

“Standing”: The Foundation of Search and Seizure Law

“We use ‘standing’ as a shorthand term.”¹

While there are many “shorthand terms” in the field of criminal law, none of them have more significance than “standing.” That is because it is the central principle upon which the law of search and seizure is based. In fact, an intrusion by officers into a place or thing will not constitute a “search” unless somebody had it. For instance, if an officer looks inside the glove box of a car and finds evidence that incriminates a passenger who did not have standing, the evidence cannot be suppressed because, as far as the Fourth Amendment is concerned, nothing happened.

This principle can be quite helpful to prosecutors who can often prevent the suppression of evidence by invoking it. It can also be useful to officers because it may enable them to determine whether an intrusion they need to make would constitute a search and, therefore, whether they will need a warrant or some exception to the warrant requirement. This issue is especially apt to arise when officers are engaged in physical and electronic surveillance, walking on private property, requesting records from a business, or opening a container after the suspect says, “That’s not mine!”

What is “Standing”?

A defendant has standing—which means a “search” can occur—only if he had a reasonable expectation of privacy in the place or thing that officers explored.² It doesn’t matter whether the place or thing was a home, a motel room, a car, a suitcase, a pack of cigarettes, or a garbage can—the law does not consider it “searched” unless the per-

son who is challenging the intrusion reasonably believed that it, or its contents, would be private. In the words of the United States Supreme Court:

The Fourth Amendment protects legitimate expectations of privacy rather than simply places. If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no “search” subject to the Warrant Clause.³

The test for determining whether a defendant has standing is fairly straightforward. As we will discuss in this article, standing exists if, (1) the defendant actually believed that the evidence would not be observed, and (2) this belief was objectively reasonable.⁴ “[W]e ask two threshold questions,” said the California Supreme Court. “First, did the defendant exhibit a subjective expectation of privacy? Second, is such an expectation objectively reasonable, that is, is the expectation one that society is willing to recognize as reasonable?”⁵

Although these are technically two separate requirements, the first one is so easily satisfied that it is seldom a contested issue. After all, virtually every criminal who has ever served time in jail or prison actually believed the evidence that sent him there would not have been discovered by the authorities. Consequently, the only real issue in most cases is whether the defendant’s subjective expectation of privacy was objectively reasonable.

Basic principles

Before we look at how the courts analyze the privacy expectations in those places and things in which officers usually find evidence, there are some basic principles that should be kept in mind.

¹ *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 670. Edited.

² See *U.S. v. Salvucci* (1980) 448 US 83, 91-92 [“[A]n illegal search only violates the rights of those who have a legitimate expectation of privacy in the invaded place.”]; *Maryland v. Macon* (1985) 472 US 463, 469 [“A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.”]; *California v. Greenwood* (1988) 486 US 35, 39-40 [“An expectation of privacy does not give rise to Fourth Amendment protection unless society is prepared to accept that expectation as objectively reasonable.”]; *People v. Roybal* (1998) 19 Cal.4th 481, 507 [“An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded place or the seized thing.”].

³ *Illinois v. Andreas* (1983) 463 US 765, 771.

⁴ See *Rakas v. Illinois* (1978) 439 US 128, 143, fn.12.

⁵ *People v. Camacho* (2000) 23 Cal.4th 824, 830-31.

STANDING DEPENDENT ON AREA INTRUDED UPON: A defendant will not have standing merely because he reasonably expected privacy in the vicinity of the place or thing in which the evidence was discovered. Instead, he must prove that his expectation of privacy encompassed the precise place or thing that was breached by officers. “The legitimate expectation of privacy,” explained the California Supreme Court, “must exist in the particular area searched or thing seized in order to bring a Fourth Amendment challenge.”⁶

STANDING DEPENDENT ON PLAUSIBLE VANTAGE POINT: If the evidence could have been seen from a vantage point that officers could have occupied without violating the defendant’s Fourth Amendment rights, the defendant will probably not have standing to challenge the observation—even if officers viewed the evidence from another place. That’s because it is the *existence* of a plausible vantage point, not the officers’ actual use of it, that bears on the reasonableness of an expectation of privacy.⁷

(The qualification that the vantage point must be “plausible” essentially means that officers could have seen the evidence with the naked eye, or at least without using unusually intrusive types of visual aids and without engaging in extreme measures. This subject is discussed in the section “Difficulty of Observation.”)

