]

SEARCHING CELL PHONES: As the result of California's Electronic Communications Privacy Act, a search warrant is required to search cell phones and other electronic communications devices that are located

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[37] See *People v. James* (1969) 1 Cal.App.3d 645, 648-49; *People v. Webster* (1991) 54 Cal.3d 411, 430-1; *People v. Windham* (1987) 194 Cal.App.3d 1580, 1590; *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 534.

[38] 29 Cal.App.3d 940, 948. Also see *People v. Hunt* (1990) 225 Cal.App.3d 498, 509; *People v. Evans* (1973) 34 Cal.App.3d 175, 180.

[39] See *Florida v. Jimeno* (1991) 500 U.S. 248, 251 ["The scope of a search is generally defined by its expressed object."]; *United States Ross* (1982) 456 U.S. 798, 821; *California v. Acevedo* (1991) 500 U.S. 565, 570 [officers may search the "compartments and containers within the automobile [if] supported by probable cause"]; *Maryland v. Garrison* (1987) 480 U.S. 79, 84-85 ["[P]robable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."]; *Wyoming v. Houghton* (1999) 526 U.S. 295, 302; *People v. Chavers* (1983) 33 Cal.3d 462, 470 [glove box]; *People v. Hunter* (2005) 133 Cal.App.4th 371 [trunk].

[40] *United States Ross* (1982) 456 U.S. 798, 821-22.

[41] (2002) 96 Cal.App.4th 612, 626.

[42] See *People v. Kraft* (2000) 23 Cal.4th 978, 1043 [the officers "merely looked in a spot where the specified evidence of crime plausibly could be found, even if it was not a place where photographs normally are stored"]; *People v. Smith* (1994) 21 Cal.App.4th 942, 950 [drug dealers "usually attempt to secrete contraband where the police cannot find it"]; *In re Arturo D.* (2002) 27 Cal.4th 60, 78 ["an officer is entitled to conduct a nonpretextual warrantless search for such documents in those locations where such documentation reasonably may be expected to be found"].

[43] See *People v. Valdez* (1987) 196 Cal.App.3d 799, 806 ["the officer's entry into the individual's pocket can only be justified if the officer's sensorial perception, coupled with the other circumstances, was sufficient to establish probable cause to arrest the defendant for possession of narcotics before the entry into the pocket"]; *People v. Temple* (1995) 36 Cal.App.4th 1219, 1227.

[44] (9th Cir. 1993) 3 F.3d 1312, 1314.

in a vehicle; i.e., merely having probable cause is no longer sufficient.[45] However, if officers believe they have probable cause to search the phone, they may seize it and seek a warrant.[46] Furthermore, because a weapon might be disguised as a cell phone, officers may conduct a physical examination of its exterior and case.[47]

PERMISSIBLE INTENSITY OF THE SEARCH: Officers may conduct a "probing" or reasonably thorough search.[48] Causing damage to the vehicle is permissible only if reasonably necessary and only if the damage was not excessive; e.g., OK to take paint samples from hit-and-run vehicle.[49] Suggestion: If it will be necessary to damage the vehicle, seek a warrant if there is time.

Reasonable Suspicion Searches

Although officers may no longer search a vehicle merely because they had probable cause to arrest an occupant, they may search it for evidence of that crime if, in addition to having probable cause to arrest, they reasonably believed that evidence pertaining to that crime was located inside the vehicle; i.e., probable cause to search is not required.[50] As the Supreme Court explained in *Arizona v. Gant*, "[C]ircumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[51] For example, in applying this rule, the courts have noted the following:

- "When a driver is arrested for being under the influence of a controlled substance, the officers could reasonably believe that evidence relevant to that offense might be found in the vehicle."[52]
- "Given the crime for which the officer had probable cause to arrest (illegal possession of a firearm), it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," such as ammunition or a holster.[53]
- "[T]he agents arrested Evans and Swanson for bank robbery and they had every reason to believe there was evidence of the offense in the green Cadillac."[54]

As for the scope of the search, officers may search the entire passenger compartment and all containers inside it; i.e., they need not restrict the search to places and things in which the evidence might be found.[55] It appears they may also search the trunk.[56]

As noted earlier, however, pursuant to the California Electronic Communications Privacy Act, officers may not search cell phones or other communications devices without a warrant or consent.[57] Instead, as noted earlier, if they believe they have probable cause to search it, they may seize it and apply for a warrant.[58] They may also conduct a physical examination of the phone's exterior and its case.[59]

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[45] Pen. Code § 1546 et seq.
[46] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2486].
[47] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2485].
[48] See *California v. Acevedo* (1991) 500 U.S. 565, 570; *United States Ross* (1982) 456 U.S. 798, 820.
[49] See *United States Ramirez* (1998) 523 U.S. 65, 71; *People v. Robinson* (1989) 209 Cal.App.3d 1047, 1055.
[50] See *U.S. v. Edwards* (7th Cir. 2014) 769 F.3d 509, 514; *U.S. v. Vinton* (D.C. Cir. 2010) 594 F.3d 14, 25.
[51] (2009) 556 U.S. 332, 335.
[52] See *People v. Nottoli* (2011) 199 Cal.App.4th 532, 554.
[53] *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1065. Also see *U.S. v. Johnson* (6th Cir. 2010) 627 F.3d 578, 584.
[54] *U.S. v. Smith* (7th Cir. 2012) 697 F.3d 625, 630.
[55] See *People v. Nottoli* (2011) 199 Cal.App.4th 531, 556.
[56] **NOTE**: The reason we think a search of the trunk is permitted is that a search based on reasonable suspicion is more akin to a probable cause search than a limited search incident to arrest. Therefore, the scope of the search should be substantially the same as the scope of probable cause searches which includes the trunk. See *United States v. Ross* (1982) 456 U.S. 798, 821["nice distinctions . . . between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand"].
[57] See Pen. Code § 1546 et seq.
[58] See: *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2486].
[59] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2485].

Vehicle Inventory Searches

Unlike "investigative" vehicle searches based on probable cause or reasonable suspicion, vehicle inventory searches are classified as "community caretaking" searches because their main purposes are to (1) provide a record of the property inside the vehicle so as to furnish the owner with an accounting; (2) protect officers and others from harm if the vehicle happened to contain a dangerous device or substance; and (3) protect officers, their departments, and ultimately the taxpayers from false claims that property in the vehicle was lost, stolen, or damaged.[60]

Despite their obvious benefits, vehicle inventory searches are subject to certain restrictions that help ensure that they are not used as a pretext to conduct an investigative search for evidence.[61] Specifically, officers may conduct a search only if:

(1) TOWING WAS REASONABLY NECESSARY: The officer's decision to impound or store the vehicle was reasonable under the circumstances.

(2) STANDARD SEARCH PROCEDURES: The search was conducted in accordance with departmental policy or standard procedure.

Towing reasonably necessary

Because an inventory search can be conducted only if officers need to take temporary custody or control of the vehicle, the first requirement is that towing must have been reasonably necessary under the circumstances.[62] As the Court of Appeal explained, "[T]he ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances."[63] This does not mean that towing must have been imperative. Instead, as the First Circuit explained, it must have been reasonable:

> Framed precisely, the critical question is not whether the police needed to impound the vehicle in some absolute sense, but whether the decision to impound and the method chosen for implementing that decision were, under all the circumstances, within the realm of reason.[64]

NO LEAST INTRUSIVE MEANS TEST: In determining whether towing was reasonably necessary, it is immaterial that there might have been a less intrusive means of protecting the vehicle or its contents; e.g., by locking the vehicle and leaving it at the scene.[65] Instead, what matters is whether the decision was reasonable.[66] Furthermore, if towing was reasonably necessary, it is immaterial that the officers' decision to tow was based in part on their suspicion that the vehicle contained evidence.[67]

EXAMPLES OF REASONABLE NECESSITY: While it would be impractical to provide a comprehensive list of those situations in which the decision to tow a vehicle would be considered "reasonable," the following usually fall into that category:

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[60] See *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1; *Colorado v. Bertine* (1987) 479 U.S. 367, 373; *People v. Steeley* (1989) 210 Cal.App.3d 887, 892.

[61] See *U.S. v. Duguay* (7th Cir. 1996) 93 F.3d 346, 351 ["the decision to impound (the 'seizure') is properly analyzed as distinct from the decision to inventory (the 'search')"].

[62] See *People v. Andrews* (1970) 6 Cal.App.3d 428, 433 ["[U]pon police impoundment of an automobile, the police undoubtedly become an involuntary bailee of the property and responsible for the vehicle and its contents."]; *U.S. v. Smith* (6th Cir. 2007) 510 F.3d 641, 651 ["A warrantless inventory search may only be conducted if police have lawfully taken custody of the vehicle."].

[63] *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1247.

[64] *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 786. Edited.

[65] See *City of Ontario v. Quon* (2010) 560 U.S. 746, 763; *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 350; *People v. Williams* (2006) 145 Cal.App.4th 756, 761.

[66] See *People v. Bell* (1996) 43 Cal.App.4th 754, 761, fn.1; *Gallegos v. City of Los Angeles* (9th Cir. 2002) 308 F.3d 987, 992.

[67] See *Colorado v. Bertine* (1987) 479 U.S. 367, 372 ["[T]here was no showing that the police, who were following standard procedures, acted in bad faith or for the *sole* purpose of investigation." Emphasis added]; *People v. Torres* (2010) 188 Cal.App.4th 775, 792 [pretext tow was unreasonable because "the record shows a concededly investigatory motive and no community caretaking function"]; *U.S. v. Harris* (8th Cir. 2015) 795 F.3d 820, 822 [officers "may keep their eyes open for potentially incriminating items that they might discover in the course of an inventory search, as long as their sole purpose is not to investigate a crime"]; *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 364, 372 ["officers will inevitably be motivated in part by criminal investigative objectives. Such motivation, however, cannot reasonably disqualify an inventory search that is performed under standardized procedures for legitimate custodial purposes."]; *U.S. v. Coccia* (1st Cir. 2006) 446 F.3d 233, 240-41 ["A search or seizure undertaken pursuant to the community caretaking exception is not infirm merely because it may also have been motivated by a desire to investigate crime."].

