Searches Incident to Arrest

"It is a difficult exercise at best to predict a criminal suspect's next move . . ."

U.S. v. *Reilly*[1]

Taking a suspect into custody is a "tense and risky undertaking."[2] Although most arrests are uneventful, the potential for violence lurks in every one of them. This is because people who are about to lose their freedom—even for a short time—may act irrationally and even "attempt actions which are unlikely to succeed."[3] As the court observed in *U.S.* v. *Arango*, "It is the threat of arrest or the arrest itself which may trigger a violent response—regardless of the nature of the offense which first drew attention to the suspect."[4]

To reduce these dangers and also to help prevent suspects from destroying evidence, the courts permit officers to conduct a type of search known as a "search incident to arrest." These searches differ from most others in that they may be conducted as a matter of routine, meaning that officers will not be required to justify their decision to search the arrestee.[5] As the United States Supreme Court observed:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.[6]

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[1] (9th Cir. 2000) 224 F.3d 986, 993.

[2] *State* v. *Murdock* (Wis. Supreme 1990) 155 Wis.2d 217, 231. ALSO SEE *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7 ["Every arrest must be presumed to present a risk of danger to the arresting officer."]; *U.S.* v. *Reilly* (9th Cir. 2000) 224 F.3d 986, 993 ["[I]it is both naïve and dangerous to assume that a suspect will not act out desperately despite the fact that he faces the barrel of a gun."].

[3] *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207. ALSO SEE *U.S.* v. *Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 670 ["A willful and apparently violent arrestee, faced with the prospect of long-term incarceration, could be expected to exploit every available opportunity"]; *United States* v. *Chadwick* (1977) 433 U.S. 1, 14 ["When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed."].

[4] (7th Cir. 1989) 879 F.2d 1501, 1505.

[5] See *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7 ["Although the Supreme Court of Washington found little likelihood that Overdahl could escape from his dormitory room, an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation."]; *United States* v. *Chadwick* (1977) 433 U.S. 1, 15 [officers are not required "to calculate the probability that weapons or destructible evidence may be involved."]; *U.S.* v. *Osife* (9th Cir. 2004) 398 F.3d 1143, 1145 ["[C]ourts are *not* to decide on a case-by-case basis whether the arresting officers' safety is in jeopardy or whether evidence is in danger of destruction."]; *Mary Beth G.* v. *City of Chicago* (7th Cir. 1983) 723 F.2d 1263, 1269 ["[A] police officer does not have to assess the likelihood that the individual arrestee is possessing a weapon or concealing evidence"].

[6] *United States* v. *Robinson* (1973) 414 U.S. 218, 235.

It is therefore immaterial that the suspect was arrested for a relatively minor crime,[7] or that he could not have reached a weapon or evidence after he was arrested because he was handcuffed, surrounded by officers, or locked in a patrol car.[8]

As we will show in this article, the rules covering these searches are not complicated. This is because the courts understand that searches incident to arrest are conducted often and under stressful and diverse circumstances. Accordingly, they have attempted to provide officers with rules that are "easily applied, and predictably enforced."[9]

We will start with the basic requirements that must be met in all situations. Then we will discuss the additional requirements for each of the four types of searches incident to arrest, which are: (1) search of the arrestee; (2) search of the area within the arrestee's immediate control; (3) search of the area immediately adjoining the place of arrest; and, (4) if the arrestee was an occupant of a car, search of the passenger compartment of the vehicle.

BASIC REQUIREMENTS

Although there are several types of searches incident to arrest, they all have the same three basic requirements, specifically:

(1) **Lawful arrest**: The suspect must have been lawfully arrested.
(2) **Custodial arrest**: The arrest must have been "custodial" in nature.
(3) **Contemporaneous search**: The search must have been "contemporaneous" with the arrest.

Lawful arrest

A suspect is deemed "lawfully arrested" at the moment there was probable cause to arrest him for any offence. This rule has several ramifications.

SEARCH BEFORE ARREST: Because a lawful arrest occurs automatically when there is probable cause, a search that occurs before the suspect is arrested may qualify as a search incident to arrest.[10] As the Court of Appeal explained, "Once there is probable cause for

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[7] See *Washington* v. *Chrisman* (1982) 455 U.S. 1 [minor in possession of alcohol]; *Gustafson* v. *Florida* (1973) 414 U.S. 260 [driving without a license]; *United States* v. *Robinson* (1973) 414 U.S. 218 [driving on a revoked license]; *People* v. *McKay* (2002) 27 Cal.4th 601, 619-25 [riding bicycle in wrong direction]; *People* v. *Stoffle* (1991) 1 Cal.App.4th 1671, 1679 [traffic warrant; *People* v. *Hamilton* (2002) 102 Cal.App.4th 1311, 1317 [displaying false registration tags] *People* v. *Boren* (1987) 188 Cal.App.3d 1171, 1177 [drunk in public]; *U.S.* v. *Osife* (9th Cir. 2005) 398 F.3d 1143 [urinating in public]; *U.S.* v. *Arango* (7th Cir. 1989) 879 F.2d 1501, 1506 [search is permitted "without regard to the nature of the offense supporting the arrest."]. **NOTE**: In the past, California law permitted searches incident to arrest only if officers had probable cause to believe they would find a weapon or evidence. This limitation was abrogated by Proposition 8. See *In re Demetrius A.*
NOTE: **Arrest for public intoxication:** Proposition 8 nullified the rule of *People* v. *Longwill* (1975) 14 Cal.3d 943 that a person arrested for public drunkenness cannot be searched incident to arrest until it was determined that the arrestee would be incarcerated. See *People* v. *Boren* (1987) 188 Cal.App.3d 1171, 1175; *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228-9.
(1989) 208 Cal.App.3d 1245, 1247.

[8] See "Searching Beyond the Arrestee" ("Suspect handcuffed, restrained"), below.

[9] See *New York* v. *Belton* (1981) 453 U.S. 454, 459.

[10] See *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538 ["An officer with probable cause to arrest can search incident to the arrest before making the arrest."]; *People* v. *Nieto* (1990) 219 Cal.App.3d 1275, 1278 ["[I]t makes no difference that the seizure came before the arrest as long as probable cause for the arrest existed at the time the evidence was seized and a

an arrest it is immaterial that the search preceded the arrest."[11] This rule is especially important to prosecutors because a pre-arrest pat down, consent search, or other warrantless search that was ruled unlawful for some reason will frequently be upheld as a search incident to arrest if there was probable cause.[12]

OFFICERS UNSURE ABOUT PROBABLE CAUSE: If a court finds there was probable cause, the "lawful arrest" requirement is satisfied even if the officers were unsure they had it, or even if they thought they didn't.[13]

For example, in *People* v. *Loudermilk*[14] two Sonoma County sheriff's deputies detained a hitchhiker at about 4 A.M. because he matched the description of a man who shot another man about an hour earlier in nearby Healdsburg. When they asked the man, Loudermilk, to show them some ID, he claimed he had none. A deputy then searched his wallet for ID and, when Loudermilk saw that he had found it, he spontaneously said, "I shot him. Something went wrong in my head."

Loudermilk contended his statement should have been suppressed because it was prompted by the search of his wallet, which he claimed did not qualify as a search incident to arrest because one of the deputies testified he didn't think he had probable cause to arrest Loudermilk for the shooting. The court said it didn't matter what the deputy thought—what counts is what the court thought. And it thought the deputy had probable cause.

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contemporaneous arrest in fact occurred."]; *People* v. *King* (1971) 5 Cal.3d 458, 463 ["[I]t is immaterial that the search preceded, rather than followed, the arrest."]; *People* v. *Avila* (1997) 58 Cal.App.4th 1069, 1076 ["[I]t is unimportant whether a search incident to an arrest precedes the arrest or vice versa"]; *U.S.* v. *Smith* (9th Cir. 2004) 389 F.3d 944, 951 ["A search incident to arrest need not be delayed until the arrest is effected. Rather, when an arrest follows quickly on the heels of the search, it is not particularly important that the search preceded the arrest rather than vice versa."]; *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 541 ["A search may be incident to a subsequent arrest if the officers have probable cause to arrest before the search."]. **NOTE**: In *People* v. *Superior Court (Hawkins)* (1972) 6 Cal.3d 757, the California Supreme Court ruled that a formal arrest was required. This rule was nullified by Proposition 8. See *People* v. *Trotman* (1989) 214 Cal.App.3d 430, 435; *People* v. *Deltoro* (1989) 214 Cal.App.3d 1417, 1422.

[11] *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 536.

[12] See *People* v. *Le* (1985) 169 Cal.App.3d 186, 193 ["Under the federal authorities, it is not essential that . . . the search is being conducted on the basis of a particular legal theory so long as the objective facts, when fully determined, afford probable cause."]; *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1004.

[13] See *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538 [probable cause to arrest for felony possession of narcotics; Court: "It is irrelevant whether [the officer] believed he had probable cause."]; *People* v. *Adams* (1985) 175 Cal.App.3d 855, 860-1 [probable cause to arrest for robbery; Court rejects argument that "probable cause to arrest does not exist unless the officer believes it exists."]; *People* v. *Brown* (1989) 213 Cal.App.3d 187, 192 [probable cause to arrest for parole violation; in ruling the officer's search of two small containers was lawful as a search incident to arrest, the court noted that because probable cause existed it was immaterial that the officer believed the defendant "was only being detained and was not under arrest."]; *U.S.* v. *Anchondo* (10th Cir. 1998) 156 F.3d 1043, 1045 [probable cause to arrest for felony possession of narcotics: Court: "Whether or not the officer intended to actually arrest the defendant at the time of the search is immaterial"]; *People* v. *Gonzales* (1989) 216 Cal.App.3d 1185, 1189-90 [probable cause to arrest for felony possession of narcotics; Court: [the officer's "legal assessment" that he did not have probable cause "was largely irrelevant if the search was reasonable viewed objectively from a judicial perspective."].

[14] (1987) 195 Cal.App.3d 996.