STANDING DEPENDENT ON MEANS OF INTRUSION: A defendant who reasonably believed that a place or thing could not be seen by a certain means may not have standing if officers utilized another method

that was reasonably foreseeable.⁸ For example, while a person might reasonably expect that no one on the ground would be able to see the marijuana plants in his backyard, he would likely not have standing if officers observed it from a helicopter or from atop an adjoining building.⁹

STANDING DEPENDENT ON WHO INTRUDED: Even if there was a plausible vantage point from which someone might have seen the evidence, a defendant might have standing if he reasonably believed it would not have been seen *by officers*. As the D.C. Circuit noted, a person “may invite his friends into his home but exclude the police, he may share his office with coworkers without consenting to an official search.”¹⁰ Similarly, the California Court of Appeal ruled that, while it might be unreasonable for a college student to believe that his dorm room would not be inspected by university officials, he could certainly expect that police officers would not walk in and look around.¹¹

DEFENDANT ATTEMPTED TO PREVENT DISCOVERY: The fact that the defendant tried (albeit unsuccessfully) to hide or prevent discovery of the evidence may prove that he subjectively expected privacy. But it does not prove that his expectation was objectively reasonable.¹² As the United States Supreme Court commented in *California v. Ciraolo*, “Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer’s observations from a public vantage point where he has a right to be and which renders the activities clearly visible.”¹³

⁶ *People v. McPeters* (1992) 2 Cal.4th 1148, 1171. ALSO SEE *People v. Ooley* (1985) 169 Cal.App.3d 197, 202.

⁷ See *U.S. v. Knotts* (1983) 460 US 276, 285; *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 426 [“if the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion”]; *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 311 [“The view of the backyard was vulnerable to observation by any of petitioner’s neighbors, in essence, open to public view.”].

⁸ See *Dow Chemical Co. v. United States* (1986) 476 US 227, 237, fn.4 [Dow took precautions against ground surveillance but not aerial surveillance]; *Katz v. United States* (1967) 389 US 347, 352 [although Katz could not reasonably expect that he would not be seen when he entered a phone booth, he could reasonably expect that his conversation would not be intercepted]; *People v. Camacho* (2000) 23 Cal.4th 824, 835 [court noted that a child chasing a ball or a meter reader may have implied consent to enter a side yard for a limited purpose, but not a police officer whose purpose was to look through a window].

⁹ See *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 425; *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 311.

¹⁰ *U.S. v. Most* (D.C. Cir. 1989) 876 F.2d 191, 198. ALSO SEE *U.S. v. Lyons* (D.C. Cir. 1983) 706 F.2d 321, 325.

¹¹ *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1211.

¹² See *Dow Chemical Co. v. U.S.* (1986) 476 US 227, 236-37 [that “Dow’s inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public from the ground” did not prevent aerial surveillance]; *People v. Venghiattis* (1986) 185 Cal.App.3d 326, 331 [“His efforts at hiding the garden from passers-by do not serve to protect him from overflights.”].

¹³ (1986) 476 US 207, 213.

“PRIVATE” PLACES: The fact that the place or thing intruded upon could be characterized as “private” does not prove that the owner or possessor reasonably expected that it or its contents would not be disclosed. As the D.C. Circuit explained in *U.S. v. Lyons*, “[T]he question we must answer is not whether the room and closet were somehow ‘private spaces’ in the abstract, but whether Lyons had a reasonable expectation of privacy therein.”¹⁴

OWNERSHIP, POSSESSION, CONTROL: While many suspects who owned, lawfully possessed, or controlled the place or thing that was intruded upon will have standing, these circumstances may be offset by other factors.¹⁵ “Ownership,” said the California Supreme Court, “does not necessarily signify a legitimate expectation of privacy,” although it is “one factor to be considered in the analysis.”¹⁶

WHAT IS NOT “STANDING”: Over the years, many defendants who lacked a reasonable expectation of privacy in a certain item of evidence would urge the courts to grant them standing anyway, arguing that several other circumstances ought to be considered. And the courts have consistently refused.¹⁷ For example, they have rejected arguments that defendants automatically acquired standing whenever prosecutors sought to use the evidence against them in court (the “target” theory),¹⁸ or because the defendants had a right to be on the premises that were intruded upon (the “legitimately on the premises” theory),¹⁹ or because the evidence was discovered during a search of property that belonged to the defendant’s accomplice (the “co-conspirator” theory).²⁰

It should be noted that California used to be a “target theory” state, meaning that defendants could challenge the admissibility of any evidence that prosecutors wanted to use against them. That changed, however, in 1982 when the voters passed Proposition 8 (“The Victims’ Bill of Rights”) which, among other things, eliminated California’s “vicarious exclusionary rule” and prohibited the suppression of evidence unless the defendant could prove he had standing.²¹

Preliminary matters

Before we explore the core issues, there are a couple of other things about standing that should be noted.