TRAFFIC HAZARD: The vehicle constituted a traffic hazard or obstruction.[68]

ABANDONMENT: The vehicle had been abandoned.[69]

DRIVER INCAPACITATED: The driver had become incapacitated by injuries or illness.[70]

DRIVER ARRESTED + NECESSITY: While the Vehicle Code authorizes towing when officers have arrested the driver or other person in control of the vehicle,[71] the courts permit towing only if it was reasonably necessary.[72] For example, towing would ordinarily be permitted if the vehicle was away from the arrestee's home, especially if it was located in an area with a significant threat of theft or vandalism, or if the car was in an isolated area, or if the car could not be secured.[73] Towing would not ordinarily be reasonable if the vehicle could have been parked and secured in a safe place.[74] Similarly, there would ordinarily be no need to tow a vehicle if the arrestee wanted a friend at the scene to take possession, and the friend was licensed and insured.[75]

UNOCCUPIED CAR NEEDING PROTECTION: Even if the Vehicle Code did not expressly authorize towing, officers may do so if towing was reasonably necessary to protect the vehicle or its contents from theft or damage.[76] If towing was necessary, it is immaterial that the vehicle was located on private property.[77]

TOWING FORFEITED VEHICLE: Officers may tow a vehicle that was subject to forfeiture.[78]

EXPIRED REGISTRATION: The Vehicle Code authorizes towing if (1) the vehicle was on the street or a public parking facility; and (2) the registration expired over six months earlier, or the registration sticker or license plate was issued for another vehicle or was forged.[79]

SUSPENDED OR REVOKED DRIVER'S LICENSE: The Vehicle Code states that officers may impound a vehicle if the driver was given a notice to appear for violating Vehicle Code sections 14601 or 12500.[80] But if the driver was cited for driving on a suspended or a revoked license there is some uncertainty as to whether officers may tow the vehicle if there was a licensed and insured passenger on the scene who was willing to drive. As noted earlier, if the driver had been *arrested*, officers must ordinarily permit such a passenger to take the vehicle because there is no apparent justification for towing when the driver is going to jail and cannot drive off after officers have left. The situation might be viewed differently, however, if the driver was going to be cited and released. This is because it is possible, (maybe even probable considering his demonstrated contempt for California's licensing statutes) that the driver will drive anyway after officers depart. Thus, in *People v. Burch*[81] the court upheld towing in such a situation because the officer testified he usually did so "to prevent the cited driver from simply getting back into the vehicle and driving away."

[68] See *Cady v. Dombrowski* (1973) 413 U.S. 433, 443 [the "vehicle was disabled as a result of the accident, and constituted a nuisance along the highway"]; Veh. Code §§ 22651(a)-(b); *Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3d 858, 864.

[69] Veh. Code § 22669.

[70] Veh. Code § 22651(g).

[71] Veh. Code § 22651(h)(1).

[72] See *U.S. v. Ruckes* (9th Cir. 2009) 586 F.3d 713.

[73] See *People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1248; *People v. Scigliano* (1987) 196 Cal.App.3d 26, 30; *People v. Benites* (1992) 9 Cal.App.4th 309, 326; *Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3d 858, 864.

[74] See *People v. Williams* (2006) 145 Cal.App.4th 756, 762; *Miranda v. City of Cornelius* (9th Cir. 2005) 429 F.3d 858, 864 ["But no such public safety concern is implicated by the facts of this case involving a vehicle parked in the driveway of an owner who has a valid license"].

[75] See *U.S. v. Maddox* (9th Cir. 2010) 614 F.3d 1046, 1050; *U.S. v. Duguay* (7th Cir. 1996) 93 F.3d 346, 353.

[76] See *People v. Scigliano* (1987) 196 Cal.App.3d26, 29.

[77] See *Halajian v. D&B Towing* (2012) 209 Cal.App.4th 1, 15; *People v. Scigliano* (1987) 196 Cal.App.3d 26, 29; *People v. Auer* (1991) 1 Cal.App.4th 1664, 1669.

[78] See *Florida v. White* (1999) 526 U.S. 559, 566; *Cooper v. California* (1967) 386 U.S. 58.

[79] Veh. Code § 22651(o)(1)(A); *People v. Suff* (2014) 58 Cal.4th 1013, 1056.

[80] Veh. Code § 22651(p).

[81] (1986) 188 Cal.App.3d 172, 180.

Search procedures are reasonable

In addition to proving that the decision to tow was reasonable, officers must prove that the search was conducted in accordance with "standardized criteria or established routine."[82] The purpose of this requirement is to help ensure that inventory searches are not conducted for the purpose of "general rummaging in order to discover incriminating evidence."[83] As the Second Circuit observed in *U.S. v. Lopez*:

> [W]hen a police department adopts a standardized policy governing the search of the contents of impounded vehicles, the owners and occupants of those vehicles are protected against the risk that officers will use selective discretion, searching only when they suspect criminal activity and then seeking to justify the searches as conducted for inventory purposes.[84]

This does not mean the criteria and routine must be set forth in elaborate specificity. As the First Circuit pointed out, this would be impractical:

> Virtually by definition, the need for police to function as community caretakers arises fortuitously, when unexpected circumstances present some transient hazard which must be dealt with on the spot. The police cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities. Rather, they must be free to follow sound police procedure, that is, to choose freely among the available options, so long as the option chosen is within the universe of reasonable choices.[85]

Keep in mind that officers are not required to prove that, under the circumstances in each case, it was reasonable to conduct an inventory search of the vehicle. This is because, as discussed earlier, it is settled that inventory searches are always reasonable whenever a vehicle will be towed.[86] As the Ninth Circuit observed, "[I]t is undisputed that once a vehicle has been impounded, the police may conduct an inventory search."[87]

As we will now explain, there are two ways in which officers and prosecutors can prove that a search was conducted in accordance with standardized policy.

WRITTEN DEPARTMENTAL POLICY: If a department has a written policy in which it defines the permissible scope and intensity of its inventory searches, prosecutors can satisfy the standardization requirement by introducing a copy of the policy into evidence after laying the necessary foundation by, for example, having the searching officer identify it. What should be included in such a policy? In most cases, the following will suffice:

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[82] *Florida v. Wells* (1990) 495 U.S. 1, 4. Also see *Colorado v. Bertine* (1987) 479 U.S. 367, 374, fn.6 ["Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria."]; *People v. Nottoli* (2011) 199 Cal.App.4th 531, 546 ["But there was no evidence that [turning on a cell phone] was taken in accordance with any standardized policy or practice"]; *People v. Williams* (1999) 20 Cal.4th 119, 127 ["[T]he record must at least indicate that police were following some 'standardized criteria' or 'established routine' when they elected to open the containers"]; *People v. Green* (1996) 46 Cal.App.4th 367, 374 ["The search should be carried out pursuant to standardized procedures, as this would tend to ensure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function."].

[83] *Florida v. Wells* (1990) 495 U.S. 1, 4.

[84] (2nd Cir. 2008) 547 F.3d 364, 371. Also see *U.S. v. Marshall* (8th Cir. 1993) 986 F.2d 1171, 1176 ["When the police follow standardized inventory procedures that impact all impounded vehicles in a similar manner and sufficiently regulate the discretion of the officers conducting the search, the reasonableness requirement of the Fourth Amendment is satisfied."]; *U.S. v. Khoury* (11th Cir. 1990) 901 F.2d 948, 958 ["An inventory search is not a surrogate for investigation, and the scope of an inventory search may not exceed that necessary to accomplish the ends of the inventory."].

[85] *U.S. v. Rodriguez-Morales* (1st Cir. 1991) 929 F.2d 780, 787. Also see *U.S. v. Coccia* (1st Cir. 2006) 446 F.3d 233, 239 ["standard protocols have limited utility in circumscribing police discretion in the impoundment context because of the numerous and varied circumstances in which impoundment decisions are made."].

[86] See *South Dakota v. Opperman* (1976) 428 U.S. 364, 369 ["When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents."]; *People v. Benites* (1992) 9 Cal.App.4th 309, 328 [inventory searches of towed vehicles are "inevitable]; *U.S v. Lopez* (2nd Cir. 2008) 547 F.3d 364,, 369 ["It is well recognized in Supreme Court precedent that, when law enforcement officials take a vehicle into custody, they may search the vehicle and make an inventory of its contents."].

[87] *U.S. v. Wanless* (9th Cir. 1989) 882 F.2d 1459, 1463.

GENERAL SCOPE AND INTENSITY: The policy need only specify the general areas and things in the vehicle that should be searched in order to locate and identify items that need to be included in the inventory,[88] such as the following: the passenger compartment, including the glove box, console, under the seats;[89] the trunk,[90] including under the spare tire;[91] all open and closed containers including containers that did not belong to the driver or owner of the vehicle;[92] and the engine compartment.[93] The policy may also authorize a search of motorcycles,[94] rental cars,[95] and any property that officers turn over to a third party, such as the driver's friend.[96] If the vehicle contains so much property that a listing of each item would take an excessive amount of time, the policy may permit officers to photograph the property instead.[97] The policy need not require a listing of every object in the vehicle.[98]

OFFICER DISCRETION IS PERMITTED: The policy may permit officers to exercise discretion in determining what to search, but officers must exercise their discretion based on community caretaking objectives—not investigative interests.[99] As the Supreme Court explained, "A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself."[100]

READING DOCUMENTS: The policy may require or permit officers to read documents in the vehicle,[101] and to look through notebooks and other multipage documents to "ensure that there was nothing of value hidden between the pages."[102]

NO DAMAGE: The policy must not authorize officers to damage or destroy parts of the vehicle.[103]

CHP 180 FORMS: In lieu of a written policy as to the scope and intensity of the search, law enforcement agencies may satisfy the "standardization" requirement by mandating that their officers complete a CHP 180 form.[104] This form requires, among other things, that officers list all "property" in the vehicle, including radios, tape decks, firearms, tools, and ignition keys. It also requires a description of all damage to the vehicle.