ARREST FOR "WRONG" CRIME: If officers arrested a suspect for a particular crime but a court rules that probable cause for *that* crime did not exist, the "lawful arrest" requirement will nevertheless be met if there was probable cause to arrest for some other crime. As the court stated in *People* v. *Le*:

> [I]t is not essential that the arresting officer at the time of the arrest or search have a subjective belief that the arrestee is guilty of a particular crime . . . so long as the objective facts, when fully determined, afford probable cause.[15]

For example, in *In re Donald L.*[16] a Martinez police officer detained the defendant at about 9 P.M. because he resembled a man who was suspected of having just cased a house for a burglary. The officer also noticed that Donald was carrying a "club type" instrument. During a subsequent pat search, the officer found some jewelry. Suspecting that Donald stole the jewelry during a burglary, the officer conducted a more thorough search and found more jewelry. The officer then arrested him for burglary.

On appeal, Donald contended the search could not be upheld as a search incident to arrest because, when it occurred, the officer did not have probable cause to arrest him for burglary. Even if that were true, said the court, it wouldn't matter because when the officer saw him carrying the club he had probable cause to arrest him for carrying a "billy" or "blackjack."[17] Consequently, the "lawful arrest" requirement was met.

PRETEXT ARRESTS: So long as there was probable cause, it is immaterial that officers decided to arrest the suspect because they wanted to search him.[18]

ARREST IN AN "EXTRAORDINARILY HARMFUL" MANNER: Even if an arrest was supported by probable cause, it will be invalid if it was conducted in an "extraordinary manner, unusually harmful to [the arrestee's] privacy or physical interests."[19]

"Custodial" arrest

The second requirement for conducting a search incident to arrest is that the arrest must have been "custodial" in nature.[20] As we will discuss, an arrest is "custodial" if, (1)

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[15] (1985) 169 Cal.App.3d 186, 193. ALSO SEE *People* v. *Rodriguez* (1997) 53 Cal.App.4th 1250, 1252-6.

[16] (1978) 81 Cal.App.3d 770.

[17] See Penal Code § 12020(a)(1).

[18] See *Whren* v. *United States* (1996) 517 U.S. 806, 812-3 ["[We have] never held, outside the context of inventory search or administrative inspection, that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment"]; *People* v. *Boissard* (1992) 5 Cal.App.4th 972, 984; *People* v. *Williams* (1988) 198 Cal.App.3d 873, 886; *People* v. *McGraw* (1981) 119 Cal.App.3d 582; *People* v. *Valenzuela* (1999) 74 Cal.App.4th 1202, 1208-9; *People* v. *Woods* (1999) 21 Cal.4th 668; *People* v. *Rodriguez* (1997) 53 Cal.App.4th 1250, 1266. **NOTE:** In *People* v. *Haven* (1963) 59 Cal.2d 713, 719 the California Supreme Court ruled that an arrest may not be used as a pretext to search for evidence. This rule is at odds with *Whren* and, accordingly, cannot result in the suppression of evidence. See *In re Lance W.* (1985) 37 Cal.3d 873; *People* v. *Hull* (1995) 34 Cal.App.4th 1448, 1455 ["When a defendant moves to suppress evidence citing a violation of the Fourth Amendment, the federal standard for exclusion must be applied. There is no independent California standard."].

[19] See *Whren* v. *United States* (1996) 517 U.S. 806, 818; *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 354. ALSO SEE "Searching the arrestee" ("Extreme searches"), below.

[20] **NOTE**: The main reason for this requirement is that the primary justification for searches incident to arrest is the increased danger that exists whenever officers travel with a person who is under arrest. See *United States* v. *Robinson* (1973) 414 U.S. 218, 234-5 ["[T]he danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into

the suspect was arrested for an offense for which officers were *required* to transport him, or (2) a statute gave officers the *option* of doing so and they elected to do so. This requirement is also met if officers were not authorized to transport the suspect but they did so nonetheless. On the other hand, an arrest is not custodial if the arrestee will be cited at the scene and released; e.g., minor traffic violation.[21]

MANDATORY CUSTODY: The "custodial arrest" requirement is met automatically when there is probable cause to arrest the suspect for a felony or other crime for which officers were required to transport him to jail, a police station, detox facility, or other detention or treatment facility; e.g., arrest for a misdemeanor that is reasonably likely to continue.[22] It is immaterial that the suspect was arrested for a bailable offense or would otherwise not be detained after he arrived.[23]

OPTIONAL CUSTODY: If a statute gives officers the option of taking the suspect into custody, the arrest becomes "custodial" at the point they elected to do so.[24] An arrest of a juvenile also becomes custodial if officers decided to drive him home, to school, or to a curfew center.[25] Conversely, an arrest is not custodial if officers had not yet decided to take the suspect into custody.[26] As the Seventh Circuit pointed out, "[T]he reasonableness of a search or seizure depends on what actually happens rather than what could have happened."[27]

For example, in *U.S.* v. *Parr*[28] an officer made a traffic stop on a vehicle because he knew that the driver, Parr, was driving on a suspended license. After placing Parr in the back seat of the patrol car, the officer searched his car and found stolen mail. The officer seized the mail but decided to release Parr. Several months later, Parr was charged with

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custody and transporting him to the police station"]. ALSO SEE *Knowles* v. *Iowa* (1998) 525 U.S. 113, 117.

[21] See *Knowles* v. *Iowa* (1998) 525 U.S. 113, 117 ["A routine traffic stop is a relatively brief encounter and is more analogous to a so-called *Terry* stop than to a formal arrest."]; *People* v. *Superior Court (Fuller)* (1971) 14 Cal.App.3d 935, 942 ["Although a traffic violator is technically under arrest during the period immediately preceding his execution of a promise to appear, neither he nor his vehicle may be searched on that ground alone."]; *People* v. *Coleman* (1991) 229 Cal.App.3d 321, 325-6 [noncustodial arrest for possession of a small amount of marijuana].

[22] See Penal Code §§ 827.1(h), 835.5 *et seq.*; *People* v. *Sanchez* (1985) 174 Cal.App.3d 343, 349 [arrest for drunk in public].

[23] See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 350; *People* v. *Boren* (1987) 188 Cal.App.3d 1171, 1175; *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1247; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860 ["A search incident to an arrest is proper even if the police officer plans to release the arrestee without booking him or her."]; *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228 ["[W]e are bound by those federal decisions admitting evidence from searches incidental to lawful arrests *even if* the underlying warrant was for a bailable offense."].

[24] See *U.S.* v. *Pino* (6th Cir. 1988) 855 F.2d 357, 359 [search occurred after the officer decided "to arrest Pino for the illegal lane change, rather than just giving him a citation."].

[25] See *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1248 [transport home]; *In re Charles C.* (1999) 76 Cal.App.4th 420, 424 [transport home]; *In re Humberto O.* (2000) 80 Cal.App.4th 237 [transport to school]; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860 [to curfew center].

[26] See *U.S.* v. *Jackson* (7th Cir. 2004) 377 F.3d 715, 717 ["[I]t is *custody*, and not a stop itself, that makes a full search reasonable."]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 650 ["Because the principal justifications for full searches are the need to detect risks to the arresting officers and to preserve evidence that suspects could destroy on the way to the lockup, there is slight warrant for intrusive steps when detention is brief and the drivers (and most evidence) will soon depart."].

[27] *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 650.

[28] (9th Cir. 1988) 843 F.2d 1228.

possession of the stolen mail. Although the officer had probable cause to arrest Parr, and although he had the discretionary authority to take him into custody, the court ruled the search of the car could not be upheld as a search incident to arrest because he had not exercised his discretion to do so. Said the court, "[I]t is not clear that the police action taken here is the type of 'custodial arrest' necessary to support a search incident to arrest."

TRANSPORTING IN VIOLATION OF STATUTE: The United States Supreme Court has ruled that if officers took the suspect into custody despite a statutory requirement that he be cited and released, the arrest is nevertheless "custodial" so long as there was probable cause.[29] The California Supreme Court applied this rule in *People* v. *McKay*[30] where an officer stopped the defendant for riding a bicycle in the wrong direction on a street. When McKay said he had no ID in his possession, the officer arrested him under the authority of Vehicle Code § 40302(a) which authorizes a custodial arrest when a violator is unable to provide "satisfactory identification."

On appeal, McKay argued that he had, in fact, "satisfactorily" identified himself and, therefore, his arrest violated section 40302(a). The court said it didn't matter because a violation of a state statute will not invalidate an arrest based on probable cause. Said the court, "[S]o long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."

"Contemporaneous" search

A search cannot be "incident" to an arrest unless there was a connection between the two. Thus, the third and final requirement is that the search must be a "contemporaneous" incident of the arrest.[31] As a practical matter, this means, (1) the search must occur within a reasonable time after the arrest, and (2) the search must occur while the arrestee is on the scene or very shortly after he was transported.

"SUBSTANTIALLY CONTEMPORANEOUS": While the word "contemporaneous" in common usage refers to situations in which two acts occur at about the same time, a search incident to arrest need not occur simultaneously with the arrest or even immediately

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[29] See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 650 ["*[Atwater]* holds that police may make full custodial arrests for fine-only offenses, so there is no doubt that the officer could have taken Garcia to the stationhouse without ado"]; *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 538-9. **NOTE**: Officers may be civilly liable for violating such a statute. See *People* v. *McKay* (2002) 27 Cal.4th 601, 618-9.

[30] (2002) 27 Cal.4th 601.