STANDING: MORE ENDURING THAN FREDDY KRUEGER: In 1978, the United States Supreme Court made the mistake of trying to purge the term “standing” from the legal lexicon.²² In its place, the justices said they wanted everyone to start saying “reasonable expectation of privacy.” (It’s hard to understand *why*, considering that “standing” was widely used and understood throughout the legal profession. And best of all, it has ten fewer syllables than its designated replacement.) In any event, here we are 32 years later and the term “standing” is alive and well. Taking note of this unheard-of situation (perhaps the only time the Supreme Court did not have the last word), the Court of Appeal pointed out that the term “standing” has “demonstrated a vampiric persistence,” adding that “if the United States Supreme Court cannot drive a stake through its heart, we doubt that we can.”²³

¹⁴ (D.C. Cir. 1983) 706 F.2d 321, 325. ALSO SEE *Katz v. U.S.* (1967) 389 US 347, 350 [“[T]he Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’”].

¹⁵ See *Rawlings v. Kentucky* (1980) 448 US 98, 105 [“[We have] emphatically rejected the notion that ‘arcane’ concepts of property law ought to control the ability to claim the protections of the Fourth Amendment.”]; *U.S. v. Salvucci* (1980) 448 US 83, 91 [“legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest”].

¹⁶ *People v. McPeters* (1992) 2 Cal.4th 1148, 1172. ALSO SEE *Rakas v. Illinois* (1978) 439 US 128, 143, fn.12 [Court notes it “has not altogether abandoned use of property concepts” in determining the whether an expectation of privacy was reasonable]; *Mancusi v. DeForte* (1968) 392 US 364, 367 [“[The Fourth] Amendment does not shield only those who have title to the searched premises.”].

¹⁷ See *U.S. v. Salvucci* (1980) 448 US 83, 86 [“attempts to vicariously assert violations of the Fourth Amendment rights of others have been repeatedly rejected by this Court”].

¹⁸ See *U.S. v. Salvucci* (1980) 448 US 83, 90 [DA “may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation without legal contradiction.”].

¹⁹ See *Rakas v. Illinois* (1978) 439 US 128, 142; *Minnesota v. Carter* (1998) 525 US 83, 90.

²⁰ See *U.S. v. Padilla* (1993) 508 US 77, 82; *People v. Madrid* (1992) 7 Cal.App.4th 1888, 1897.

²¹ See *In re Lance W.* (1985) 37 Cal.3d 873, 885-89; *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1131.

²² *Rakas v. Illinois* (1978) 439 US 128, 139.

²³ *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1368, fn.8.

COURT PROCEDURE: If prosecutors want to challenge a defendant's standing to challenge a search, they must so notify the court at the start of the hearing on a motion to suppress. If they fail to do so, they will be deemed to have waived the issue.²⁴ But if they provide the court and defendant with notice, it becomes the defendant's burden to prove—by a preponderance of the evidence—that he reasonably expected privacy in the place or thing in which the evidence was discovered.²⁵

Although this is considered a “threshold question” at suppression hearings,²⁶ judges may postpone ruling on the the standing issue and, instead, require that prosecutors first prove that the search was lawful. The apparent purpose of this rule is speed up the hearing because if prosecutors succeed (and they usually do) the standing issue would become moot.²⁷

One other thing: If the defendant testifies at the hearing, his testimony may not be used at trial to prove his guilt.²⁸ Although the Supreme Court has not ruled on whether prosecutors may use his testimony to impeach him,²⁹ it appears they may.³⁰

TOTALITY OF CIRCUMSTANCES: In determining whether a defendant has standing, the courts will consider the totality of circumstances.³¹ But, as we will discuss in the remainder of this article, there are

four circumstances that are especially important: (1) the nature of the place or thing that was intruded upon by officers, (2) the defendant's relationship to that place or thing, (3) the difficulty of observation, and (4) whether the defendant relinquished standing by doing or saying something that made it unreasonable to expect that the evidence would remain private.