UNWRITTEN DEPARTMENTAL POLICY: Although it is usually better to have a written policy, a department may verbally disseminate a policy that will meet the above requirements. As the court explained in *U.S. v. Tackett*, "Whether a police department maintains a written policy is not determinative, where testimony establishes the existence and contours of the policy."[105] Similarly, the California Supreme Court pointed out that the Fourth Amendment "does not require a *written* policy governing closed containers but the record must at least indicate that police were following some 'standardized criteria' or 'established routine.'"[106]

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[88] See *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 364, 371.
[89] See *South Dakota v. Opperman* (1976) 428 U.S. 364, 372-76; *U.S. v. Andrews* (5th Cir. 1994) 22 F.3d 1328, 1336.
[90] See *U.S. v. Johnson* (5th Cir. 1987) 815 F.2d 309, 314; *U.S. v. Tueller* (10th Cir. 2003) 349 F.3d 1239, 1244.
[91] See *U.S. v. Johnson* (5th Cir. 1987) 815 F.2d 309.
[92] See *Florida v. Wells* (1990) 495 U.S. 1, 4; *People v. Williams* (1999) 20 Cal.4th 119, 138.
[93] See *U.S. v. Pappas* (8th Cir. 2006) 452 F.3d 767, 772; *U.S. v. Lumpkin* (6th Cir. 1998) 159 F.3d 983, 987-88.
[94] See *People v. Needham* (2000) 79 Cal.App.4th 260, 267 ["We see no reason to treat motorcycles differently from cars"].
[95] See *U.S. v. Mancera-Londono* (9th Cir. 1990) 912 F.2d 373, 376; *U.S. v. Petty* (8th Cir. 2004) 367 F.3d 1009, 1012.
[96] See *People v. Needham* (2000) 79 Cal.App.4th 260, 267; *U.S. v. Tackett* (6th Cir. 2007) 486 F.3d 230, 233.
[97] See *U.S. v. Taylor* (8th Cir. 2011) 636 F.3d 461.
[98] See *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 364, 371.
[99] See *Colorado v. Bertine* (1987) 479 U.S. 367, 375; *People v. Steeley* (1989) 210 Cal.App.3d 887, 892.
[100] *Florida v. Wells* (1990) 495 U.S. 1, 4.
[101] See *People v. Hovey* (1988) 44 Cal.3d 543, 571.
[102] *U.S. v. Khoury* (11th Cir. 1990) 901 F.2d 948, 959. Also see *U.S. v. Andrews* (5th Cir. 1994) 22 F.3d 1328, 1335.
[103] See *U.S. v. Edwards* (5th Cir. 1978) 577 F.2d 883, 893; *U.S. v. Lugo* (10th Cir. 1992) 978 F.2d 631, 636.
[104] See *People v. Williams* (1999) 20 Cal.4th 119, 123; *County of Los Angeles v. Barker* (2015) 242 Cal.App.4th 475, 478.
[105] (6th Cir. 2007) 486 F.3d 230, 233.
[106] *People v. Williams* (1999) 20 Cal.4th 119, 127 [Edited]. Also see *U.S. v. Lopez* (2nd Cir. 2008) 547 F.3d 364, 370 [standard NYPD towing policy was established through an officer's testimony that officers are required to "do a total inventory of a vehicle. Everything has to come out."].

For example, in *People v. Green*[107] the Court of Appeal ruled that proof of a standardized policy was sufficient when the officer testified that she "considered the inventory search to be a natural consequence following the decision to impound defendant's automobile. Although she did not use the magic words 'standard procedure,' her matter-of-fact response indicates that an inventory search following impound of the vehicle is standard department procedure."

Here's another example of an officer's testimony that satisfied the standardization requirement:

> **DA**: What was your purpose of doing the inventory search; why did you do it?
>
> **Ofc**: Policy of Moss Point Police Department, when you arrest someone out of their vehicle, you tow it and do an inventory search of their personal belongings and items left in the vehicle for the protection of the city.
>
> **DA**: Is that standard operating procedures?
>
> **Ofc**: Yes, ma'am.
>
> **DA**: And is the policy, whether written or unwritten, of the police department to do that in every case?
>
> **Ofc**: Yes, ma'am.
>
> **DA**: And you said it was to protect the City of Moss Point or the police department. What do you mean by that?
>
> **Ofc**: Well, so the person that's arrested doesn't come back and say, well, I had a five thousand dollar stereo, or five hundred dollars and now it's missing."

In contrast, in *People v. Aguilar*[108] the Court of Appeal ruled that an inventory search was unlawful because the officer testified that "he impounded 90 percent of the time; he had not seen the [departmental] policy; and one of the reasons he impounded Aguilar's car was to look in the trunk." Said the court, "It is clear from [the officer's] testimony that the arrest and the impound were for "an investigatory police motive."

Protective Vehicle Searches

When officers have detained or arrested an occupant of a vehicle, a weapon in the passenger compartment can be almost as dangerous to them as a weapon in his waistband. For this reason, officers may conduct a protective search of the vehicle if both of the following circumstances existed:

(1) Officers reasonably believed there was a "weapon" inside the vehicle.

(2) The detainee or arrestee had potential access to the passenger compartment.

If these circumstances existed, officers may seize any weapons in plain view,[109] and may also search the passenger compartment for additional weapons.[110] They may not, however, search the trunk unless they develop grounds to conduct a probable cause search of it.[111]

Keep in mind that, if these circumstances existed, officers will not be required to prove that the detainee also presented a danger to them. For example, in *People v. Lafitte*[112] sheriff's deputies in

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[107] (1996) 46 Cal.App.4th 367, 375. Also see *People v. Steely* (1989) 210 Cal.App.3d 887, 892 [officer testified that his department's unwritten policy required that he "inventory the contents of a vehicle prior to towing to make sure what property is in the vehicle in case it shows up missing from the tow yard"].

[108] (1991) 228 Cal.App.3d 1049, 1052.

[109] See *Michigan v. Long* (1983) 463 U.S. 1032, 1050 ["If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances."]; *Adams v. Williams* (1972) 407 U.S. 143; *People v. Perez* (1996) 51 Cal.App.4th 1168, 1173 [as passenger stepped outside, a gun fell to the seat]; *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042 ["Once the officers discovered the knives, they had reason to believe that their safety was in danger and, accordingly, were entitled to search the [passenger] compartment and any containers therein for weapons."].

[110] See *Michigan v. Long* (1983) 463 U.S. 1032, 1049, 1051 [the officers "did not act unreasonably in taking preventive measures to ensure that there were no other weapons within Long's immediate grasp."]; *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042 ["Once the officers discovered the knives, they had reason to believe that their safety was in danger and, accordingly, were entitled to search the [passenger] compartment and any containers therein for weapons."]. Also see "Where there's some, there's usually more," in the section "Probable Cause Searches," above.

[111] See *Michigan v. Long* (1983) 463 U.S. 1032, 1049 [Court limits its holding to "the search of the passenger compartment of an automobile"].

[112] (1989) 211 Cal.App.3d 1429, 1433.

Orange County made a traffic stop on Lafitte at about 10:15 P.M. because one of his headlights was not working. While one of the deputies was explaining the situation to Lafitte, the other shined a flashlight inside the car and saw a knife on the open door of the glove box. The deputy seized the knife, then conducted a protective search of the passenger compartment for additional weapons. During the search, he found a handgun. Although it was not illegal to have such a knife in a vehicle, and although Lafitte had been cooperative throughout the detention, the court ruled that the search was justified because "the discovery of the weapon" provided "a reasonable basis for the officer's suspicion."

Officers are not, however, required to prove that, in addition to the presence of a weapon, the detainee appeared to present a danger to them. Still, it is a circumstance that should be cited because it would help prove that a protective vehicle search was necessary, just as it is a relevant circumstance in determining whether a pat search was necessary;[113] e.g., the detainee had a history of violence against officers, or he was hostile, or his behavior was unpredictable because it appeared he was under the influence of drugs or alcohol.[114]

"Weapon" defined

There are two types of weapons that will justify a protective search: (1) a conventional weapon; and (2) an object that, based on circumstantial evidence, is being used as a weapon. In some cases, the presence of a weapon may also be inferred based on the suspect's behavior.

CONVENTIONAL WEAPONS: An officer's observation of any type of conventional weapon in plain view (such as a firearm, knife, brass knuckles, nunchakus) will, of course, justify a protective vehicle search. This is true even if the weapon was possessed lawfully; e.g., a "legal" knife.[115]

VIRTUAL WEAPONS: A virtual weapon is essentially any object that reasonably appeared as if it was being used as a weapon, even though it was manufactured for another purpose. Examples include baseball bats, hammers, crow bars screwdrivers, and box cutters. How can the courts determine the intended use of an object? Like most things, it is based on the totality of circumstances, especially the location of object, its proximity to the suspect, and especially the ease with which it can cause physical harm to people.[116]

BEHAVIOR INDICATING PRESENCE OF WEAPON: Based on the law pertaining to pat searches, an officer's belief that there was a weapon in the passenger compartment may be based on the suspect's behavior and other circumstantial evidence.[117]

For example, in *People v. King*[118] two San Diego police officers stopped King for driving with expired registration. As one of them was walking up to the driver's window, he saw King "reach under the driver's seat," at which point he heard the sound of "metal on metal." In court, the officer testified that, based on these circumstances, he "feared for the safety of his partner and himself," especially because "there was increased gang activity in the area." After ordering King to exit, the officer looked under the front seat and found a .25-caliber semiautomatic handgun. In ruling that the officer reasonably believed there was a weapon under the seat, the court said, "[I]n addition to King's movement, we have the contemporaneous sound of metal on metal and the

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[113] See *Michigan v. Long* (1983) 463 U.S. 1032, 1047-48 [the principles pertaining to pat searches were the basis for the Court's recognition that protective vehicle searches may be reasonably necessary].

[114] See, for example, *Amacher v. Superior Court* (1969) 1 Cal.App.3d 150 [officer "had personally had words with petitioner when he stopped him for a traffic violation. He knew that petitioner had had numerous hostile run-ins with other officers, and that petitioner had little or no respect for law enforcement officers."]; *In re Michael S.* (1983) 141 Cal.App.3d 814 [suspect "acted very nervous, started breathing very rapidly, hyperventilating, and became boisterous and angry and very antagonistic [and] clenched and unclenched his fists" and became "borderline combative."]; *People v. Methey* (1991) 227 Cal.App.3d 349, 358 [detainee was carrying a pry bar].

[115] See *People v. Lafitte* (1989) 211 Cal.App.3d 1429.

[116] See *People v. Lafitte* (1989) 211 Cal.App.3d 1429 [knife atop an open glove box door]

[117] *Michigan v. Long* (1983) 463 U.S. 1032, 1049 [a protective vehicle search is permissible if the police officer "possesses a reasonable belief based on specific and articulable facts," including "rational inferences" from those facts"].

[118] (1989) 216 Cal.App.3d 1237.

officer's fear created by the increased level of gang activity in the area."