[31] See *Shipley* v. *California* (1969) 395 U.S. 818, 819 ["The Court has consistently held that a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."]; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33; *Preston* v. *United States* (1964) 376 U.S. 364, 367 [the justifications for seizing weapons and evidence "are absent where a search is remote in time or place from the arrest."]; *People* v. *Balassy* (1973) 30 Cal.App.3d 614, 622 ["To be incident to a lawful arrest, a warrantless search must be limited both as to time and place."]. **NOTE**: In *U.S.* v. *Doward* (1st Cir. 1994) 41 F.3d 789, 793 the court noted that the *Belton* Court may have intentionally lengthened the permissible time lapse between the arrest and search. Said the court, "The *Belton* majority's circumspect use of the discrete phrase 'contemporaneous *incident* of that arrest,' [at p. 460] rather than the less expansive phrase 'contemporaneous *with* that arrest'—as Doward would have us read it—plainly implies a greater temporal leeway between the custodial arrest and the search that Doward advocates."].

thereafter. Instead, the courts require only that the search be "roughly" or "substantially" contemporaneous with the arrest.[32] As noted in *U.S.* v. *McLaughlin*:

> There is no fixed outer limit for the number of minutes that may pass between an arrest and a valid, warrantless search that is a contemporaneous incident of the arrest. Instead, the courts have employed flexible standards such as "roughly contemporaneous with the arrest," and within "a reasonable time" after obtaining control of the object of the search.[33]

"CONTINUOUS SEQUENCE OF EVENTS": Although the amount of time that passed between the arrest and search is important, the real issue is whether the search and arrest were part of a closely connected progression of events or, to put it another way, whether the search "was undertaken as an integral part of a lawful custodial arrest process."[34] As the D.C. Circuit explained:

> The relevant distinction turns not upon the moment of the arrest versus the moment of the search but upon whether the arrest and search are so separated in time or by intervening events that the latter cannot fairly be said to have been incident to the former.[35]

If they are not so separated, a time lapse—even a significant one—should not invalidate the search. As the Ninth Circuit put it, "[A] search need not be conducted immediately upon the heels of an arrest, but sometimes may be conducted well after the arrest, so long as it occurs during a continuous sequence of events."[36]

The types of "events" that may properly intervene between an arrest and search must, however, be sufficiently weighty so that a reasonable officer would have concluded they took precedence over the search. To put it another way, officers must be diligent in beginning and conducting the search. If they can do it immediately after the arrest, they should do so. But if there were things they needed to do beforehand, the search will ordinarily be upheld if there was no unnecessary delay. As the Fourth Circuit observed,

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[32] See *Shipley* v. *California* (1969) 395 U.S. 818, 820 ["substantially contemporaneous"]; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33 ["substantially contemporaneous"]; *U.S.* v. *Smith* (9th Cir. 2004) 389 F.3d 944. 951 ["roughly contemporaneous"]; *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607 ["absolute" contemporaneousness is not required]; *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1419 ["Concerning the temporal scope of the search, we have held that a search incident to arrest must be conducted at about the same time as the arrest."]; *People* v. *Adams* (1985) 175 Cal.App.3d 855, 861 [search within ten minutes of arrest was "substantially contemporaneous"]; *U.S.* v. *Doward* (1st Cir. 1994) 41 F.3d 789, 793 [court notes lack of authority to support view that "officers must discontinue a passenger-compartment search—properly initiated as a contemporaneous incident of an occupant's arrest—the instant the arrestee is transported from the scene."].

[33] (9th Cir. 1999) 170 F.3d 889, 892.

[34] *U.S.* v. *Brown* (D.C. Cir. 1982) 671 F.2d 585, 587. ALSO SEE *U.S.* v. *Nelson* (4th Cir. 1996) 102 F.3d 1344, 1347 ["Pragmatic necessity requires that we uphold the validity and reasonableness of a search incident to arrest if the search is part of the specific law enforcement operation during which the search occurs."]; *People* v. *McBride* (1969) 268 Cal.App.2d 824, 829 ["Manifestly, the second search was part of a continuous process which began with a valid arrest"]; *U.S.* v. *McLaughlin* (9th Cir. 1999) 170 F.3d 889, 892 ["[S]ome courts have characterized the critical issue as whether the arresting officers conducted the search as soon as it was practical to do so, including whether the officers took intervening actions not directly related to the search."]; *People* v. *Webb* (1967) 66 Cal.2d 107, 120 [court notes an "emphasis on the 'continuing series of events'"].

[35] *U.S.* v. *Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 668.

[36] *U.S.* v. *Smith* (9th Cir. 2004) 389 F.3d 944. 951.

"[O]fficers need not reorder the sequence of their conduct during an arrest simply to satisfy an artificial rule that would link the validity of the search to the duration of the risks."[37]

The following are examples of circumstances that have been found to justify a delay in beginning the search:

- After arresting the four occupants of a car, but before searching the vehicle, an officer split the suspects up "so they would not be in physical touching area of each other"; he also retrieved and searched a suspicious envelope on the front seat and *Mirandized* the suspects.[38]
- Officers delayed searching the suspect's car for five minutes in order to complete the paperwork for impounding the car.[39]
- Officers delayed searching the suspect's car until it had been towed from the arrest scene because "the gunfire and subsequent crash of defendant's car had attracted a crowd so large that extra policemen had to be summoned [to control] the mob that was forming."[40]
- Officers delayed searching the suspect's car because they were dispatched to a priority auto accident.[41]
- After arresting a suspected drug dealer on the front porch of a residence, officers delayed searching a bag he was carrying until he had been handcuffed and moved to the street.[42]
- Officers delayed searching the clothing of a female suspect until they reached the jail so that a female officer could conduct the search.[43]
- Officers who had arrested the suspect in his home delayed searching the room in which he was arrested because it was necessary to conduct a protective sweep.[44]

On the other hand, a search will not be deemed contemporaneous with an arrest if, before beginning the search, officers did things that were not reasonably necessary. For example:

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[37] *U.S.* v. *Nelson* (4th Cir. 1996) 102 F.3d 1344, 1347. ALSO SEE *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607 ["[I]t does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures."].

[38] *New York* v. *Belton* (1981) 453 U.S. 454, 462 ["The search of the respondent's jacket followed immediately upon that arrest."].

[39] *U.S.* v. *McLaughlin* (9th Cir. 1999) 170 F.3d 889, 892 ["Here, the defendant's arrest, the filling out of the impound paperwork, and the search of his car were all part of a continuous, uninterrupted course of events, all occurring within a relatively brief period of time."].

[40] *People* v. *Webb* (1967) 66 Cal.2d 107, 125. ALSO SEE *U.S.* v. *Schleis* (8th Cir. 1976) 543 F.2d 59, 62 [OK to search suspect's briefcase at police station because a large crowd had gathered at the site of the arrest].

[41] *People* v. *McBride* (1969) 268 Cal.App.2d 824, 829. ALSO SEE *People* v. *Jones* (1969) 274 Cal.App.2d 614, 620 [where the arrest occurred "on a high-speed freeway with eight persons standing alongside the freeway," the officers delayed searching the suspect's car for one hour in order to transport the suspects to jail].

[42] *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607. ALSO SEE *U.S.* v. *Tank* (9th Cir. 2000) 200 F.3d 627, 631 [search of car was lawful even though it was driven to the suspect's home less than a block from the arrest site before it was searched].

[43] See *People* v. *Boren* (1987) 188 Cal.App.3d 1171, 1177 ["However, defendant being a female, it was only reasonable that Officer Owen not conduct this search in the field"].

[44] *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1420.

- Officers delayed searching a vehicle for 30-45 minutes in order to conduct "several conversations with the arrestee.[45]
- Officers seized two packages from the suspect's car when he was arrested but, for no apparent reason, delayed searching them for four to five hours.[46]

SUSPECT ON THE SCENE: The search must ordinarily occur while the arrestee was on the scene.[47] Like the "time" element, however, there is some flexibility here. For example, it is immaterial that the arrestee was being escorted out the door when the search occurred, or that he was being transported to jail while the search was underway.[48]

On the other hand, a search is not contemporaneous with an arrest if the suspect had already been transported to jail or to a police station unless there was good cause for delaying the search.[49] As the court noted in *People* v. *Balassy*, "It is now well settled that once the accused is safely in custody at the station house, removed from the vicinity of his car, the reasons justifying a warrantless search of a vehicle as incident to an arrest no longer obtains."[50]

SEARCH AT THE ARREST SCENE: Unless there is good cause to conduct the search somewhere else, it must occur at the scene of the arrest. For example, containers that were taken from the suspect or found in his car must be searched at the arrest scene, not at the police station.[51]

After officers have determined that the three requirements for conducting a search incident to arrest have been met, the question arises: What places and things may be

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[45] *U.S.* v. *Vasey* (9th Cir. 1987) 834 F.2d 782, 787.

[46] *People* v. *Reigler* (1981) 127 Cal.App.3d 317, 322 [overruled on other grounds in *People* v. *Reigler* (1984) 159 Cal.App.3d 1061] ["[A] problem arises because the officers did not open the packages at the time of the seizure and the arrest; rather, the officers delayed the opening of the packages until some four to five hours later after they had been seized. [T]his delay is fatal to the officers' right to open the packages without a warrant."

[47] See *U.S.* v. *Lugo* (10th Cir. 1992) 978 F.2d 631, 635 ["[W]hen the search of Lugo's truck began, Lugo was no longer at the scene. He was handcuffed and sitting in the back seat of a patrol car proceeding toward Green River."]; *U.S.* v. *Hardeman* (E.D. Michigan 1999) 36 F.Supp.2d 770, 780 ["[A]s the government readily acknowledges, [the search] was made long after defendant was arrested and removed from the premises."].

[48] See *People* v. *Summers* (1999) 73 Cal.App.4th 288, 290 [search of small house trailer was lawful even though, when it occurred, an officer was escorting the suspect outside and may have been "just outside" the trailer]; *U.S.* v. *Hudson* (9th Cir. (1996) 100 F.3d 1409, 1419; *U.S.* v. *Doward* (1st Cir. 1994) 41 F.3d 789, 793 ["Nothing in [*Belton*] even remotely implies that law enforcement officers must *discontinue* a passenger-compartment search—properly initiated as a contemporaneous *incident* of an occupant's arrest—the instant the arrestee is transported from the scene."].

[49] See *Mestas* v. *Superior Court* (1972) 7 Cal.3d 537, 541 ["Once the police had taken defendant to the police station, removing him from the vicinity of his car, the subsequent search of that car could not be considered incident to defendant's arrest."]; *U.S.* v. *Lugo* (10th Cir. 1992) 978 F.2d 631, 635 ["Once Lugo had been taken from the scene, there was obviously no threat that he might reach in his vehicle and grab a weapon or destroy evidence. Thus, the rationale for a search incident to arrest had evaporated."].

[50] (1973) 30 Cal.App.3d 614, 622.

[51] See *United States* v. *Chadwick* (1977) 433 U.S. 1, 15 ["[W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest."]; *U.S.* v. *Burnette* (9th Cir. 1983) 698 F.2d 1038, 1049 ["Where such a container is not searched immediately, but is instead taken to the police station and searched later, a warrant is required."].

searched? As we will now explain, officers may search, (1) the arrestee's person, and (2) places and things within his immediate control.