The Place Intruded Upon

The most important circumstances in determining whether a search occurred and whether the defendant has standing are the nature of the place that was intruded upon and the defendant's connection to it.³² This is because people naturally view some places as highly private (e.g., homes), somewhat private (e.g., cars), or not private at all (e.g., things in plain view). In other words, there exists a “hierarchy of protection” based on a “fundamental understanding that a particular intrusion into one domain of human existence seriously threatens personal security, while the same intrusion into another domain does not.”³³ Or, as the Alaska Supreme Court put it, “Expectations of privacy are not all of the same intensity,” and “distinctions may be made in the varying degrees of privacy retained in different places and objects.”³⁴

²⁴ See *Steagald v. U.S.* (1981) 451 US 204, 209 [the Government may lose its right to contest standing if “it has failed to raise such questions in a timely fashion during the litigation”]; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1641.

²⁵ See *People v. McPeters* (1992) 2 Cal.4th 1148, 1172; *U.S. v. Matlock* (1974) 415 US 164, 178.

²⁶ See *Illinois v. Andreas* (1983) 463 US 765, 771; *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1044.

²⁷ See *People v. Contreras* (1989) 210 Cal.App.3d 450, 456 [“The trial judge acted well within her discretion in requiring the prosecution to proceed first.”]; *People v. Williams* (1992) 3 Cal.App.4th 1535, 1539, fn.2 [“A trial court has the discretion to determine whether standing should be determined prior to entertaining evidence addressed solely to the reasonableness of the search.”]. **NOTE:** If prosecutors go first and the search is ruled unlawful, the defendant may rely on the prosecution's evidence to prove he has standing. See *People v. Dees* (1990) 221 Cal.App.3d 588, 595.

²⁸ See *Simmons v. U.S.* (1968) 390 US 377, 393 [defendant's testimony at suppression hearing “may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.”].

²⁹ See *U.S. v. Salvucci* (1980) 448 US 83, 94 [“That issue need not be and is not resolved here”].

³⁰ See *U.S. v. Beltran-Gutierrez* (9th Cir. 1994) 19 F.3d 1287, 1289-90.

³¹ See *Oliver v. United States* (1984) 466 US 170, 177 [“No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant.”]; *In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1132 [“There is no set formula for determining whether a person has a reasonable expectation of privacy in the place searched, but the totality of the circumstances are considered.”].

³² See *Oliver v. United States* (1984) 466 US 170, 178 [“certain areas deserve the most scrupulous protection from government invasion”]; *Rakas v. Illinois* (1978) 439 US 128, 143, fn.12 [privacy expectations must be based on “understandings that are recognized and permitted by society”]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1015 [“The determining factor is whether common habits in the use of property result in a reasonable expectation of privacy in a given situation.”]; *Sacramento County Deputy Sheriffs' Association v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1479 [the setting “remains a consideration”].

³³ *People v. Dumas* (1973) 9 Cal.3d 871, 882-83.

³⁴ *State v. Myers* (1979) 601 P.2d 239, 242.

Inside homes

We will start with the most private of all private places: a person's home. It does not matter whether it is a house, a condominium, or an apartment—it is at the top of the list of “private” places.³⁵ “At the risk of belaboring the obvious,” said the Supreme Court, “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.”³⁶

This does not mean that every observation into a home constitutes a search. On the contrary, the courts have consistently ruled that people cannot reasonably expect privacy as to things or conditions in their homes that can be readily observed from the outside.³⁷ In the words of the Tenth Circuit, “Although privacy in the interior of a home and its curtilage are at the core of what the Fourth Amendment protects, there is no reasonable expectation that a home and its curtilage will be free from ordinary visual surveillance.”³⁸

For this reason, people cannot ordinarily expect that officers would not observe things inside their homes if, (1) the observation was made through an open door or a window that was uncovered or only partially covered; and (2) the officers made the observation from a sidewalk, pathway, or any other place they could have occupied without violating the defendant's reasonable expectation of privacy.

For example, in *People v. Superior Court (Reilly)*³⁹ two San Jose police officers were driving by a local motel when they happened to notice a car parked in front of one of the rooms. It caught their attention because it belonged to a suspected drug dealer. So they decided to investigate. From the walkway in front of the room they could see inside through a three-inch gap in the curtains; and what they saw

was a man photographing something that appeared to be false ID documents. As a result, the officers arrested the man and another occupant, the defendant. The defendant argued that the officers' observation was unlawful, but the court disagreed, pointing out that “[a]nyone passing by could observe [the man's] strange nocturnal activity.”