Potential access

If officers reasonably believed that a weapon was inside the vehicle, a protective search will be permitted only if the detainee or arrestee had not yet been subjected to a "full custodial arrest" and was therefore able to "gain immediate control" of the weapon. When that happens, said the Supreme Court, a protective vehicle search is permitted because "the officer remains particularly vulnerable" and the officer "must make a quick decision as to how to protect himself and others from possible danger."[119]

It should be noted that defense attorneys have sometimes cited *Arizona v. Gant*[120] as authority for prohibiting protective vehicle searches unless the detainee or arrestee had *actual* access to the passenger compartment at the time the search occurred. But *Gant's* requirement of actual access pertained to searches incident to arrest, and there is no logical reason that this requirement should be imported into the field of protective searches because officers do not ordinarily have as much control over detainees or those arrestees who not been subjected to a full custodial arrest.

Searches for ID

There is a type of warrantless vehicle search that is similar to, but distinct from, probable cause searches: searches for identification and related documentation. It is, of course, settled that officers who have stopped a vehicle for a traffic violation may inspect the driver's license, vehicle registration, rental forms, and proof of insurance.[121] Because they also have probable cause to believe that such documents will be found in the vehicle, it has been argued that officers who have made a traffic stop should themselves be able to conduct a search for the documents. The courts have, however, consistently rejected these arguments mainly because there will usually be no reason to prohibit the driver from doing so.

Officers may, however, search for such documentation if they reasonably believed it would have been impractical or dangerous for them to permit the driver or another occupant to conduct the search, or if officers reasonably believed the vehicle had been stolen or abandoned.[122] For example, the courts have upheld warrantless searches for documentation under the following circumstances:

- The driver was unable to produce a driver's license and said he did not know where the registration certificate was located because he did not own the vehicle.[123]
- The driver abandoned the car and the passenger (a parolee) said he didn't know the owner.[124]
- The driver said the car belonged to one of his passengers, but the passengers claimed they were hitchhikers."[125]
- An armed and dangerous driver fled from officers and they reasonably believed the vehicle contained evidence that would help them locate him.[126]
- The driver was stopped at 2 A.M. for driving erratically; there were two other men in the vehicle, one of whom had been hanging out a window and waving a whiskey bottle.[127]

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[119] *Michigan v. Long* (1983) 463 US 1032, 1052.
[120] (2009) 556 U.S. 332. Also see *U.S. v. Scott* (8th Cir. 2016) __ F.3d __ ["we have rejected the notion that *Gant's* requirements apply when no arrest has taken place"].
[121] See Veh. Code § 12951(b) ["The driver of a motor vehicle shall present the registration or identification card or other evidence of registration of any or all vehicles under his or her immediate control for examination upon demand of any peace officer" who has been lawfully stopped for a traffic violation."]; *In re Arturo D.* (2002) 27 Cal.4th 60, 78 ["When the officer prepared to cite Arturo for a Vehicle Code violation, he had both a right and an obligation to ascertain the driver's true identity"].
[122] See *People v. Hart* (1999) 74 Cal.App.4th 479, 488.
[123] *People v. Martin* (1972) 23 Cal.App.3d 444, 447. Also see *People v. Vermouth* (1971) 20 Cal.App.3d 746, 752.
[124] *People v. Turner* (1994) 8 Cal.4th 137, 182,
[125] *People v. Webster* (1991) 54 Cal.3d 411, 431.
[126] *People v. Remiro* (1979) 89 Cal.App.3d 809, 830.
[127] *People v. Faddler* (1982) 132 Cal.App.3d 607, 610.

Two other things should be noted. First, before beginning the search, officers may order the occupants to exit.[128] Second, the search must be limited to places and things in which such documents may reasonably be found; e.g., the glove box, above the visor, under the seats.[129] But the search need not be limited to places in which such documents are "usually" or "traditionally" found.[130] Finally, in the absence of probable cause, officers may not search the trunk for ID.[131]

Other Vehicle Searches

There are five other types of warrantless vehicle searches that, although they do not require much discussion, should be noted.

CONSENT SEARCHES: The owner of a vehicle, or a person who has the owner's permission to drive it, may ordinarily consent to a search of both the vehicle and its contents.[132] There is, however, an exception: Officers may not search a container in the vehicle if it reasonably appeared that someone other than the consenting person had exclusive control or access to it.[133]

PROBATION AND PAROLE SEARCHES: Officers may ordinarily search the vehicle pursuant to the terms of probation or parole if they were aware that the owner or the driver was on parole or was on probation which contained a search clause authorizing vehicle searches or searches of property under the probationer's control. In addition to searching property under the control of the probationer or parolee, officers may search property belonging to a passenger if they reasonably believed the parolee could have stowed his belongings in the property when he became aware of "police activity."[134]

EXIGENT CIRCUMSTANCES: Under the exigent circumstances exception to the warrant requirement, officers may forcibly enter a vehicle if it was reasonably necessary to protect a person from imminent harm, or protect property from imminent damage; e.g., child locked in vehicle, an occupant was sick or injured, gun or dangerous chemical was inside. It may also be necessary to enter a vehicle that has been burglarized or is otherwise insecure for the purpose of locking it or searching for registration that will enable officers to notify the owner.

SEARCHES BY VEHICLE THEFT INVESTIGATORS: Officers whose primary responsibility is to investigate vehicle theft may search unoccupied vehicles to determine the lawful owner if the vehicle was located "on a highway or in any public garage, repair shop, terminal, parking lot, new or used car lot, automobile dismantler's lot, vehicle shredding facility, vehicle leasing or rental lot, vehicle equipment rental yard, vehicle salvage pool, or other similar establishment."[135]

VIN SEARCHES: Regardless of whether there are grounds to do so, officers may look through the windshield of a vehicle to inspect the VIN plate located on the dash if the car is located in a public place. If the vehicle was stopped for a traffic violation, and if the VIN plate was covered, officers may enter the vehicle and remove the covering in order to record the VIN number.[136] POV

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[128] See *People v. Webster* (1991) 54 Cal.3d 411, 431.
[129] See *In re Arturo D.* (2002) 27 Cal.4th 60, 78, 81; *People v. Webster* (1991) 54 Cal.3d 411, 431; *People v. Turner* (1994) 8 Cal.4th 137, 182 [glove box]; *People v. Martin* (1972) 23 Cal.App.3d 444, 447 ["on the sun visors"].
[130] See *In re Arturo D.* (2002) 27 Cal.4th 60, 78 [search need not be limited to "traditional repositories"].
[131] See *In re Arturo D.* (2002) 27 Cal.4th 60, 86, fn.25 [trunk is not where ID documents reasonably would be expected to be found].
[132] See *People v. Clark* (1993) 5 Cal.4th 950, 979; *People v. Carvajal* (1988) 202 Cal.App.3d 487, 495-97.
[133] See *People v. Baker* (2008) 164 Cal.App.4th 1152, 1159-60 ["Although the officer testified that he did not know who the purse belonged to when he searched it, there was no reasonable basis to believe the purse belonged to anyone other than the sole female passenger."]; *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321, 326 ["[R]eliance upon the third party's consent is not justified where it is clear that the property belongs to another."]; *People v. Cruz* (1964) 61 Cal.2d 861, 866 ["The general consent given by Ann and Susan that the officers could 'look around' did not authorize [the officers] to open and search suitcases and boxes that he had been informed were the property of third persons."].
[134] See *People v. Schmitz* (2012) 55 Cal.4th 909, 926.
[135] Veh. Code § 2805.
[136] See *New York v. Class* (1986) 475 U.S. 106; *People v. Lindsey* (1986) 182 Cal.App.3d 772, 779.

Recording Staged Communications

"[That gun] sure did put a hole right through him. I could hear it go through the car after it went through him."
Murder suspect bragging to informant.[1]

Undercover officers, police informants, crime victims, and others will frequently engage suspects in staged conversations pertaining to a crime under investigation. These conversations may take place over the phone or face-to-face, and they are almost always recorded by microphones or miniaturized video cameras. The objective, of course, is to obtain a recording of an incriminating statement that prosecutors can use in court.

Recently, the recording of electronic communications became a hot topic in California as the result of the state's new Electronic Communications Privacy Act (CalECPA) which went into effect on January first.[2] Because CalECPA restricts how officers can obtain copies of electronic communications such as emails, voicemails, and text messages, there is some uncertainty as to whether it or other state laws, or maybe the Fourth Amendment, might restrict the recording of these staged conversations. A related question is whether the law affects the recording of inmate phone calls in jails and prisons, and the secret recording of conversations between officers and barricaded suspects.

As we will discuss, CalECPA should not affect any of these operations. There is, however, another state law that might, so we will discuss it as well. (We will not discuss *Miranda* because, even if the suspect was in custody, it does not apply when the person asking questions was an undercover agent.[3])

Secretly Recording Telephone Conversations With Suspects

CalECPA: CalECPA does not restrict these operations because its stated objective is to restrict when and how officers can compel an electronics communications provider to disclose private communications or data pertaining to such communications. Thus, while CalECPA clearly restricts access to electronic communications and metadata possessed by, for example, email and voicemail providers, it does not purport to restrict the recording, or the subsequent access to recordings, by law enforcement.

Invasion of Privacy Act: In addition to CalECPA, California has a so-called Invasion of Privacy Act (IPA) which generally prohibits people from intercepting or recording any telephone call or face-to-face communication unless *all* parties to the conversation consented.[4] At first glance, this rule would seem to restrict staged undercover operations because it is impossible to obtain a suspect's consent to "secretly" record his incriminating conversations. Fortunately, the IPA contains a law enforcement exception which states that such recordings may be made without court authorization if (1) *one* of the parties to the conversation consented (e.g., the undercover officer or informant), and (2) the purpose of the recording was to obtain evidence pertaining to extortion, bribery, or any other violent felony, including kidnapping.[5] It also allows the recording of annoying phone calls.