SEARCHING THE ARRESTEE

In most cases, the first thing officers do is search the arrestee. How intensive a search is permitted? The courts have described it as a "full" search,[50] but that's not very helpful. Still, about all that can be said about its intensity is that it is more intrusive than a pat down,[52] and it entails "a relatively extensive exploration" of the arrestee, including his pockets.[53]

"EXTREME" SEARCHES: The search must not be "extreme," "patently abusive," or "unnecessarily intrusive.[54] For example, strip searches and body cavity searches would never be permitted as a routine incident to an arrest.[55] Nor may officers routinely reach under the arrestee's clothing and feel an arrestee's breasts, buttocks, legs, or genital

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[52] See *United States* v. *Robinson* (1973) 414 U.S. 218, 227-8; *People* v. *Dennis* (1985) 172 Cal.App.3d 287, 290 [a "full" search "is a greater intrusion than [a] pat-down"]. ALSO SEE *Terry* v. *Ohio* (1968) 392 U.S. 1, 17, fn. 13 [Court notes the following is an "apt" description of the procedure: "The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."].

[53] See *United States* v. *Edwards* (1974) 415 U.S. 800; *Terry* v. *Ohio* (1968) 392 U.S. 1, 25; *United States* v. *Robinson* (1973) 414 U.S. 218, 227; *United States* v. *Santana* (1976) 427 U.S. 38, 43 [officers could lawfully order the arrestee to empty her pockets]; *Rawlings* v. *Kentucky* (1980) 448 U.S. 98; *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 536; *People* v. *Fay* (1986) 184 Cal.App.3d 882, 893; *U.S.* v. *McKissick* (10th Cir. 2000) 204 F.3d 1282, 1296 [a search incident to arrest "is not limited to a frisk for weapons, but may have as its purpose a search for evidence of a crime."]; *Mary Beth G.* v. *City of Chicago* (7th Cir. 1983) 723 F.2d 1263, 1270 ["In characterizing what constitutes a full search incident to arrest, the *Robinson* Court quoted with approval language from *Terry* that describes a reasonable search incident to arrest as one involving 'a relatively extensive exploration of the person.'"].

[54] See *United States* v. *Robinson* (1973) 414 U.S. 218, 236 ["While thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause"]; *U.S.* v. *Dorlouis* (4th Cir. 1997) 107 F.3d 248, 256.

[55] See *Schmerber* v. *California* (1966) 384 U.S. 757, 769-70 ["Whatever the validity [of the reasons justifying searches incident to arrest] they have little applicability with respect to searches involving intrusions beyond the body's surface."]; *Illinois* v. *Lafayette* (1983) 462 U.S. 640, 645 ["[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street"]; *Fuller* v. *M.G. Jewelry* (9th Cir. 1991) 950 F.2d 1437, 1446 ["[T]he visual body cavity inspection was not justified as a search incident to arrest."]; *Giles* v. *Ackerman* (9th Cir. 1984) 746 F.2d 614, 616 ["[W]e see nothing in *Robinson* and *Schmerber* that authorizes the somewhat less intrusive strip search as incident to arrest."]; *U.S.* v. *Amaechi* (E.D. Virginia 2000) 87 F.Supp.2d 556, 563 ["The Supreme Court has stated, quite clearly, that the considerations that justify the authority to search incident to a lawful arrest . . . have little applicability with respect to searches involving intrusions beyond the body's surface."]; *U.S.* v. *Ford* (E.D. Virginia 2002) 232 F.Supp.2d 625, 631 [officer violated the Fourth Amendment when he "shoved his gloved hand into defendant's buttocks."]; *Jane Doe* v. *Calumet City* (N.D. Illinois 1990) 754 F.Supp. 1211, 1220 ["Police officers must have some level of particularized justification to strip search an individual arrestee."]; *Commonwealth* v. *Gilmore* (1998) 498 S.E.2d 464, 468 ["[T]he authority of the police under the Fourth Amendment to conduct a 'full search' of an arrestee's person without a warrant is only skin deep."].

area.[56] Furthermore, in the unlikely event it becomes necessary to remove some of the arrestee's clothing to conduct a full search, officers must do so with due regard for the arrestee's legitimate privacy interests.[57] As the Court explained in *Illinois* v. *Lafayette*, "[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street . . . "[58]

SEARCHING ITEMS IN THE ARRESTEE'S POSSESSION: Officers may open and search all personal property and containers in the arrestee's possession. As the California Court of Appeal observed, "[A]n officer with probable cause to arrest may open any container found on the arrestee in the course of a full body search."[59] For example, the courts have upheld searches of wallets, purses, shoulder bags, backpacks, hide-a-key boxes, cigarette packages, pillboxes, and envelopes.[60]

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[56] See *Amaechi* v. *West* (E.D. Virginia 2000) 87 F.Supp.2d 556, 560 [upon arresting a woman who wore nothing but a house dress, an officer allegedly "proceeded to run his hands over her hips, inside her now-opened dress. Moreover, with one hand palm-up, he allegedly swiped across her groin area, at which time the tip of his finger slightly penetrated her genitals"; the court ruled the search was "analogous to an improper body cavity or strip search [which was] unconstitutionally unjustified and unreasonable under the circumstances."].

[57] See *U.S.* v. *Williams* (7th Cir. 2000) 209 F.3d 940, 944 ["Williams was never disrobed or exposed to the public. The search occurred at night, away from traffic and neither officer saw anyone in the vicinity."]; *U.S.* v. *McKissick* (10th Cir. 2000) 204 F.3d 1282, 1297, fn. 6 ["Officer Patten testified he did not remove Mr. Zeigler's clothes during the search, but he might have unzipped Mr. Zeigler's pants after discovering a lump in Mr. Zeigler's crotch area that was inconsistent with his genitals."]; *U.S.* v. *Dorlouis* (4th Cir. 1997) 107 F.3d 248, 256 ["The search did not occur on the street subject to public viewing but took place in the privacy of the police van."].

[58] (1983) 462 U.S. 640, 645.

[59] *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538.

[60] See *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538 ["hide-a-key" box]; *People* v. *Aguilar* (1985) 165 Cal.App.3d 221, 225 [wallet]; *People* v. *Methey* (1991) 227 Cal.App.3d 349, 358-9 [wallet]; *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1005-6 [wallet]; *People* v. *Sanchez* (1985) 174 Cal.App.3d 343, 348 [wallet]; *People* v. *Baker* (1970) 12 Cal.App.3d 826, 841 [handbag]; *People* v. *Ingham* (1992) 5 Cal.App.4th 326, 331 [purse]; *People* v. *Nagdeman* (1980) 110 Cal.App.3d 404, 412 [purse]; *People* v. *Garcia* (1981) 115 Cal.App.3d 85, 103 [purse]; *People* v. *Belvin* (1969) 275 Cal.App.2d 955, 957-9 [purse]; *People* v. *Harris* (1980) 105 Cal.App.3d 204, 216 [purse]; *People* v. *Brocks* (1981) 124 Cal.App.3d 959, 964 [change purse]; *People* v. *Superior Court (Irwin)* (1973) 33 Cal.App.3d 475, 479 [purse]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 230 [shoulder bag]; *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243-4 [backpack]; *People* v. *Gutierrez* (1984) 163 Cal.App.3d 332, 335 [small cardboard box]; *People* v. *Gonzales* (1989) 216 Cal.App.3d 1185 ["cylindrical rolled up clear plastic baggy"]; *People* v. *Brown* (1989) 213 Cal.App.3d 187, 192 [pill bottle]; *United States* v. *Robinson* (1973) 414 U.S. 218, 223 [cigarette package]; *Gustafson* v. *Florida* (1973) 414 U.S. 260, 262 [cigarette package]; *U.S.* v. *Rodriguez* (7th Cir. 1993) 995 F.2d 776, 778 [address book]; *U.S.* v. *Lynch* (D. Virgin Islands 1995) 908 F.Supp. 284, 288 [collected cases re searches of wallets and address books]; *U.S.* v. *Porter* (4th Cir. 1983) 738 F.2d 622, 627 [carry-on bag]; *U.S.* v. *Schleis* (8th Cir. 1976) 543 F.2d 59, 62 [briefcase]; *U.S.* v. *Stephenson* (8th Cir. 1986) 785 F.2d 214, 225 [briefcase]; *U.S.* v. *Nohara* (9th Cir. 1993) 3 F.3d 1239, 1243 [bag]; *U.S.* v. *Litman* (4th Cir. 1984) 739 F.2d 137, 139 [shoulder bag]; *U.S.* v. *Molinaro* (7th Cir. 1989) 877 F.2d 1341, 1346-7 [address book]; *U.S.* v. *Holzman* (9th Cir. 1989) 871 F.2d 1496, 1504 [address book]; *U.S.* v. *Vaneenwyk* (W.D. N.Y. 2002) 206 F.Supp.2d 423, 426 [day planner].
NOTE: California's old restrictive rule governing searches of containers was based primarily on principles announced in *United States* v. *Chadwick* (1977) 433 U.S. 1. See *People* v. *Minjares* (1979) 24 Cal.3d 410, 417-21. The *Chadwick* rationale was repudiated in *California* v. *Acevedo* (1991) 500 U.S. 565.

Note that officers may search such an item even if they had already taken control of it.[61] "[I]t is well settled," said the U.S. Court of Appeals, "that officers may separate the suspect from the container to be searched, thereby alleviating their safety concerns, before they conduct the search."[62]

SEARCHING PAGERS, CELL PHONES: If the suspect is carrying a pager or cell phone, officers may activate the device so as to reveal any stored phone numbers.[63] As noted in *U.S.* v. *Ortiz*, "[I]t is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence."[64] It is also arguable that officers may also search PDA's and other types of handheld data storage devices because they are tantamount to a wallet or briefcase.

SEARCHING DISCARDED ITEMS: If the suspect dropped, discarded, or tried to hide an item just prior to his arrest, officers may retrieve and search it.[65] As the Sixth Circuit explained, "So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to a search incident to arrest."[66]

SEARCHING BEYOND THE ARRESTEE

The "immediate control" test

In addition to searching the suspect, officers may search places and things within his "immediate control." These searches, commonly known as *"Chimel"* searches,[67] can be tricky because it is often difficult to figure out exactly what an arrestee "controls." Yet, it is essential that officers know how to make this determination.