On the other hand, the more effort that was necessary to see the evidence, the greater the likelihood that that effort will convert the observation into a search. For example, the courts have ruled that officers conducted a search when, in order to see through a window or open door, they had to:

- step onto “a small planter area between the building and the parking lot”⁴⁰
- traverse some bushes that constituted a “significant hindrance”⁴¹
- climb over a fence, onto a trellis, then walk along the trellis for a considerable distance⁴²

Even if officers saw the evidence from a place they had a right to occupy, a search may result if the observation was made by using visual aids from a considerable distance. For example, in *People v. Arno*⁴³ LAPD officers learned that Arno was selling illegal pornographic movies out of his office in the Playboy Building. In the course of the investigation, an officer stationed himself on a hilltop about 250 yards away. With the naked eye, he could see only the shapes and shadows of people inside the office. But with a pair of high-powered binoculars he could see, among other things, Arno and others handling a “distinctively marked” container of pornography. Based on this information, the officers conducted a warranted search of the office and found illegal pornography. But the court ruled the evidence should have been suppressed because the defendant's suspicious activity was “not observable to anyone not using an optical aid.”

³⁵ See *Kyllo v. U.S.* (2001) 533 US 27, 40 [“[T]he Fourth Amendment draws a firm line at the entrance to the house.”].

³⁶ *U.S. v. Karo* (1984) 468 US 705, 714.

³⁷ See *People v. Camacho* (2000) 23 Cal.4th 824, 834 [“Had [the officers] been standing on a public sidewalk, they could have observed defendant [in his home] for as long as they wished.”]; *People v. Stevens* (1974) 38 Cal.App.3d 68-69 [lawful observation into home through a “defectively closed door”]; *Ponce v. Craven* (9th Cir. 1969) 409 F.2d 621, 625 [“If [the defendant] did not wish to be observed, he could have drawn his blinds.”].

³⁸ *U.S. v. Hatfield* (10th Cir., 2003) 333 F.3d 1189, 1196.

³⁹ (1975) 53 Cal.App.3d 40, 45.

⁴⁰ *Jacobs v. Superior Court* (1973) 36 Cal.App.3d 489.

⁴¹ *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 636.

⁴² *Pate v. Municipal Court* (1970) 11 Cal.App.3d 721, 724.

⁴³ (1979) 90 Cal.App.3d 505.

Similarly, in *United States v. Kim*⁴⁴ FBI agents were informed that Kim was operating a “major” book-making operation from his high-rise apartment in Hawaii. So they began watching the apartment from the only available vantage point: a building about a quarter of a mile away. Using a telescope, they were able to see Kim talking on a telephone while reading a certain sports sheet that was considered indispensable among Hawaii’s bookies, and this information was used to help establish probable cause for a wiretap. But the court ruled that the agents’ use of the telescope rendered their observations an illegal search. Said the court, “It is inconceivable that the government can intrude so far into an individual’s home that it can detect the material he is reading and still not be considered to have engaged in a search.”

Although privacy expectations inside homes are high, not everyone who happens to be inside a home when a police intrusion occurred will have standing to challenge it. Instead, it depends on their relationship to the premises.

FAMILY MEMBERS: All members of the family will ordinarily have standing to challenge a search of any room or area on the premises. Thus, the court noted in *In re Rudy F.*:

As against government intrusion, family members have an expectation of privacy in their entire home. It would be intrusive, unwise, and impractical to make expectation of privacy against government intrusion turn on the various family uses of different areas in the home.⁴⁵

OVERNIGHT HOUSEGUESTS: Overnight houseguests have will standing to challenge a search of their own property and those places and things in the house over which they had been given temporary control,

such as a bedroom.⁴⁶ As the Supreme Court observed in *Minnesota v. Olson*, “To hold that an overnight guest has a legitimate expectation of privacy in his host’s home merely recognizes the everyday expectations of privacy that we all share.”⁴⁷

PERSON IN TEMPORARY CONTROL: A person who has been given temporary exclusive control over the premises by the owner (such as a babysitter or caretaker) will ordinarily have standing to challenge a warrantless entry of the premises, in addition to a search of his personal property. In the words of the Court of Appeal, a person has a “protectable expectation of privacy” if he is “a permissive occupant who temporarily controls a residence, while performing functions recognized as valuable by society.”⁴⁸