Although this exception is restricted to certain crimes, this should not ordinarily pressent a problem because the list includes most crimes for which such a sensitive operation would be undertaken. For example, while the statute does not expressly state that it covers drug trafficking, it plainly does so because of the close connection between trafficking and violent felonies.[6]

The Fourth Amendment: The Fourth Amendment does not restrict these undercover operations because a person who makes an incriminating state-

[1] *People v. Phillips* (1985) 41 Cal.3d 29, 52, fn.5. Edited.
[2] Pen. Code § 1546 et seq.
[3] See *Illinois v. Perkins* (1990) 496 U.S. 292.
[4] See Pen. Code §§ 632(a), 632.5(a) and 632.7. Also see 18 U.S.C. §§ 2510 and 2511.
[5] Pen. Code § 633.5.
[6] See *People v. Glaser* (1995) 11 Cal.4th 354, 367. Also see *People v. Thurman* (1989) 209 Cal.App.3d 817, 822.

ment to another (except an attorney) cannot reasonably expect that the other person will honor his stated or implied promise to keep it private. As the Supreme Court observed, "[I]f the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence."[7]

For example, in *Lopez v. United States*[8] the defendant offered a bribe to an IRS agent who was investigating him for failing to pay income taxes. The agent took the bribe but immediately reported it to his superiors. Lopez and the agent had agreed to meet three days later at Lopez's office, so the IRS sent the agent to the meeting with a hidden recording device. During the meeting, Lopez made several incriminating statements that were used against him at trial. He appealed his conviction to the Supreme Court, arguing that the recording constituted an unlawful search under the Fourth Amendment because he reasonably expected that a conversation in his private office would be private. But the Court ruled that such an expectation would have been unreasonable under the circumstances because the recording device merely recorded a conversation to which "the Government's own agent was a participant" and which the agent was "fully entitled to disclose" to prosecutors and jurors.

Intercepting Face-To-Face Conversations with Suspects

Instead of engaging the suspect in a telephone conversation, officers may be able to arrange a face-to-face meeting between him and an undercover officer or police agent who is wearing a hidden recording device. Or, if the meeting occurs in a private place that is controlled by officers (e.g., a motel room), they may be able to hide the device in the room itself.

CALECPA: CalECPA does not apply because, as noted, it restricts only the acquisition of electronic communications recordings made by cell phone, email, and other providers.

INVASION OF PRIVACY ACT: The IPA does not restrict these operations because, as noted, there is a law enforcement exception which permits warrantless recording if one party to the conversation consents. There is, however, one twist: If the bugging device was preinstalled or otherwise hidden in a room, and if the undercover officer or police agent temporarily left the room, the recording of any incriminating conversations between the remaining suspects in the room will likely be suppressed. This is because the police agent would no longer be a "party" to the conversation and therefore none of the remaining parties would have consented to the recording.[9]

THE FOURTH AMENDMENT: The Fourth Amendment is not an obstacle to these types of operations because, as noted, a suspect cannot reasonably expect that the person he is speaking with is not recording the conversation. For example, in *U.S. v. Thompson* the Seventh Circuit recently ruled that such an operation did not violate the Fourth Amendment because, as the court explained, "[O]nce Thompson invited the informant into the apartment, he forfeited his privacy interest in those activities that were exposed to the informant."[10]

Also note that a face-to-face conversation may also be recorded by video devices because cameras record "nothing more than what the informant could see with his naked eye."[11]

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[7] *U.S. v. White* (1971) 401 U.S. 745, 752. Also see *People v. Phillips* (1985) 41 Cal.3d 29, 52.
[8] (1963) 373 U.S. 427.
[9] See *U.S. v. Nerber* (9th Cir. 2000) 222 F.3d 597, 604 ["once the informants left the room, defendants' expectation to be free from hidden video surveillance was objectively reasonable"]; *U.S. v. Lee* (3rd Cir. 2004) 359 F.3d 194, 202; *U.S. v. Laetividal-Gonzalez* (11th Cir. 1991) 939 F.2d 1455, 1462 ["Any conversations recorded when [the informant] was absent from the office would not have been admissible evidence"].
[10] (7th Cir. 2016) __ F.3d __ [2016 WL 384860].
[11] *U.S. v. Thomspon* (7th Cir. 2016) __ F.3d __ [2016 WL 384860]. Also see *U.S. v. Wahchumwah* (9th Cir. 2013) 710 F.3d 862, 866-68.

Intercepting Conversations in Jails and Prisons

Jails and prisons routinely monitor and record telephone conversations between inmates and people on the outside (except attorneys). They also routinely monitor conversations between inmates and their visitors. As we will now explain, such a practice does not violate any law.

CALECPA: Although jail and prison conversations are intercepted by means of electronic recording equipment, they are not regulated by CalECPA because, as noted, it applies only when investigators attempt to compel the disclosure of communications from an electronic communications provider.

INVASION OF PRIVACY ACT: The recording of inmate telephone and visitor conversations in jails and prisons does not violate the IPA because it expressly exempts communications that are not "confidential." And such communications are not confidential because jails and prisons routinely post notices that they may be recorded. As the court observed in *People v. Kelley*, "So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent."[12] In other words, in jails and prisons "the age-old truism still obtains: 'Walls have ears.'"[13]

It appears the IPA also exempts recordings that are made in police stations because the California Supreme Court ruled in *People v. Loyd* that "[t]here is no longer a distinction" between the reasonable privacy expectations of people who communicate in jails and those who communicate in police cars (and thus, presumably, police stations).[14]

THE FOURTH AMENDMENT: As just discussed, jail and prison inmates, and suspects who are questioned in police stations, cannot reasonably expect that their conversations will be private (except attorney client conversations). Thus, the interception of such conversation does not constitute a "search" under federal law and, therefore, a court order is not required. As the Ninth Circuit observed in *U.S. v. Van Poyck,* "Even if Van Poyck believed that his calls were private, no prisoner should reasonably expect privacy in his outbound telephone calls."[15]

Recording Barricaded Suspects

When officers respond to barricaded suspect calls—with or without hostages—they will often want to utilize an electronic listening device that intercepts and transmits any conversations that occur in the building; e.g., conversations between the suspect and his accomplices or captives. In some cases, the device will be a cell phone—commonly known as a "throw phone"—that is tossed inside to encourage and enable him to talk with officers.

Although the suspect may be unaware that these devices are recording his conversations (e.g., throw phones usually contain a bugging device that stays on even when the phone is turned off), for many years no one seriously suggested that these operations interfered with anyone's privacy rights. After all, when a barricaded suspect is threatening to kill himself or others, the exigent circumstances exception to the warrant requirement says that court authorization is not required if immediate action is reasonably necessary—and it usually is.

Technically, however, these operations might violate the IPA because, assuming the conversation is deemed "confidential," the IPA says that law enforcement officers may not intercept such a communication unless *all* parties to the communication consented.[16] Because it would be impractical to obtain a suspect's consent under these circumstances, officers would theoretically risk criminal prosecution unless they obtained a court order. And yet it appears that no officer has ever been prosecuted for committing such a "crime," and that no hostage has ever attempted to sue an officer for invading his privacy while trying to save his life. So this has never presented a problem in real life.

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[12] (2002) 103 CA4 853, 858.
[13] *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528. 535-36. Also see Pen. Code § 632(c).
[14] (2002) 27 Cal.4th 997.
[15] (9th Cir. 1996) 77 F.3d 285, 290-91.
[16] See Pen. Code § 632(a).

Unfortunately, however, we cannot end the discussion at this point because the Legislature decided in 2011 that this situation needed "fixing" so it enacted an exigent circumstances exception to the IPA which became Penal Code section 633.8. As explained in the statute, "It is the intent of the Legislature in enacting this section to provide law enforcement with the ability to use electronic amplifying or recording devices to eavesdrop on and record the otherwise confidential oral communications of individuals within a location when responding to an emergency situation that involves the taking of a hostage or the barricading of a location."

Although this "fixed" the non-problem, it created an actual one. Specifically, while writing the statute, the Legislature decided that it needed to add a section that would protect the "privacy rights" of barricaded suspects. So it devised an excessively complex and burdensome procedure that officers must follow *after* the emergency had been defused. Specifically, within 48 hours they must apply for an eavesdropping warrant that must comply with all the myriad and onerous requirements for a California *wiretap* order.[17]

Apart from the dubious wisdom of this requirement, the question arises how a judge can order officers to do something they have already done. They might also ask, What happens if the judge refuses to sign the order? The answer is apparently "nothing" because the statute states that evidence obtained in violation of its procedure cannot be suppressed.[18]

As for the cumbersome wiretap procedure, the Legislature apparently believed it was justified by the need to protect the privacy rights of barricaded suspects and hostage takers. But this seems to have been unnecessary because there is already an effective mechanism by which barricaded suspects (and anyone else) can challenge the admissibility of evidence that they claim was obtained by officers as the result of an unreasonable interference with their reasonable expectations of privacy: It is known as a Motion to Suppress.[19] POV

Pinging 911 Hangups

When a person phones 911 on a cell phone, but hangs up before the call can be completed, 911 operators can "ping" the caller's telephone and thereby learn the caller's current location. This may enable 911 operators to send help to the location or at least enable officers to locate the caller to determine whether there was, in fact, an emergency.

Although it is apparent that CalECPA was not intended to restrict this practice, the wording of the statute might technically be interpreted to mean that a warrant is necessary because CalECPA states that a warrant is required to obtain "electronic device information" which it defines as information that reveals the "current and prior locations of the device."[20]

However, such an interpretation would be illogical for three reasons. First, as discussed earlier, CalECPA applies only when officers are trying to compel a provider to furnish electronic communications. Second, CalECPA states that a warrant is not required if the 911 operator "in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information."[21] This would apparently include 911 hangups because many of these calls are from people who are unable to complete the call due to illness, injury, or an imminent threat. Third, CalECPA says a warrant is not required if "the intended recipient"—which would be the 911 operator—voluntarily disclosed the information to a law enforcement agency.[22] POV

[17] See Pen. Code § 633.8(e).
[18] See Pen. Code § 633.8(l).
[19] **NOTE**: The statute states that it is intended to protect only "confidential oral communications." Accordingly, if the barricaded suspect was holding a hostage, nothing he said would be "confidential" so it would be unnecessary to comply with the statute.
[20] See Pen. Code § 1546(g).
[21] Pen. Code § 1546.1(c)(5).
[22] Pen. Code § 1546.1(a)(3).

Recent Cases

People v. Perez

(2016) 243 Cal.App.4th 863

Issue

Was a murder suspect's confession given voluntary, or did it result from an officer's promise of leniency?

Facts

One evening in Indio, Christopher Jasso decided to commit an armed robbery, and he enlisted his friend Fabian Perez to be his getaway driver. Jasso ultimately decided to rob a cab driver and, after flagging one down, he got into the backseat, pulled out a .25 caliber handgun and shot the driver in the head. The driver, Carlos Cardona, was killed. Jasso then took Cardona's wallet and, after he was picked up by Perez, he gave him half of the loot (consisting of about $300). Perez later disposed of the gun.