To provide guidance, the courts have devised some rules that permit certain searches and prohibit others, even though the rules sometimes authorize searches of places and things that were not really within the suspect's immediate control. Some of these rules are based on generalizations as to what is usually within an arrestee's immediate control. Others are a bit arbitrary, sometimes permitting searches of places and things over which the arrestee had absolutely no control. In any event, they are felt to be justified by "[t]he

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[61] See *New York* v. *Belton* (1981) 453 U.S. 454, 462, fn. 5; *U.S.* v. *Porter* (4th Cir. 1984) 738 F.2d 622, 627; *U.S.* v. *Nelson* (4th Cir. 1996) 102 F.3d 1344, 1346 ["[T]he justification [for searching a container] does last for a reasonable time after the officers obtain exclusive control of the container"].

[62] *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 542.

[63] See *U.S.* v. *Reyes* (S.D.N.Y. 1996) 922 F.Supp. 818, 833 ["Agent Coad accessed the memory of Pager #1 soon after another agent seized the pager from the bag attached to Reyes' wheelchair. [Therefore] the search of the memory of Pager #1 was a valid search incident to Reyes' arrest."]; *U.S.* v. *Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["[T]he general requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest. The search conducted by activating the pager's memory is therefore valid."]; *U.S.* v. *Lynch* (D. V.I. 1995) 908 F.Supp. 284, 287 ["[T]he search of the pager was valid as incidental to Thomas' valid arrest."]; *U.S.* v. *Thomas* (3d Cir. 1997) 114 F.3d 404, 404, fn.2; *U.S.* v. *Cote* (N.D. Ill. 2005) 2005 WL 1323343 [slip copy][search of a cell phone's number log was analogous to a search of a wallet or address book and was, therefore, lawful as a search incident to arrest]; *Johnson* v. *State* (Ind. App. 2005) __ N.E.2d __ [2005 WL 1669472].

[64] (7th Cir. 1996) 84 F.3d 977, 984.

[65] See "Basic principles" ("Immediate control at time of arrest"), below.

[66] *Northrop* v. *Trippett* (6th Cir. 2001) 265 F.3d 372, 379.

[67] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'"].

need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment . . . "[68]

Under no circumstances, however, will officers be permitted to embark on a "general search" in the guise of a search incident to arrest.[69]

Basic principles

To determine what places and things are within a suspect's "immediate control," the courts apply the following principles.

IMMEDIATE CONTROL AT TIME OF ARREST: The test is whether the place or thing was within the suspect's immediate control when he was notified he was under arrest—not when he was *searched*.[70] As the Sixth Circuit explained, "So long as the defendant had the item within his immediate control near the time of his arrest, the item remains subject to a search incident to arrest."[71]

HOW MUCH "CONTROL" IS REQUIRED? It is somewhat misleading to say that a place or thing must be within or under the arrestee's "control." In most cases, a person who is being arrested doesn't have much control over anything. It is, therefore, more accurate to

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[68] *Thornton* v. *United States* (2004) 541 U.S. 615, __.

[69] See *People* v. *Summers* (1999) 73 Cal.App.4th 288, 290 ["The justification for *Chimel* searches is officer safety, not officer opportunism, i.e., a postarrest license to embark on a general search."]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 7 ["[T]he arresting officers in clear derogation of petitioners' rights proceeded after the discovery of the hashish to search the entire apartment."]; *State* v. *Murdock* (Wis. Supreme 1990) 155 Wis.2d 217, 228 ["The *Chimel* rule did not create the search incident to arrest doctrine, but instead limited its scope. Previous cases had permitted full-scale searches of entire rooms, even an entire four-room apartment, under the guise of search incident to arrest."].

[70] See *New York* v. *Belton* (1981) 453 U.S. 454, 462 ["The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was 'within the arrestee's immediate control'"]; *People* v. *Rege* (2005) 130 Cal.App.4th 1584]["[T]he proper focus should be on the area into which the defendant could have grabbed at the time of his arrest, not the area that was under his immediate control at the time of the search"]; *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1419 ["[T]he critical inquiry is whether the search was properly limited to the area within the arrestee's immediate control at the time of his arrest."]; *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767 ["The critical time for analysis is the time of the arrest and not the time of the search."]; *U.S.* v. *Nelson* (4th Cir. 1996) 102 F.3d 1344, 1347; *U.S.* v. *Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 669 ["Indeed, if the courts were to focus exclusively upon the moment of the search, we might create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer."; *People* v. *Rege* (2005) 130 Cal.App.4th 1584["[I]t makes no sense to condition a search incident to arrest upon the willingness of police to remain in harm's way while conducting it." Quoting *People* v. *Summers* (1999) 73 Cal.App.4th 288, 295 [conc. opn. of Bedsworth, J.).]. Or it might give them a disincentive to separate the suspect from backpacks, briefcases, and other containers in their immediate possession when they were arrested. **ALSO SEE** *U.S.* v. *Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 668 ["To the extent that *Belton* might be thought to apply only to automobiles, however, we have already rejected that interpretation." Citing *U.S.* v. *Brown* (D.C. Cir. 1982) 671 F.2d 585, 587.].

[71] *Northrop* v. *Trippett* (6th Cir. 2001) 265 F.3d 372, 379.

say that a place or thing may be searched if it would have been within his immediate control if officers had not been present.[72]

SUSPECT HANDCUFFED, RESTRAINED: If a place or thing was within the arrestee's immediate control when he was arrested, it is immaterial that the search began after he had been handcuffed, locked in a patrol car, or surrounded by officers.[73]

SUSPECT SEPARATED FROM ITEM SEARCHED: It is also immaterial that officers, after arresting the suspect, separated him from an item in his possession before searching it.[74]

"IMMEDIATE CONTROL" VS. "GRABBING DISTANCE": Although the area within an arrestee's immediate control is sometimes referred to as "grabbing distance,"[75] it is not

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[72] See *U.S.* v. *Palumbo* (8th Cir. 1984) 735 F.2d 1095, 1097 ["[A]ccessibility, as a practical matter is not the benchmark. The question is whether the cocaine was in the area within the immediate control of the arrestee"]; *State* v. *Murdock* (Wis. Supreme 1990) 155 Wis.2d 217, 236 ["[W]e conclude that the *Chimel* standard authorizes a contemporaneous, limited search of the area immediately surrounding the arrestee measured at the time of the arrest without consideration to actual accessibility to the area searched."]. ALSO SEE *New York* v. *Belton* (1981) 453 U.S. 454, 462, fn.5 [in rejecting the argument that an item is not searchable if officers had gained "exclusive control" over it, the Court observed, "But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'"].

[73] See *New York* v. *Belton* (1981) 453 U.S. 454, 462; *People* v. *Stoffle* (1991) 1 Cal.App.4th 1671, 1681 [court notes it is the "near uniform rule" in the federal courts that "even where the arrestee is handcuffed and locked in a patrol car the police may search the passenger compartment of the arrestee's vehicle under *Belton*." Citations omitted.]; *People* v. *Hunt* (1990) 225 Cal.App.3d 498, 508 [court agrees with uniform federal rulings that *"Belton's* 'bright line' rule to authorize contemporaneous searches of vehicles where the occupants of the vehicles were immobilized and separated from the searched vehicles, usually by being put in the back of a patrol car" or handcuffed."]; *People* v. *Rege* (2005) 130 Cal.App.4th 1584 ["[I]t is clear that a valid search incident to arrest may take place even after the suspect has been arrested or immobilized"]; *People* v. *Mitchell* (1995) 36 Cal.App.4th 672, 674 ["The search is permitted even after an arrestee has been removed from the vehicle and restrained."]; *People* v. *Prance* (1991) 226 F.3d 1525, 1533 [car may be searched "even where the arrestee has been moved away from the vehicle and is no longer within reach of such items."]; *U.S.* v. *Moorehead* (9th Cir. 1995) 57 F.3d 875, 878 ["A defendant need not be in the automobile and may be effectively restrained."]; *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607 ["[I]t does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures. Thus handcuffing Rolenc and having reinforcements enter Fleming's house should not be determinative, unless we intend to use the Fourth Amendment to impose on police a requirement that the search be absolutely contemporaneous with the arrest, no matter what the peril to themselves or to bystanders."]; *U.S.* v. *Willis* (7th Cir. 1994) 37 F.3d 313, 317 ["[W]e have also held that officers may conduct valid searches incident to arrest even when the officers have secured the suspects in a squad car and rendered them unable to reach any weapon or destroy evidence."]; *U.S.* v. *Karlin* (7th Cir. 1988) 852 F.2d 968, 972 [it is reasonable to conduct the search after securing the suspect]; *U.S.* v. *Doward* (1st Cir. 1994) 41 F.3d 789, 791, fn.1 ["the great weight of authority . . . holds that *Belton's* bright-line rule applies even in cases where the arrestee is under physical restraint and at some distance from the automobile during the search."].

[74] See *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 542 ["[I]t is well-settled that officers may separate the suspect from the container to be searched, thereby alleviating their safety concerns, before they conduct the search."].

[75] See *U.S.* v. *Arango* (7th Cir. 1989) 879 F.2d 1501, 1505; *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."].

limited to places and things that are literally within his reach or "wingspan." Instead, the courts tend to permit searches of places and things that were within "lunging" distance at the time of arrest.[76]

EXPECT IRRATIONALITY, NOT ACROBATICS: In determining whether a place or thing was within the arrestee's immediate control, officers may take into account that suspects who are about to be arrested may act irrationally—that their fear of losing their freedom may cause them to lunge into places that may be some distance away.[77] As the United States Supreme Court observed, "There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."[78]

Consequently, a search will not be invalidated merely because it was questionable that the arrestee could have reached the place or thing that was searched.[79] Still, as the Seventh Circuit observed, it must have been "conceivably accessible to the arrestee—assuming that he was neither an acrobat nor a Houdini."[80]

OBJECTS THAT CANNOT HOLD WEAPONS OR EVIDENCE: If an object was within the suspect's immediate control when he was arrested, officers may search it even if it was not large enough to hold a weapon or evidence. This is mainly because, as the United States Supreme Court pointed out, the decision to search a particular place or thing incident to an arrest "is necessarily a quick ad hoc judgment," the lawfulness of which should "not depend on what a court may later decide was the probability in a particular

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[76] See *Thornton* v. *United States* (2004) 541 U.S. 615, __ ["nor is an arrestee less likely to attempt to lunge for a weapon"]; *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 542 ["Since *Chimel*, the Supreme Court has interpreted broadly both the area under "immediate control' and the likelihood of danger or destruction of evidence."]; *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 330 ["[T]he police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."].