INVITEES WITH GENERAL PRIVILEGES: An invitee who is allowed to use certain rooms or areas in the residence at will may have a protectable privacy interest in those places even though he does not stay overnight. For example, in *U.S. v. Haydel*⁴⁹ the court ruled that the homeowner’s adult son had standing to challenge a search of an area because he was permitted to store his things there, and because he had been given a key to the premises. On the other hand, in *People v. Cowan*⁵⁰ the court ruled that, although the defendant had a “standing invitation” to visit the occupants, he failed to prove “he had authority to be in the apartment alone [or] to enter without permission.”

CASUAL VISITORS: People who have been invited inside—including, of course, guests who came to plan or engage in criminal activity—will not have standing to challenge a search of anything other than their own property.⁵¹ As the California Supreme Court observed, “Occasional presence on the

⁴⁴ (D. Hawaii 1976) 415 F.Supp. 1252.

⁴⁵ (2004) 117 Cal.App.4th 1124, 1134. ALSO SEE *Guest v. Leis* (6th Cir. 2001) 255 F.3d 325, 333.

⁴⁶ See *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1641-42; *U.S. v. Davis* (9th Cir. 2003) 332 F.3d 1163, 1168. COMPARE *People v. Hernandez* (1988) 199 Cal.App.3d 1182, 1189-90 [no standing to challenge search of a bedroom in a home in which the defendant was an overnight guest in another bedroom].

⁴⁷ (1990) 495 US 91, 98.

⁴⁸ *People v. Moreno* (1992) 2 Cal.App.4th 577, 587. ALSO SEE *People v. Stewart* (2003) 113 Cal.App.4th 242, 252 [“appellant clearly had permissive temporary control over the premises searched”].

⁴⁹ (5th Cir. 1981) 649 F.2d 1152, 1155.

⁵⁰ (1994) 31 Cal.App.4th 795, 800.

⁵¹ See *Minnesota v. Carter* (1998) 525 US 83, 90 [respondents “were essentially present for a business transaction”]; *People v. Welch* (1999) 20 Cal.4th 701, 747-48 [defendant was merely “a transient guest”]; *People v. Koury* (1989) 214 Cal.App.3d 676, 686 [“the mere legitimate presence there by invitation or otherwise, without more, is insufficient to create a protectable expectation”].

premises as a mere guest or invitee is insufficient to confer such an expectation [of privacy].”⁵² Thus, in *People v. Dimitrov* the court ruled that the defendant did not have standing to challenge a search of a high-volume drug house in Hollywood because he did not live there, he had no key, and he candidly admitted that he really couldn’t expect any privacy while visiting because people were always “coming and going.”⁵³

Outside homes (the “curtilage”)

The land immediately outside a home is known in the law as the “curtilage”; and it ordinarily consists of the front, back, and side yards, plus the driveway.⁵⁴ Because the curtilage is considered ancillary to the house itself, the residents can ordinarily expect that officers will not search it for evidence without a warrant or consent.

What about walking onto the curtilage and looking at things in plain view? The rule is that officers may do so if it reasonably appeared that visitors were invited to enter the area.⁵⁵ As the Court of Appeal explained:

[A] police officer who makes an uninvited entry onto private property does not per se violate the occupant’s Fourth Amendment right of privacy. The criterion to be applied is whether entry is made into an area where the public has been implicitly invited . . .⁵⁶

Before going further, it is important to understand that, even if officers entered an area that was not impliedly open to visitors (and thus they technically conducted a search), their search will not be deemed unlawful unless its intrusiveness outweighed the public interest that was served by the entry.⁵⁷ To put it another way, the courts balance the degree of intrusion “against the public concern for the prevention of crime and the concern to maintain peace and security.”⁵⁸ For example, uninvited entries into the curtilage for the following reasons have been deemed justified:

- officers reasonably believed that the entry was necessary to investigate a crime⁵⁹
- officers had grounds to detain or arrest someone in a yard⁶⁰
- officers reasonably believed that property in a yard was stolen⁶¹

NORMAL ACCESS ROUTES: Officers may walk along any pathway from the street because, as the California Supreme Court explained, “A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there.”⁶² Or, as the Court of Appeal aptly put it, “An officer is permitted the same license to intrude as a reasonably respectful citizen.”⁶³

⁵² *People v. Ayala* (2000) 24 Cal.4th 243, 279.