Inside the cab, investigators found a .25 caliber shell casing on the driver's seat and a newspaper in the back seat. Investigators checked businesses in the area for surveillance cameras and eventually located one outside a convenience store. The video showed Jasso walking into the store shortly before the murder, buying something, then getting into Cardona's taxi.

Next, they obtained a warrant to search Jasso's home where they found (1) a wallet that matched the description of Cardona's wallet; (2) clothing that matched the clothing that Jasso was wearing on the video; and (3) two spent .25 caliber shell casings which, according to forensics, had been fired from the same gun that was used to kill Cardona. Forensics also found Jasso's fingerprints on the newspaper that was left in the back seat of the taxi.

Investigators later interviewed one of Jasso's friends who said that Perez had admitted to him that he was Jasso's accomplice, but that Jasso was the shooter. Perez also said the murder weapon belonged to him. After an unproductive search of Perez's home, officers obtained his consent to accompany them to the police station for questioning.

During the first 25 minutes of the interview, Perez denied any involvement in the crimes. After that, one of the detectives made the following (highly edited) comments to Perez:

- You can go home today. I'm telling you, you can go home today. You can live the life that you want to live. You put yourself in a situation, something really bad happened, I don't think you were part of that."
- If you are honest, "we are not gonna charge you with anything. Simply that's it." "You be honest, you tell the truth." "You'll have your life, maybe you'll go into the Marines and you'll chalk this up to a very scary time in your life."

Perez then admitted that he assisted Jasso in the robbery, but that the murder of the taxi driver was unplanned. After Perez was charged with the robbery and murder, he filed a motion to suppress the statements on grounds that they were involuntary. The trial court denied the motion and Perez was found guilty of murder and sentenced to life without parole. (Jasso was tried separately. He was found guilty and sentenced to death.)

Discussion

On appeal, Perez argued that his motion to suppress should have been granted because his statement was the product of impermissible police interrogation tactics. Specifically, he contended that, as the result of the detective's promise not to charge him if he was honest, his subsequent confession was involuntary. The court agreed.

As a general rule, a statement is voluntary if the suspect made it freely. Although the words "freely" and "voluntary" might suggest that a statement can be voluntary only if it was spontaneous or even impulsive, that is not true. Nor is it true that a statement is voluntary only if it was the product of a rational and unburdened mind. Instead, it is more accurate—or at least more helpful—to say that a statement is voluntary if it was not *in*voluntary.

There are two circumstances that must exist for a statement to be deemed involuntary: (1) the inter-

rogation must have been psychologically coercive in nature, and (2) the coercion must have played a dominant role in the suspect's decision to make the statement.[1] In *Perez*, this second requirement was plainly met because Perez made his incriminating statement shortly after the detective told him that he would not be charged if he gave a true statement, and also because there were no intervening circumstances. Consequently, the central issue was whether the detective's comments to Perez constituted coercion.

An officer's words or conduct will be deemed psychologically coercive if they generated such stress that the suspect would have felt compelled to confess or make a damaging admission.[2] Psychological coercion often results if an officer expressly or impliedly promised that, in return for a truthful statement, he would give the suspect something that the suspect wanted desperately; e.g., his freedom, a lighter sentence. Psychological coercion may also result if an officer said or implied that he would withhold such assistance if the suspect refused to make a truthful statement.

On the other hand, it is not inherently coercive for officers to inform a suspect of the realities of his predicament, such as the possible charges he is facing and the ranges of jail or prison time he might be facing.[3] Nor is it inherently coercive to promise the suspect that officers would notify a prosecutor or judge that he had given a truthful statement.[4] But—and this is critically important—they must not promise or imply that the suspect would receive any of these things in return for a truthful statement, such as a specific term of imprisonment.

In *Perez*, it was clear that the detective did not merely discuss potential sentences or promise to talk to prosecutors—he expressly promised Perez that he would not be charged if he gave a truthful statement. As the court explained,

> [The detective] told Perez, "We are not gonna charge you with anything. Simply that's it." The sergeant did far more than simply exhort Perez to tell the truth and promise to make a charging *recommendation* to the prosecutor. He clearly promised Perez that Perez would not be charged with a crime.

Accordingly, the court ruled that Perez's statement was involuntary and that it should have been suppressed.

Comment

In another recent case, *People v. Peoples*,[5] the California Supreme Court had to decide whether Stockton police officers had utilized coercion in obtaining an incriminating statement from Peoples who, during a five month crime spree, committed two burglaries, three robberies, and four murders. After he was arrested for the crimes, he was questioned for about 12 hours, and during the first ten hours he claimed he was innocent. Then one of the detectives notified him that his wife had "implicated" him in the crimes, and the detective showed him pictures of his family, pleading with him "not to make his family's life any more difficult than he already had." Peoples then led the detectives to the murder weapon. It was also revealed that, during the interview, Peoples "showed signs of physical and mental exhaustion; sweating, pulling out his hair, rubbing his skin, twitching his facial muscles, grinding his teeth, and at times appearing to fall asleep."

As for threating Peoples that they would "drag" his wife into the case if he did not confess, the court ruled that this did not constitute a threat because the detective "did not suggest that they would charge

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[1] See *Colorado v. Connelly* (1986) 479 U.S. 157, 164; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1088.
[2] See *Culombe v. Connecticut* (1961) 367 U.S. 568, 576; *Arizona v. Fulminante* (1991) 499 U.S. 279, 287.
[3] See *People v. Daniels* (1991) 52 Cal.3d 815, 863 ["There is nothing improper in confronting a suspect with the predicament he or she is in"]; *People v. Flores* (1983) 144 Cal.App.3d 459, 469 ["truthful and commonplace statements of possible legal consequences, if unaccompanied by threat or promise, are permissible"].
[4] See *People v. Carrington* (2009) 47 Cal.4th 145, 174 ["The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant that full cooperation might be beneficial in an unspecified way."]; *People v. Boyde* (1988) 46 Cal.3d 212, 239 ["[The detective] repeatedly and clearly stated that he had no authority to make any promise of leniency regarding the pending robbery-kidnap charges, but could only pass information on to the district attorney."].
[5] (2016) 62 Cal.4th 718.

his wife with a crime." As for Peoples' mental state, the court acknowledged that the interview was lengthy, and that Peoples "showed some signs of fatigue." There were, however, some offsetting circumstances; i.e., he "was given numerous breaks, drinks, and food, and he was offered the chance to speak with a lawyer numerous times." Thus, the court concluded that "the prosecution met its burden of establishing by a preponderance of the evidence that defendant's statement was not coerced."

People v. Arredondo

(2016) 245 Cal.App.4th 186

Issue

Are unlicensed drivers exempt from California's "implied consent" law?

Facts

At about 11 P.M., an unlicensed driver named Marcus Arredondo was driving erratically in a car containing six passengers. He eventually flipped the car, and this resulted in serious injuries to one passenger and minor injuries to another. In addition, Arredondo had been knocked unconscious and remained so after he was transported to the Santa Clara Valley Medical Center's trauma room. An officer at the hospital who had been dispatched there to "keep track" of him was informed that Arredondo had been identified as the driver of the car. Although Arredondo still had not regained consciousness, the officer arrested him and instructed a phlebotomist to take a blood sample pursuant to California's so-called "implied consent" law. The sample tested at 0.08%.

After being charged with felony drunk driving and driving without a license, Arredondo filed a motion to suppress the blood test results, arguing that he had neither expressly nor impliedly consented to a blood draw. The trial court denied the motion based on another California law that says a driver who has not signed an implied consent form is nevertheless deemed to have given his consent by driving a motor vehicle on a California roadway. Arredondo subsequently pled no contest, but appealed the denial of his motion to suppress.

Discussion

A driver who has been arrested for a DUI-related crime will be deemed to have expressly consented to chemical testing if (1) he voluntarily agreed to take the test, or (2) he signed a consent form which motorists are required to sign when they apply for or renew a driver's license.[6] In addition, a driver may be deemed to have impliedly consented by simply driving a motor vehicle on a California roadway.

Arredondo argued that he had not expressly consented to the blood draw since he was unconscious at the time; and, since he had never applied for a driver's license, he had never signed a DMV consent form. Consequently, the issue was whether he had impliedly consented.

It is the law in California that a person who has been arrested for committing certain DUI-related crimes on a California roadway "is deemed to have [impliedly] given his or her consent to chemical testing of his or her blood or breath."[7] The law also says that a driver who is unconscious or is "otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent . . . ."[8] It would therefore appear that Arredondo had impliedly consented to chemical testing because he was, in fact, operating a motor vehicle in California, and he had been arrested for a DUI-related crime. But the Court of Appeal saw things differently.

First, it essentially ruled that courts cannot imply consent merely because the arrestee drove on a California roadway. This is because, in the court's view, driving a motor vehicle is a basic or fundamental right, not merely a privilege; and, as the result, "it is doubtful that the state has the power to flatly

[6] See Veh. Code §13384(b) ["I agree to submit to a chemical test of my blood, breath, or urine for the purpose of determining the alcohol or drug content of my blood when testing is requested by a peace officer acting in accordance with Section 13388 or 23612 of the Vehicle Code."].
[7] Veh. Code § 23612(a)(1)(A).
[8] Veh. Code § 23612(a)(5).

prohibit its citizens from driving" because such a prohibition means "foregoing a constitutional right to travel."[9] Thus, it ruled that a driver can ordinarily consent to chemical testing only if he expressly consented by either notifying an officer that he consented or by signing the DMV's consent form when he applied for or renewed a driver's license. And because Arredondo was unconscious when he was arrested, and because he was also unlicensed, he had done neither of these things.

The court did, however, acknowledge that a driver might be deemed to have consented if he engaged in certain conduct that effectively manifested such consent. But it ruled that merely driving a car on a roadway is insufficient. In the words of the court, "The mere operation of a motor vehicle is not a manifestation of *actual* consent to a later search of the driver's person. To declare otherwise is to adopt a construct contrary to fact."

In support of its ruling, the court noted three things. First, it said that, although a defendant may waive his Fourth Amendment rights as a condition of probation, such a waiver is effective only because the defendant was "explicitly told of, and agrees to accept, the conditions imposed upon his or her enjoyment of the privilege the state grants him by withholding the prescribed punishment for his offense." But unlike probationers, said the court, drivers who choose not to participate in California's licensing process do not effectively consent to blood or breath testing because, said the court, they "have not been asked to agree, or told that they have a choice, or apprised of the consequences that will flow from their conduct."