[77] See *U.S.* v. *Reilly* (9th Cir. 2000) 224 F.3d 986, 993 ["[I]it is both naïve and dangerous to assume that a suspect will not act out desperately despite the fact that he faces the barrel of a gun."]; *United States* v. *Chadwick* (1977) 433 U.S 1, 15 [officers are not required "to calculate the probability that weapons or destructible evidence may be involved."]; *U.S.* v. *Queen* (7th Cir. 1988) 847 F.2d 346, 354 ["Indeed, the Supreme Court—as well as several courts of appeals, including our own—have upheld searches incident to arrest where the possibility of an arrestee's grabbing a weapon or accessing evidence was at least as remote as in the situation before us." Citations omitted.]; *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207 ["*Chimel* does not require the police to presume that an arrestee is wholly rational."]; *U.S.* v. *Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 670; *State* v. *Murdock* (Wis. Supreme 1990) 155 Wis.2d 217, 235 ["[W]e cannot require an officer to weigh the arrestee's probability of success in obtaining a weapon or destructible evidence hidden within his or her immediate control."].

[78] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7.

[79] See *U.S.* v. *Palumbo* (8th Cir. 1984) 735 F.2d 1095, 1097 ["[A]ccessibility, as a practical matter is not the benchmark. The question is whether the cocaine was in the area within the immediate control of the arrestee"]; *State* v. *Murdock* (Wis. Supreme 1990) 155 Wis.2d 217, 231 ["[A]ctual accessibility, as a practical matter, cannot be the benchmark determining the authority to search and the reasonableness of the scope of a search incident to arrest. Arrests are tense and risky undertakings during which many activities necessarily happen simultaneously."].

[80] *U.S.* v. *Queen* (7th Cir. 1988) 847 F.2d 346, 353. ALSO SEE *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 330 ["[S]earches have sometimes been upheld even when hindsight might suggest that the likelihood of the defendant reaching the area in question was slight."].

arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[81]

SUSPECT FLEES: If the suspect fled when officers attempted to arrest him, they may search the area that would have been within his immediate control had he submitted.[82] Otherwise arrestees might have an incentive to flee from incriminating evidence in order to avoid its discovery.

For example, in *People* v. *Williams*[83] the defendant led Fullerton police officers on a high speed pursuit after he had burglarized a clothing store. When Williams bailed out, some of the officers chased him on foot while others searched his car, finding items taken from the store. Williams was arrested about 15 to 20 minutes later, about one block away. On appeal, he argued the search of his car could not be upheld as a search incident to his arrest because of the distance. The court responded, "Of no legal significance is the fact that defendant, through his efforts to escape, succeeded in separating himself from the car by a distance of about one block."

SUSPECT HIDES AN OBJECT: If the suspect secreted an item he was carrying just before he was arrested, there is authority for retrieving and searching the object after the suspect was arrested. As the California Court of Appeal observed, "[I]t would be absurd to rule that because [the suspect] was successful in removing an observed article from his immediate presence moments before his arrest, the officers could not retrieve it from where it was placed."[84]

TIMING AN ARREST: Officers will sometimes delay arresting a suspect until he is inside his home, car, or some other place. If a search incident to the arrest results in the discovery of evidence, he may contend the search was unlawful on grounds that officers deliberately timed the arrest so as to justify a search of the place to which he was moved.

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[81] *United States* v. *Robinson* (1973) 414 U.S. 218, 235. ALSO SEE *Mary Beth G.* v. *City of Chicago* (7th Cir. 1983) 723 F.2d 1263, 1269 ["Initially, the Supreme Court attempted to tie strictly the scope of the search [incident to arrest] to the circumstances which rendered its initiation permissible [citing *Chimel* v. *California*], but the Court subsequently rejected that position in *United States* v. *Robinson*. The majority in *Robinson* was unwilling to place on the arresting officers the burden of deciding in each case whether or not there is present one of the reasons supporting the authority for a search"].

[82] See *People* v. *Pressley* (1966) 242 Cal.App.2d 555, 559-60 ["[T]he actual arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away. But we do not think that this is controlling. The process of arrest had begun at the door . . . "]; *U.S.* v. *Arango* (7th Cir. 1989) 879 F.2d 1501, 1506; *U.S.* v. *Willis* (7th Cir. 1994) 37 F.3d 313, 317 [when an occupant of a parked car saw the officer approaching, the officer saw him "sneak out of the car, and creep along the driver's side," where he was subsequently arrested; court: "There is no question that, for the purposes of a search incident to arrest, Willis was an occupant of the vehicle."]. ALSO SEE *People* v. *Thompson* (1972) 25 Cal.App.3d 132, 138, 141 [defendant was arrested after he placed trunks containing marijuana in his car and started to walk away; search of car upheld as incident to arrest]. **NOTE**: The suspect may also be deemed to have "abandoned" the item. See *U.S.* v. *Allen* (10th Cir. 2000) 235 F.3d 482, 489 ["Mere presence" in a car is not sufficient to established standing "particularly when the individual flees the scene after being stopped"]; *U.S.* v. *Edwards* (5th Cir.1971) 441 F.2d 749 ["Defendant's right to Fourth Amendment protection came to an end when he abandoned his car to the police, on a public highway, with engine running, keys in the ignition, lights on, and fled on foot. At that point defendant could have no reasonable expectation of privacy with respect to his automobile."].

[83] (1967) 67 Cal.2d 226.

[84] *People* v. *Superior Court (Reilly)* (1975) 53 Cal.App.3d 40, 49. **NOTE**: The suspect may also be deemed to have "abandoned" the item. See *California* v. *Greenwood* (1988) 486 U.S. 35, 39-41.

These arguments have, however, been consistently rejected so long as officers had a good reason for delaying the arrest; e.g., narcotics officers decided not to arrest the suspect in a public place because it would "blow their cover," officers waited to arrest the suspect in his home to avoid a foot pursuit.[85]

SEIZING EVIDENCE IN PLAIN VIEW: Officers who are conducting a search incident to an arrest may seize any evidence in plain view if they have probable cause to believe it is, in fact, evidence of a crime.[86] This is true even if the item was not within the arrestee's immediate control.[87]

For example, in *People* v. *Bagwell*,[88] the defendant stabbed her husband as he slept. The husband was able to drive to a gas station where someone summoned help. When he told officers what had happened, they went to the house and arrested Ms. Bagwell when she answered the door. From their position at the doorway, they could see an "obvious blood trail" leading into the hallway. One of them then entered the house and followed the trail to a bedroom where he discovered a bloodstained butcher knife. He seized the knife, which was admitted into evidence at the defendant's murder trial.

Ms. Bagwell argued that the officer could not lawfully go into the bedroom and seize the knife because the bedroom was not within her immediate control when she was arrested at the doorway. The court ruled, however, that an officer who sees evidence in plain view from a spot within the arrestee's immediate control can go to that evidence to examine it. And if he sees another item from there, and if there is probable cause to believe that item is also evidence, he may go to it. Said the court:

> Having a right to seize evidence in plain sight for later judicial use, [the officer] had a corresponding right to closely observe this incriminating indicia of violence for the same evidentiary purpose. This continuing observation led him to the far end of the hallway where he, accordingly, had a right to be. At that point the trail of blood led his eyes to the bedroom where in plain view was the death weapon.

Now that we have examined how the courts determine whether an item was within a suspect's immediate control when he was arrested, we will now look at the specific places and things that may be searched.

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[85] See *Eiseman* v. *Superior Court* (1971) 21 Cal.App.3d 342, 349; *People* v. *Barnard* (1982) 138 Cal.App.3d 400, 413; *People* v. *Groves* (1969) 71 Cal.2d 1196, 1199; *Bowyer* v. *Superior Court* (1974) 37 Cal.App.3d 151, 160 [delay to conduct "large-scale early morning raid because of the possibilities that many fugitives were present and that the terrain could permit some to escape if the ranch were not adequately surrounded."]. **PROSECUTORS NOTE**: It is arguable that an officer's deliberate act of timing an arrest so as to justify a search of a particular place or thing may not, under any circumstances, render the arrest unlawful. See *Whren* v. *United States* (1996) 517 U.S. 806, 812-3.

[86] See *Arizona* v. *Hicks* (1987) 480 U.S. 321; *Washington* v. *Chrisman* (1982) 455 U.S. 1, 5-6.

[87] See *People* v. *Superior Court (Irwin)* (1973) 33 Cal.App.3d 475, 479 ["[N]either *Chimel* nor *Block* circumscribes the distance between the lawful position of the officers and the items in plain sight especially where, as here, the distance or field of view is unobstructed by any doors, windows or other barriers."]; *People* v. *Barnard* (1982) 138 Cal.App.3d 400, 413; *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1420

[88] (1974) 38 Cal.App.3d 127.

Searching nearby containers

Officers may search all containers within the suspect's immediate control when he was arrested, even if he was not actually carrying it, and even if officers knew it did not belong to the suspect. As the United States Supreme Court observed, "A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested."[89]

Searching inside a residence

If the arrest occurred inside a residence or other structure, officers may search the following places and things.