⁵³ (1995) 33 Cal.App.4th 18, 27-28.

⁵⁴ See *Oliver v. U.S.* (1984) 466 US 170, 182, fn.12 [“[F]or most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience.”].

⁵⁵ See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 [“Just like any other visitor to a residence, a police officer is entitled to walk onto parts of the curtilage that are not fenced off.”]; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500 [“The existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated.”].

⁵⁶ *In re Gregory S.* (1980) 112 Cal.App.3d 764,775.

⁵⁷ See *People v. Camacho* (2000) 23 C4 824, 836; *U.S. v. Reyes* (2nd Cir. 2002) 283 F.3d 446, 465 [“legitimate law enforcement business”]; *In re Gregory S.* (1980) 112 Cal.App.3d 764, 776 [“the officer had a right and commensurate duty to deal with the problem at hand”]; *U.S. v. Daoust* (1st Cir. 1990) 916 F.2d 757, 758 [“The legal question is whether the police had a right to be at the back of the house where they saw the gun, or whether they were simply snooping.”].

⁵⁸ *People v. Thompson* (1990) 221 Cal.App.3d 923, 944 .

⁵⁹ See *People v. Camacho* (2000) 23 Cal.4th 824, 836; *People v. Gemmill* (2008) 162 Cal.App.4th 958, 967.

⁶⁰ See *People v. Thompson* (1990) 221 Cal.App.3d 923, 945 [“The police would have an unreasonably difficult time protecting citizens and the property from the criminal actions of third parties if police were restricted to walkways, driveways, and other normal access routes when the third parties whom the officers seek to detain do not restrict themselves to such areas.”]; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 363-64 [entry into backyard lawful in connection with the arrest of a “potentially armed parolee”].

⁶¹ See *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 841 [stolen car parts in the backyard].

⁶² *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629. ALSO SEE *People v. Edelbacher* (1989) 47 Cal.3d 983, 1015 [“The tracks were apparently visible on the normal route used by visitors”]; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1500 [“The officer walked on the paved walkway only a short distance from the front door to the side gate.”].

⁶³ *People v. Thompson* (1990) 221 Cal.App.3d 923, 943.

Furthermore, officers may ordinarily depart somewhat from a normal access route if the departure was neither substantial nor unreasonable.⁶⁴ Said the Court of Appeal, “The Fourth Amendment prohibits unreasonable searches and seizures, not trespasses.”⁶⁵ Thus, the Ninth Circuit pointed out that “officers must sometimes move away from the front door when they are attempting to contact the occupants of a residence.”⁶⁶

What about “No Trespassing” signs? Although a relevant circumstance, signs are seldom viewed as a serious effort to prevent entry, especially when they were posted in areas where privacy expectations were minimal or nonexistent; e.g., at the front of the house. In the words of the Supreme Court, “[E]fforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist.”⁶⁷

FRONT YARD, PORCH: Walking on the front yard or porch is not considered intrusive because “a front yard is likely to be crossed at any time by door-to-door solicitors, delivery men and others unknown to the owner of the premises.”⁶⁸

DRIVEWAYS: Even if a driveway was not used as a normal or alternate access route, people can seldom expect that officers and others will not walk on them, especially if they were visible from the street.⁶⁹ According to the First Circuit, “[A] person does not

have a reasonable expectation of privacy in a driveway that was visible to the occasional passersby.”⁷⁰ For example, the courts routinely rule that officers do not need a warrant to walk onto a defendant’s driveway to install a tracking device under his car, or to record the license or VIN number of his car.⁷¹

SIDE YARDS: Unless there was a normal access route or walkway along the side of the house, the courts tend to view side yards as somewhat private. And they may become more private the further back the officers go (especially late at night).⁷² For example, in *People v. Camacho*⁷³ officers in Ventura County were dispatched at about 11 P.M. to investigate a complaint of a “loud party disturbance” at Camacho’s home. But when they arrived, they heard neither loud noise nor signs of a party. Still, they decided to look around; and one of the places they checked out was the side yard, which the court described as follows:

[A]n open area covered in grass. No fence, gate or shrubbery suggested entrance was forbidden. Neither, however, did anything indicate the public was invited to enter; there was neither a path nor a walkway, nor was there an entrance to the house accessible from the side yard.