Second, the court said that the use of the term "implied consent" is "misleading, if not inaccurate." That is because the real purpose of law is not to imply consent, but simply to provide a mechanism by which officers can induce a DUI suspect to voluntarily provide a blood or breath sample. Said the court, the law's purpose is merely to "provide an incentive for voluntary submission to the chemical test."

The court's third point is somewhat technical in nature. It pointed out that the implied consent statute says a driver is "deemed" to have given his consent to chemical testing under certain circumstances. But, according to the court, this is merely a "legal fiction" because "deeming" that a person has consented to do something does not mean that the person actually or even impliedly consented. Moreover, said the court, the "legislature does not have the power to 'deem' into existence 'facts' operating to negate individual rights arising under the federal constitution," adding that it fears "the Fourth Amendment could be left *in tatters* (emphasis added) by a rule empowering the state to predicate a search on conduct that does not in fact constitute manifestation of consent, but is merely 'deemed' to do so by legislative fiat."

Despite the court's ruling that the withdrawal of Arredondo's blood was unlawful, it ruled that, pursuant to the good faith exception to the exclusionary rule, the blood test results were admissible because the implied consent statute was sufficiently confusing and ambiguous that the officer in this case could not be faulted for failing to comprehend its many defects. But now that the court in *Arredondo* has supposedly cleared up all of this confusion, the good faith rule will no longer apply. (Our conclusion: Much of this overwrought decision is of questionable validity.)

People v. Garcia

(2016) 244 Cal.App.4th 1349

Issue

Was a showup of three robbery suspects unduly suggestive because officers had told the victims beforehand that they had "caught the guys"?

Facts

Two minors, Daniel and Abraham, were skateboarding in a parking lot in Escondido when they were robbed by three men who stole a cellphone, headphones, and a skateboard. One of the robbers threatened the victims with a hammer. The victims immediately reported the robbery and informed officers that the perpetrators fled in an old gray Honda with a broken back window. They also pro-

[9] Quoting from *U.S. v. Kroll* (8th Cir. 1973) 481 F.2d 884, 886.

vided the license number of the Honda. About five hours later, officers spotted four men in the same car near the crime scene, so they attempted to make a car stop. But the men led the officers on a short pursuit which ended when all four bailed out in the parking lot of an apartment complex. Three of the men were captured following a foot chase. Inside the car, officers found property that had just been stolen in the robbery of six skateboarders that had occurred about two miles away.

At the scene of the car stop, officers phoned Daniel and Abraham and arranged to have them driven to the scene for a showup. During the phone call, Abraham was informed that officers "had caught the guys," and Daniel was told that the officers "had stopped some people they thought might be involved in the robbery." Abraham identified all three detainees but Daniel identified none of them. Both Abraham and Daniel positively ID'd the Honda.

After being charged with robbery, among other things, the defendants filed a motion to suppress the showup IDs by Abraham and also the identification of the Honda by Abraham and Daniel. The motion was denied and all three were convicted and sentenced to lengthy prison terms.

Discussion

The law pertaining to showups is fairly straightforward. As the court explained, "The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." On appeal, the defendants argued that their showup was impermissibly suggestive because Daniel and Abraham were told beforehand that officers believed that the detainees were, in fact, the robbers.

It has been argued that, prior to showups, officers must never inform a witness that they have detained one of the perpetrators, or that one of the detainees is a "suspect"; e.g., "Which one of these guys did it?"[10] Although such comments should be avoided, it will not ordinarily result in an unfair showup because witnesses who are asked to view a lineup will naturally assume that officers did not pick a detainee at random in hopes he was the perpetrator.[11]

In any event, the court in *Garcia* ruled that, even if the comments were suggestive, there were circumstances that would have reduced the chances of misidentification. Specifically, Abraham was told that "he should not infer any guilt just because someone had been detained, that he did not have to identify anyone and that it was just as important to free an innocent person as identify someone involved in the crime." And in his testimony at the motion to suppress, Abraham testified that he understood the warning to mean that the officers wanted to know "if those were the correct guys."

Furthermore, Abraham's ID of the defendants was based on several circumstances, such as their clothing, height, and hair style. As additional proof that the showup was not unduly suggestive, the court noted that, because Daniel did not identify any of the defendants, it appeared that he "felt no suggestion or pressure." Accordingly, the court ruled the lineup was not unduly suggestive, and it affirmed the defendants' convictions.

In re Rafael C.

(2016) __ Cal.App.4th __ [2016 WL 1178374]

Issue

Did school officials need a warrant to search a student's cell phone?

Facts

Inside a portable trash can on the campus at Antioch High School, school supervisors found a handgun and a magazine cartridge. They also had reason to believe that the items had just been placed there by two identified students. Shortly afterwards, these same students were spotted in a corridor without passes, so school supervisors detained them and took them to the vice principal's office. While the students were being questioned in adjoining rooms that were visible from the corridor, officials noticed a third student, Rafael C., walking back and

[10] See *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 400.

[11] See *People v. Carpenter* (1997) 15 Cal.4th 312, 368 ["Anyone asked to view a lineup would naturally assume the police had a suspect."].

forth in front of the office, and he was keeping an eye on the two detained students. Because of this "odd" behavior, one of the officials attempted to detain Rafael and bring him to the office for questioning, but he "hurriedly walked away without turning around." The supervisor apprehended him and walked him back to the office.

While a vice principal was questioning him, Rafael became "physically fidgety" and "immediately reached down into his pocket." Fearing that he was reaching for a handgun, officials tried to prevent him from grabbing whatever was in his pocket. During the ensuing struggle, they realized that the object was a cell phone and that Rafael was apparently trying to "interact" with it in some way. After they had subdued him, a vice principal searched the phone and discovered photos of, among other things, Rafael holding the same gun that had been discovered earlier. Based on this and other evidence, Rafael was declared a ward of the court and was committed to a juvenile correctional facility.

Discussion

On appeal, Rafael argued that the photos should have been suppressed, claiming that school officials cannot search a student's cell phone without a warrant. The court disagreed, pointing out that the Supreme Court in *New Jersey v. T.L.O.* ruled that searches of students and their possessions at schools were permitted if officials had reasonable suspicion to believe the search was warranted. As the Court in *T.L.O.* explained, "Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[12] Because it was apparent that the circumstances here were more than sufficient to warrant the search, it is unnecessary to elaborate further.

Of interest, however, was Rafael's argument that a warrantless search of a student's cell phone was unlawful because the Supreme Court in *Riley v. California* ruled that, because cell phones contain massive amounts of personal information, a cell phone in an arrestee's possession may not be routinely searched as an incident to the arrest. Instead, said the court, if officers believe they have probable cause for a warrant, they may seize the phone and apply for one[13] The court in *Rafael* observed, however, that *Riley* plainly applied only to searches that are conducted incident to an arrest. And because of the obvious differences between searches incident to arrest on the streets, and searches of students in schools, the court ruled that *T.L.O.*, not *Riley*, governs searches of cell phones in schools.

Although it was apparent that the school officers had grounds to search Rafael's cell phone, the court pointed out that in determining the reasonableness of such a search, courts must also consider the magnitude of the harm that might result if officials waited to obtain a warrant. And this factor plainly weighed heavily in favor of the warrantless search of Rafael's phone. As the court previously observed in *In re J.D.*, "Recent events have demonstrated the increased concern school officials must have in the daily operations of public schools. . . . We must be cognizant of this alarming reality as we approach our role in assessing appropriate responses by school administrators to campus safety issues."[14] Accordingly, the court ruled that search of Rafael's cell phone was lawful.

U.S. v. Lara

9th Cir. 2016) __ F.3d __ [2016 WL 828100]

Issue

May officers search a probationer's cell phone based on a probation search condition that authorizes searches of the probationer's "property"?

Facts

Paulo Lara was convicted in federal court of possession for sale and transportation of methamphetamine. As a condition of probation he was required to submit to warrantless searches of "his

[12] (1985) 469 U.S. 325, 326, 341-42.
[13] (2014) __ US __ [134 S.Ct. 2473, 2495].
[14] (2014) 225 Cal.App.4th 709, 714. Also see *In re Randy G.* (2001) 26 C4 556, 566.

person and property, including any residence, containers and vehicles under his control." When Lara failed to meet with a probation officer as required, two probation officers went to his home to conduct a probation search. During the search, the officers entered and saw a cell phone in plain view and confirmed that it belonged to Lara. So an officer opened it and found three photos of a semiautomatic handgun.

The officers then searched the house but did not find a gun. They did, however, find an illegal knife, so they arrested Lara and took his cell phone to the a forensics lab in Orange County. The reason they wanted to search the phone was, as one of them testified, "drug traffickers commonly use cell phones to arrange narcotics sales." During the search, technicians found that GPS data had been embedded in the photos of the gun, and this enabled them to determine that it had been photographed at Lara's mother's home. They retrieved the gun from Lara's mother and, as the result, Lara was charged with being a felon in possession of a firearm. His motion to suppress the gun and the data found in the phone was denied. He pled guilty but preserved his right to appeal the suppression ruling.

Discussion

IS A CELL PHONE "PROPERTY"?: Although the terms of Lara's probation expressly authorized a search of his "property," and although a telephone constitutes "property" as the term is commonly used, a three-judge panel of the Ninth Circuit ruled that the term "property" is insufficient to identity a cell phone in a search warrant because it does not do so "clearly and unambiguously." The panel also ruled that cell phone data does not constitute "property" because it often consists of massive amounts of personal information, and is therefore deserving of more privacy protection than ordinary personal property.

Actually, the panel went much further than that and said the amount of personal information contained in cell phones is so great that a search of a person's cell phone is more intrusive than a search of his entire home. Here are the panel's precise words: *"A cell phone search would typically expose to the government far more than the most exhaustive search of a house."* This is a remarkable statement because it is so obviously false. It does, however, serve to demonstrate that, in the minds of this panel (and also in the mind of Apple Computer's CEO), a forensic search of a person's cell phone constitutes a greater invasion of privacy than the forcible occupancy of the person's home by a throng of police officers who conduct an intensive search of, among other things, bedrooms, closets, drawers, desks, cabinets, notebooks, and sometimes every document on the premises.