GRABBING AREA: Officers may search the spaces within the arrestee's "grabbing area"; e.g., under a mattress about two feet from the arrestee,[90] under a bed on which the arrestee was lying,[91] under a sofa two feet from suspect,[92] a nearby chair,[93] behind a dresser drawer in the arrestee's motel room.[94]

Officers may also search containers located in this area; e.g., a canvas bag within three feet of the arrestee,[95] a rifle case "near" his feet,[96] a suitcase on a bed next to which he was standing,[97] a cardboard box at the foot of a bed on which he was lying,[98] a duffle bag at the foot of a bed on which he was lying,[99] a carry-on bag within his reach,[100] a jacket 3-4 feet away.[101]

Note that if a container or other object was within the suspect's immediate control when he was arrested, officers may search it even if they knew it belonged to someone else. As the Court of Appeal observed, "Nothing in [*Chimel* or *Belton*] requires that the areas searched within the reach of the arrestee must themselves be his or her personal property."[102]

VICINITY SEARCHES: Officers who have made a custodial arrest inside a home or other structure may also search spaces "immediately adjoining the place of arrest from which an attack could be immediately launched."[103] Such a search is permitted regardless of whether officers have reason to believe there is anyone else on the premises.[104]

There are two important differences between vicinity searches and searches within an arrestee's "grabbing distance." First, the sole objective of a vicinity search is to locate

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[89] *Chimel* v. *California* (1969) 395 U.S. 752, 763.
[90] *People* v. *Sims* (1993) 5 Cal.4th 405, 449-51. ALSO SEE *People* v. *Rege* (2005) 130 Cal.App.4th 1584 [search under mattress in small motel room].
[91] *People* v. *King* (1971) 7 Cal.3d 458, 463.
[92] *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[93] *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767.
[94] *U.S.* v. *Palumbo* (8th Cir. 1984) 735 F.2d 1095, 1097.
[95] *People* v. *Flores* (1979) 100 Cal.App.3d 221, 227.
[96] *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1420.
[97] *U.S.* v. *Andersson* (9th Cir. 1987) 813 F.2d 1450, 1456.
[98] *People* v. *Spencer* (1972) 22 Cal.App.3d 786, 797.
[99] *People* v. *Arvizu* (1970) 12 Cal.App.3d 726, 729.
[100] *U.S.* v. *Porter* (4th Cir. 1984) 738 F.2d 622, 627.
[101] *U.S.* v. *Mason* (D.C. Cir. 1975) 523 F.2d 1122, 1125-6.
[102] *People* v. *Prance* (1991) 226 Cal.App.3d 1525, 1533. ALSO SEE *People* v. *Mitchell* (1995) 36 Cal.App.4th 672, 675.
[103] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.
[104] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.

people, not weapons or evidence. Thus, officers may search only those places and things in which "unseen third parties" might be hidden.[105] For example, they could look into a closet, but not under a rug.[106]

Second, there is a difference in scope between the area within an arrestee's "immediate control" and the spaces "immediately adjoining" the place of arrest. Although they both cover a fairly small amount of territory, the area "immediately adjoining" the place of arrest will usually extend well beyond the arrestee's "grabbing" distance.[107] This is because an arrestee can only reach so far; while a friend, relative, or accomplice of the arrestee might be able to launch a sneak attack from any hidden space in the immediate vicinity. Thus, for example, officers might be permitted to look into a closet, but not under a mattress.

SEARCHING OTHER ROOMS: Officers may not *routinely* search beyond the room in which the arrest occurred.[108] There are, however, three situations in which such an expanded search might be permitted. First, if the arrestee requests permission to go into another room to, for example, obtain clothing or use the bathroom, officers may, in the words of the U.S. Supreme Court, stay "literally at [his] elbow at all times."[109] As the

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[105] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 336 ["[T]he justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house."].

[106] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 333; *U.S.* v. *Ford* (D.C. Cir. 1995) 56 F.3d 265 [drugs and handgun discovered under a mattress and behind a window shade were suppressed because these were not places in which a person might be hiding]; *U.S.* v. *Curtis* (D.D.C. 2002) 239 F.Supp.2d 1, 4 [arrest in living room, "officers could legitimately look in other spaces in the living room, in the open kitchen, and in the living room closet near the couch on which [one of the arrestees] was sitting just prior to arrest."].

[107] See *U.S.* v. *Lauter* (2nd Cir. 1995) 57 F.3d 212, 217 [vicinity sweep was "well within the scope of a permissible protective sweep, particularly in light of the small size of the apartment."]; *U.S.* v. *Sunkett* (N.D.Ga. 2000) 95 F.Supp.2d 1367, 1368 ["Consideration must be given to the size and layout of the apartment in light of the justification for the limited search."]; *U.S.* v. *Curtis* (D.C. Cir. 2002) 239 F.Supp.2d 1 [suspects were arrested in the living room of their two-bedroom apartment; living room closet and adjoining kitchen were "immediately adjoining," but not the two bedrooms located "down the hall"]; *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767 ["In this case, it is clear that the guns and drugs Officer Riddle found in the large bedroom were located in an area under the defendant's 'immediate control.' The defendant was arrested while standing next to a chair in the bedroom. The drugs were found on that chair, and the gun was found beside it."].

[108] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs"]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 7 [kitchen not within arrestee's immediate control when he was arrested in the living room]; *Guevara* v. *Superior Court* (1970) 7 Cal.App.3d 531 [kitchen not within arrestee's immediate control when he was arrested in the living room]; *People* v. *Jordan* (1976) 55 Cal.App.3d 965, 967 [bedroom not within arrestee's immediate control when he was arrested in a hallway]. ALSO SEE *People* v. *Block* (1971) 6 Cal.3d 239, 243 [cannot search upstairs when arrest occurred downstairs]; *U.S.* v. *Neely* (5th Cir. 2003) 345 F.3d 366, 371-2 [search of clothing removed at hospital was not incident to arrest that occurred "in a completely different area of the hospital"].

[109] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 6. ALSO SEE *People* v. *Breault* (1990) 223 Cal.App.3d 125, 133 ["*Chrisman* does not require a showing of exigent circumstances. [The officer] lawfully accompanied Emily into the house and properly seized the marijuana [in plain view]."]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 651 ["It would have been folly for the police to let [the arrestee] enter the home and root about [for identification] unobserved."]; *U.S.* v.

Court observed, "[I]t is not unreasonable under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest."[110] Officers may also search the arrestee's grabbing area in any room he is permitted to enter. This is because, as the California Supreme Court pointed out, an arrestee's request to move to another room may be "a ruse to permit him to get within reach of a weapon or destructible evidence."[111]

A search of another room would not, however, be permitted if officers compelled the arrestee to move there. This rule is intended to prevent officers from greatly expanding the scope of the search by requiring the arrestee to accompany them into other rooms "while they proceeded to examine the entire contents of the premises."[112] Similarly, officers may not search a place or thing merely because the arrestee would be walking near it on the way out the door.[113]

Second, a search of another room might be permitted if the suspect was standing at the door to the room when he was arrested. This is because, as the Court of Appeal pointed out, a gun within grabbing distance on one side of the door is just as deadly as a gun within grabbing distance on the other side of the door.[114]

Third, officers may search the other room if there were exigent circumstances that necessitated a search. As the Court of Appeal observed, "Routine searches cannot extend beyond the room in which the suspect is arrested, but the facts and circumstances of the case may nevertheless permit entry of other parts of the house."[115]

For example, in *U.S.* v. *Roper*[116] two drug couriers were arrested on a highway just after they had transported over 100,000 quaalude tablets to a seller at a Howard Johnson's motel. The seller and three other suspects, one of whom was Roper, were staying at the motel, and they all had rooms off the same hallway. After arresting the couriers, DEA agents went back to the motel where they saw the four suspects in the hallway. They immediately began arresting them. Because there were other guests in the

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Abdul-Saboor (D.C. Cir. 1996) 85 F.3d 664, 670 ["Abdul-Saboor had specifically requested entry to the area searched"]; *U.S.* v. *Mason* (D.C. Cir. 1975) 523 F.2d 1122, 1125-6 ["When appellant requested his leather jacket from the closet and stepped forward to a point within three or four feet of the closet before he was stopped, he brought within his immediate control the area where the gun was concealed in the suitcase."]; *Curry* v. *Superior Court* (1970) 7 Cal.App.3d 836, 849 [search permitted because arrestee was given permission to enter the room to obtain a dress].

[110] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7.

[111] *Mestas* v. *Superior Court* (1972) 7 Cal.3d 537, 541, fn.2. **NOTE**: This rule is consistent with *Chimel* because *Chimel* pertains only to routine searches incident to an arrest whereas a search of an area to which the arrestee was moved at his request is certainly not "routine." See *Chimel* v. *California* (1969) 395 U.S. 752, 763.

[112] See *People* v. *Mendoza* (1986) 176 Cal.App.3d 1127, 1132 ["Mendoza was taken from the bathroom into the presence of the shoulder bag. If the *Chimel* rule could be so easily satisfied, the officers would only have to force the defendant to accompany them while they proceeded to examine the entire contents of the premises."]; *Eiseman* v. *Superior Court* (1971) 21 Cal.App.3d 342, 350 ["The police should not be allowed to extend the scope of [the search] by having a person under arrest move around the room at their request."]; *U.S.* v. *Mason* (D.C. Cir. 1975) 523 F.2d 1122, 1126 ["Of course, *Chimel* does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a search incident to the arrest."]; *U.S.* v. *Whitten* (9th Cir. 1983) 706 F.2d 1000, 1016.

[113] See *People* v. *Mendoza* (1986) 176 Cal.App.3d 1127, 1132.

[114] See *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675.

[115] *People* v. *Jordan* (1976) 55 Cal.App.3d 965, 967.

[116] (11th Cir. 1982) 681 F.2d 1354.

hallway and because the situation was hectic, the agent who arrested Roper quickly moved him into his room where he saw a gun and other evidence in plain view.

On appeal, Roper contended the search of his room could not be upheld as a search incident to the arrest because the arrest occurred in the hallway. Ordinarily, that would be true, said the court, but there were exigent circumstances that made it reasonably necessary to move Roper to his room. Said the court, "The obvious peril created by attempting to arrest a suspected drug dealer in a hallway where other arrests are taking place while bystanders looked on sufficiently established exigent circumstances to justify returning Roper to his room."

ARRESTS OUTSIDE: If the arrest occurs anywhere outside the suspect's home or other structure, a search of the premises would not be permitted in the absence of exigent circumstances. As the United States Supreme Court observed:

> If a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, not somewhere outside—whether two blocks away, twenty feet away, or on the sidewalk near the front steps.[117]

As noted earlier, however, if the suspect requests permission to enter the house to, for example, obtain clothing, and if officers grant the request, they may accompany him and stay "literally at his elbow" at all times.[118]

SEARCHING ITEMS TO GO WITH ARRESTEE: If the arrestee asks to take a jacket or other item with him to jail, and if officers grant the request, they may search the item before giving it to the arrestee.[119]

VEHICLE SEARCHES

In the past, it was often difficult for officers to determine whether the passenger compartment of a vehicle could be searched incident to the arrest of the driver or other occupant. While the passenger compartment would always be within the arrestee's immediate control when the car was stopped, in most cases the arrestee was outside the car when he was placed under arrest, sometimes locked in a patrol car.

This resulted in a lot of uncertainty and litigation as defense attorneys would argue that a vehicle search was unnecessary because, when the search occurred, the arrestee did not have access to the car. Taking note of this problem, the United States Supreme Court observed, "[T]he courts have found no workable definition of the area within the

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[117] *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33-4. ALSO SEE *Shipley* v. *California* (1969) 395 U.S. 818, 820 ["But the Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search."]; *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 742 ["The search of the house cannot be justified as incident to the arrest of Martinez, as he was arrested outside the house."]; *People* v. *Superior Court (Arketa)* (1970) 10 Cal.App.3d 122, 126 ["The legality of the search of the shed cannot be considered as one incidental to the arrest of a defendant some 20 feet away."]; *Dillon* v. *Superior Court* (1972) 7 Cal.3d 305, 311 ["The search of the house may not be justified as incident to the petitioner's arrest because the arrest occurred outside the house."]; *People* v. *Cruz* (1964) 61 Cal.2d 861, 865.

[118] See *Washington* v. *Chrisman* (1982) 455 U.S. 1, 6-7.

[119] See *People* v. *Topp* (1974) 40 Cal.App.3d 372, 378 [officer had authority "to search the person of the defendant which would include the jacket that defendant indicated he wished to take with him to jail."]; *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 331 [ok to search jacket "for weapons before giving it to him"].

immediate control of the arrestee when that area arguably includes the interior of an automobile and the arrestee is its recent occupant."[120]

This problem was remedied in 1981 when the United States Supreme Court ruled in *New York* v. *Belton*[121] that officers who have made a custodial arrest of the driver or a passenger in a vehicle may, as a matter of routine, search the passenger compartment as an incident to the arrest. (As noted earlier, *Belton* is also important because it led to the rule that a place or thing is searchable if it was within the suspect's immediate control when he was arrested.)

What can be searched?

Officers who are conducting a vehicle search incident to the arrest of an occupant may search the following:

PASSENGER COMPARTMENT: The entire passenger compartment, including the glove box, may be searched.[122]

NO TRUNK SEARCHES: Officers may not search the trunk of a car as an incident to the arrest of an occupant.[123] There must be some other justification for a trunk search, such as consent, probable cause to search it, exigent circumstances, or a lawful vehicle inventory search of the trunk.

HATCHBACKS AND SUV'S: The cargo area at the rear of the passenger compartment in a hatchback, station wagon, or SUV may be searched if an occupant could have reached it without exiting the vehicle, even if it would have been difficult to reach.[124] As the U.S. Court of Appeals explained, "[T]he only question the trial court asks is whether the area searched is generally reachable without exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible."[125]

SEARCHING CONTAINERS: Officers who are conducting a vehicle search incident to an arrest may open and search all containers located in the passenger compartment, regardless of whether the container was open or closed,[126] whether it was too small to

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[120] *New York* v. *Belton* (1981) 453 U.S. 454, 460.

[121] (1981) 453 U.S. 454.

[122] See *New York* v. *Belton* (1981) 453 U.S. 454, 460; *People* v. *Stoffle* (1991) 1 Cal.App.4th 1671, 1680 ["[P]olice may only search the passenger compartment of an auto when the search is incident to an arrest."]; *U.S.* v. *McCrady* (8th Cir. 1985) 774 F.2d 868, 871-2 [search of glove compartment and envelope was lawful].

[123] See *New York* v. *Belton* (1981) 453 U.S. 454, 460, fn.4 ["Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk."]; *U.S.* v. *Doward* (1st Cir. 1994) 41 F.3d 789, 793 ["[T]he scope of the passenger compartment under the bright-line rule announced in *Belton* would not encompass the trunk."].

[124] See *U.S.* v. *Mayo* (9th Cir. 2005) 394 F.3d 1271, 1277-8 ["A covered hatchback area is generally, if not inevitably, accessible from the passenger compartment, albeit with some difficulty in some instances. . . . [O]fficers may search the hatchback cargo area whether covered or uncovered."]; *U.S.* v. *Rojo-Alvarez* (1st Cir. 1991) 944 F.2d 959, 970 ["Because the hatch area was within defendants' reach, the seizure of the cocaine was constitutional."]; *U.S.* v. *Pino* (6th Cir. 1988) 855 F.2d 357, 364 [search of "the rear section of a mid-sized station wagon" was lawful because it was "reachable without exiting the vehicle"].

[125] *U.S.* v. *Doward* (1st Cir. 1994) 41 F.3d 789, 794.

[126] See *New York* v. *Belton* (1981) 453 U.S. 454, 461 ["Such a container may, of course, be searched whether it is open or closed"].

hold a weapon or evidence,[127] or whether it belonged to an occupant who was not arrested.[128]

What constitutes a "container?" The United States Supreme Court in *Belton* defined the term quite broadly:

> "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.[129]

If the suspect was detained outside

If officers saw the suspect step from the vehicle shortly before they arrested him, they may search the car incident to the arrest if it was within his immediate control.[130] For example, in *Thornton* v. *United States*[131] an officer in Norfolk, Virginia decided to stop a Lincoln because its plates had been issued to a Chevy. Just then, the driver, Thornton, drove into a parking lot, stopped, and started walking off. The officer detained him (apparently while Thornton was close to his car) and eventually arrested him after determining he possessed crack cocaine. The officer then searched the passenger compartment of the Lincoln and found a handgun under the driver's seat.

On appeal to the United States Supreme Court, Thornton contended the search did not qualify as a search incident to his arrest because he was not inside the vehicle when he was detained or arrested. The Court ruled it didn't matter, so long as he was sufficiently close to the car that it was within his immediate control. "In all relevant aspects," said the Court, "the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle."

Although the officer in *Thornton* had actually seen the suspect inside the vehicle before he detained him, a car search is permitted incident to an arrest if, (1) officers reasonably believed the suspect had been a recent occupant of the vehicle, and (2) there was a "close association" between him and the car when he was arrested.

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[127] See *New York* v. *Belton* (1981) 453 U.S. 454, 461 ["It is true, of course, that these containers will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested."]; *People* v. *Molina* (1994) 25 Cal.App.4th 1038, 1043. *U.S.* v. *Doward* (1st Cir. 1994) 41 F.3d 789, 793, fn. 2 ["[*Belton*] extends to any container within the passenger compartment even though its outward appearance might foreclose the possibility that it could hold a weapon or evidence."]; *U.S.* v. *Vaneenwyk* (W.D. N.Y. 2002) 206 F.Supp.2d 423, 426 [search of day-planner and address book were lawful].

[128] See *People* v. *Mitchell* (1995) 36 Cal.App.4th 672, 677 ["[A] search incident to the arrest of an occupant of a vehicle extends to the passenger compartment of the vehicle and containers therein, including those possessed by nonarrested occupants."]; *People* v. *Prance* (1991) 226 Cal.App.3d 1525, 1532-3.

[129] *New York* v. *Belton* (1981) 453 U.S. 454, 460, fn.4.

[130] See *U.S.* v. *Bush* (4th Cir. 2005) 404 F.3d 263, 275 ["[T]he arrest of Canty as she prepared to enter the vehicle presented the same concerns of officer safety and destruction of evidence recognized by the Court in *Thornton*."]; *U.S.* v. *Osife* (9th Cir. 2005) 398 F.3d 1143, 1146 [defendant "had recently occupied the car and was standing near it when he was placed under arrest. [T]he search was therefore permissible under the Fourth Amendment."].

[131] (2004) 541 U.S. 615.

Similarly, in *People* v. *Boissard*[132] sheriff's deputies in Riverside County were dispatched to a truck stop in Blyth where two men were reportedly trying to sell drugs to truck drivers. According to the caller, the men "were in a white [Chevrolet] Celebrity." When the deputies arrived, they saw two men who matched the suspects' descriptions, and the men were standing next to a white Celebrity. When the men saw the deputies pull up, they "started walking away in different directions" but complied when a deputy ordered them "to stop and come back." In the course of the detention—which occurred "right next to" the Celebrity—Boissard was arrested for giving a false name. The deputies then searched the car incident to the arrest and found drugs under the front passenger seat.

On appeal, Boissard claimed the search was unlawful because "he was not inside or even within 'arms reach' of the car when he was arrested." The California Court of Appeal ruled it didn't matter because Boissard "was standing right next to the car when he was arrested."

Similarly, in *People* v. *Stoffle*[133] a West Sacramento police officer saw two men, Stoffle and Shaw, drinking beer in a public park in violation of a city ordinance. The men were standing at the rear of a car. As the officer pulled up, he saw Stoffle reach through an open window of the car and discard a beer can. When the officer learned that Stoffle was wanted on outstanding traffic warrants, he arrested him. Having determined that Stoffle owned the car, he searched it incident to the arrest and found cocaine inside a small film canister.

On appeal, Stoffle contended the search did not qualify as a search incident to arrest because he was not an occupant of the car when he was arrested. The court ruled, however, that a car may be searched incident to the arrest of a person if there was a "close association" between the arrestee and the car at the moment of the arrest. And, although the court did not attempt to define "close association," it ruled it certainly exists when, "as here, the arrestee has acknowledged he owns the car, has recently been physically in the car, and while staying close to the car continues to have access to it."

Other issues

NO DISMANTLING: Officers may not dismantle or disassemble the vehicle or parts of it in order to search something.[134]

IF ARRESTEE WAS HANDCUFFED, RESTRAINED: As with other searches incident to arrests, there is no requirement that the arrestee have access to the car at the time of the search. See "Basic principles" ("Suspect handcuffed, restrained"), above.

IF SUSPECT FLED: An occupant of a car will not be permitted to thwart a vehicle search by running away or otherwise distancing himself from the vehicle. Thus, if officers attempted to arrest the suspect while he was in or near the car, they may search it even though he was able to flee from the vehicle. See "Basic principles" ("Suspect flees"), above.

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[132] (1992) 5 Cal.App.4th 972.

[133] (1991) 1 Cal.App.4th 1671.

[134] See *U.S.* v. *Patterson* (7th Cir. 1995) 65 F.3d 68, 71 [search "does not extend to dismantling portions of the vehicle, including the tailgate's interior cover."].