METH TRAFFICKING IS NOT A "SERIOUS" CRIME: This was not a typo. The panel actually ruled that the search of Lara's cell phone was illegal because methamphetamine trafficking is not a serious crime, and therefore the search of Lara's cell phone was unnecessary. In the words of the court, meth trafficking is not "a particularly serious and intimate offense," that it is a "low level" and "nonviolent" crime, and that meth traffickers are not "violent felons." It would serve no purpose to discuss the foolishness of these statements because it will be apparent to all that this panel is grossly unaware of the monstrous consequences of meth use and the deadly violence associated with meth trafficking.

Comment

Lara is such a bizarre opinion that it is unlikely to have much persuasive force. In any event, it should have little effect in California because, as the result of the state's new Electronic Communications Privacy Act, it appears that cell phone searches can no longer be conducted pursuant to the terms of probation; i.e., a warrant will usually be required.

U.S. v. Thompson

(7th Cir. 2016) 811 F.3d 944

Issues

(1) When an informant or undercover officer is invited into a suspect's home to plan or commit a crime and, while inside, he uses a hidden audio and video device to record everything he saw and heard, is such an operation illegal because the suspect had not expressly consented to the recording? (2) If not, should such warrantless recording be deemed unlawful nevertheless because it constitutes such an extreme invasion of privacy?

Facts

A police informant was enlisted by a drug task force in Wisconsin to attempt to buy crack cocaine from some traffickers in the area. In the course of the operation, the informant phoned one of the traffickers and spoke with a man later identified as Aaron Thompson who told the informant to drive to a certain apartment where Thompson would sell him the drugs. Before Thompson left, officers equipped him with two miniaturized audio-video recorders.

When the informant arrived, Thompson invited him inside and the informant handed him $400. While the informant waited just inside the front door, Thompson walked over to an adjacent bathroom and opened the door, at which point someone in the room handed him the drugs and Thompson handed them to the informant. The informant then left the apartment. From where the informant had been standing he could see and hear everything that the two devices had recorded.

Based on this information, the officers obtained a warrant and searched the apartment where they found more crack cocaine. Thompson was arrested and, when his motion to suppress the video recordings was denied, he pled guilty.

Discussion

Although Thompson consented to the informant's entry, he argued that, since he had not expressly consented to the audio and video recording, the recording should be suppressed. In addition, he argued that any warrantless use of a video recording device inside a home is unlawful because it constitutes an extraordinary invasion of privacy. The court disagreed with both arguments.

SCOPE OF CONSENT: Officers and police informants who have obtained a suspect's consent to enter his home are not permitted to do anything they were not expressly or impliedly authorized to do by the consenting person. And in determining whether they had complied with this rule, the courts apply a "reasonable person" test. This means that the officer's or informant's presence in the room—and any recording conducted from there—is lawful if he remained in areas to which he was expressly or impliedly invited. As the Supreme Court observed, "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[15]

Applying this rule, the court ruled that the informant did not exceed the permissible scope of Thompson's invitation to enter because he stayed just inside the front door, which Thompson had invited him to do. As the court put it, "Thompson invited the informant into the apartment for the purpose of engaging in a drug transaction. While there, the informant did not see, hear, or take anything that was not contemplated as part of the illegal drug transaction."

INTRUSIVENESS OF VIDEO RECORDING: Thompson also urged the court to rule that any warrantless use of a hidden video recorder should be deemed illegal because it constitutes an excessive invasion of privacy. Video recording, said Thompson, "is a much greater invasion of privacy than audio recording because much more information can be captured on video." That is undoubtedly true. But it doesn't matter because, as noted earlier, an invasion of a defendant's privacy cannot occur when, as here, the defendant invites a police agent into his home, and the agent's video recorder merely chronicled what the informant saw or could have seen. Accordingly, the court affirmed Thompson's conviction.

U.S. v. Houston

(6th Cir. 2016) 813 F.3d 282

Issues

Was the warrantless electronic surveillance of a farm illegal because it was conducted by means of a camera atop a utility pole? If not, did it become illegal because the surveillance lasted ten weeks?

Facts

ATF agents received information that Rocky Joe Houston, a convicted felon, possessed firearms at his farm in Tennessee. Agents attempted to conduct visual surveillance of the farm but it was located in

[15] *Florida v. Jimeno* (1991) 500 US 248, 251.

a rural area and, according to an agent, the ATF's vehicles "stuck out like a sore thumb." So they asked a local utility company to install a camera atop a telephone pole located about 200 yards from the property. The camera—which could zoom in and out, and move left and right—transmitted the images of the farm continuously to an ATF computer.

The farm was located on unfenced property and consisted of three structures. An ATF agent testified that the view of the structures captured by the camera "was identical" to what the agents would have been able to see if they had driven on the public roads surrounding the farm.

The surveillance lasted ten weeks, over which time the camera recorded Houston in possession of several firearms. Agents then obtained a warrant to search the three structures, and the search netted 45 firearms, most of which were "attributable" to Houston. As the result, he was charged with possession of a firearm by a felon. His motion to suppress the guns was denied, and he was convicted.

Discussion

On appeal, Houston argued that the warrantless electronic surveillance of his property constituted an illegal search because (1) probable cause for the warrant was based on data obtained by means of a surveillance camera that recorded areas in which he had a reasonable expectation of privacy, and (2) electronic surveillance for ten days is too intrusive to be permitted without a warrant.

Although the law pertaining to electronic surveillance is far from settled, the prevalent rule seems to be that a warrant is not required if officers utilized technology that (1) was in general public use, and (2) merely permitted them to see things they could have seen from a plausible vantage point (although less clearly and with somewhat more effort).[16] While video surveillance cameras in some cities are as ubiquitous as fire hydrants, they are not so widely used in rural areas, and they are seldom found atop telephone poles. Nevertheless, the court ruled that the initial warrantless surveillance of Houston's farm was lawful because the camera "captured the same views enjoyed by passersby on public roads." In other words, the agents "only observed what Houston made public to any person traveling on the roads surrounding the farm."

The question, then, was whether it mattered that the surveillance was conducted continuously for ten days. There is currently very little law on whether legal electronic surveillance can become illegal if it was conducted for a long period of time. However, four justices on the Supreme Court indicated in 2012 that four weeks of continuous monitoring of a vehicle by means of a hidden GPS tracker was "surely" too intrusive to be conducted without a warrant.[17] That was because it would "catalogue every single movement that the defendant made." The justices added, however, that relatively short-term monitoring of a person's movements on public streets by means of GPS should not require a warrant because it "accords with expectations of privacy that our society has recognized as reasonable."

The court in *Houston* acknowledged these concerns, but pointed out "the surveillance here was not so comprehensive as to monitor Houston's every move; instead, the camera was stationary and only recorded his activities outdoors on the farm." Consequently, it ruled that such long-term warrantless surveillance via a stationary pole camera did not violate a Houston's Fourth Amendment rights.

U.S. v. Flores

(9th Cir. 2015) 802 F.3d 1028

Issue

Was the information in a search warrant affidavit "stale"?

Facts

Citlalli Flores was arrested at the U.S.-Mexico border near Tijuana when a Customs and Border Patrol officer found 36 pounds of marijuana hidden in a rear section of her car. Shortly after she was booked into jail, Flores phoned her cousin and instructed him to purge her Facebook account. The call was recorded and officers used the recording to

[16] See *Dow Chemical Co. v. United States* (1986) 476 U.S. 227, 238.
[17] *United States v. Jones* (2012) __ U.S. __ [132 S.Ct. 945, 964].

obtain a warrant to search Flores's Facebook account for messages pertaining to a drug conspiracy and the "importation of a controlled substance." But, for reasons that were not explained, there was almost a four month delay between the phone call and the application for the search warrant. The warrant was, however, issued.

In complying with the warrant, Facebook provided the officers with 11,000 pages of data, although only about 100 pages were relevant to drug conspiracies and the importation of drugs. When officers realized that approximately 10,900 pages should not have been released to them, they sealed those pages in an evidence bag which they could not access without a new warrant. The bag was apparently never opened.

Flores filed a motion to suppress the incriminating evidence on grounds that the warrant was based on "stale" information and that it was overbroad. The motion was denied and she was convicted. She appealed the suppression ruling to the Ninth Circuit.

Discussion

To establish probable cause for a warrant, officers must not only prove that the evidence they are seeking was taken to or produced at the place they want to search, but that there is a fair probability that it is still there.[18] In most cases, it is sufficient that the affidavit consisted of "fresh" information, meaning information pertaining to acts, conditions, or circumstances that existed or occurred so recently that it was likely that no material change in the existence and location of the evidence had taken place. The issue in *Flores* was whether the information was "stale". Flores argued it was, that the affidavit failed to establish probable cause that the Facebook records still existed and were still in the possession of Facebook.

Although the time lapse is highly relevant in determining the staleness of information, there are some other relevant circumstances. As the First Circuit observed, "When evaluating a claim of staleness, we do not measure the timeliness of information simply by counting the number of days that have elapsed. Instead, we must assess the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information."[19] For example, some types of evidence will ordinarily remain in one place for weeks, months, and even years; while other types will normally be gone in a matter of hours. Two good examples of this were provided by the Maryland Court of Appeals:

> The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later.[20]

The question, then, was whether it was reasonable to believe that Flores's Facebook data was still stored in Facebook's computers. The answer, said the court, was yes; and that is because business data that is stored electronically is usually kept for relatively long periods of time. This was also the opinion of the Seventh Circuit which pointed out that, "the persistence of digital storage, noting that in only the 'exceptional case' will a delay between the electronic transfer of an image and a search of the computer destroy probable cause to believe that a search of the computer will turn up the evidence sought."[21]

Although it would ordinarily be reasonable to believe that Flores's Facebook records would be retained for at least four months after she was arrested, Flores had instructed her cousin to purge her Facebook account. Did this matter? No, said the court, because "[i]n this day and age, even persons with minimal technological savvy are aware that data is frequently preserved and recovered after deletion from an electronic device, particularly when a third party like Facebook is involved."

Accordingly the court ruled that, "even if the agents were less likely to find evidence of drug smuggling in Flores's account [when the warrant was issued] than [when Flores was arrested], a fair probability of finding such evidence remained when the warrant issued." POV

[18] See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298.
[19] *U.S. v. Morales-Aldahondo* (1st. Cir. 2008) 524 F.3d 115, 119.
[20] *Andresen v. State* (Md. App. 1975) 24 Md. App. 128, 172.
[21] *U.S. v. Valley* (7C 2014) 755 F.3d 581, 586.

"Information is not knowledge."

—Albert Einstein

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