While looking around, one of the officers noticed an uncovered window, so he looked inside and saw Camacho packaging cocaine. This ultimately led to

⁶⁴ See *People v. Thompson* (1990) 221 Cal.App.3d 923, 944 [“the intrusion was not a substantial and unreasonable departure from a normal route of access”]; *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1499 [“[A]fter getting no response at the front door, [the officer] walked from the front door, along a concrete walkway, a short distance over to a gate”]; *U.S. v. Taylor* (4th Cir. 1996) 90 F.3d 903 [“search” did not result when “officers proceeded from the driveway, crossed the lawn, and climbed the stairs of the front porch” and from there saw incriminating evidence through a picture window].

⁶⁵ *Cohen v. Superior Court* (1970) 5 Cal.App.3d 429, 434. ALSO SEE *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953 [“[N]ot every technical trespass onto the curtilage amounts to a search.”].

⁶⁶ *U.S. v. Garcia* (9th Cir. 1993) 997 F.2d 1273, 1279.

⁶⁷ *New York v. Class* (1986) 475 US 106, 114. ALSO SEE *Oliver v. U.S.* (1984) 466 US 170, 182, fn.13.

⁶⁸ *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 840. ALSO SEE *U.S. v. Santana* (1976) 427 US 38, 42 [defendant could not reasonably expect privacy at the threshold to house]; *Illinois v. McArthur* (2001) 531 US 36, 336 [“[A] person standing in the doorway of a house is in a public place”].

⁶⁹ See *U.S. v. McIver* (9th Cir. 1999) 186 F.3d 1119, 1126 [the driveway and the apron in front of the garage were open to observation from persons passing by]; *U.S. v. Smith* (6th Cir. 1986) 783 F.2d 648, 651 [“The fact that a driveway is within the curtilage of a house is not determinative if its accessibility and visibility from a public highway rule out any reasonable expectation of privacy.”]; *U.S. v. Ventling* (8th Cir. 1982) 678 F.2d 63, 66 [a driveway “can hardly be considered out of public view”]; *U.S. v. Hatfield* (10th Cir. 2003) 333 F.3d 1189, 1194 [“[P]olice observations made from the driveway do not constitute a search.”].

⁷⁰ *Rogers v. Vicuna* (1st Cir. 2001) 264 F.3d 1, 5.

⁷¹ See *People v. Zichwic* (2001) 94 Cal.App.4th 944, 953.

⁷² See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 635 [the side yard “is covered with dirt and grass” and “there is no sidewalk or pathway leading past the window from any direction”]; *People v. Gemmill* (2008) 162 Cal.App.4th 958, 966 [“No substantial evidence supported an implied invitation to be on the east side of the house where the officer looked through the window.”].

⁷³ (2000) 23 Cal.4th 824.

a search of the premises and the seizure of cocaine. But the California Supreme Court ruled the evidence should have been suppressed because the officer's initial observation was unlawful. Said the court, "Most persons, we believe, would be surprised, indeed startled, to look out their bedroom window at such an hour to find police officers standing in their yard looking back at them."

BACKYARDS: Privacy expectations in most backyards are usually higher—often much higher—than those in the front and side yards. This is mainly because backyards are not usually visible to the public, they are ordinarily fenced in, and normal access routes seldom go through them. Thus, the court ruled in *People v. Winters* that "[a] person who surrounds his backyard with a fence and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy."⁷⁴

Still, privacy expectations in backyards may be reduced or eliminated if the physical layout or other circumstances made it reasonable for officers to believe that visitors were permitted to use the yard to contact the occupants. For example, in *People v. Willard* the court ruled there was "nothing unreasonable in [the officers] proceeding to the rear door which appears to have been a normal means of access to and egress from that part of the house. The gate was open and the rear door, actually on the side of the house, would probably be more public than a door at the back of the structure."⁷⁵

YARDS VIEWED FROM ADJOINING PROPERTY: Even if a defendant could reasonably expect that visitors would not walk into his back or side yard, a search may not result if the officers made their observation

from a neighbor's property.⁷⁶ Thus, in *People v. Superior Court (Stroud)* the Court of Appeal pointed out that "[t]he observation made by the officers looking over the five-foot fence from the neighbor's yard disclosed no more than what was in plain view of the neighboring householders and anyone else who might be on their premises."⁷⁷ Similarly, the court in *Dillon v. Superior Court*⁷⁸ ruled that the officers' observation of marijuana plants in the defendant's backyard did not constitute a search because the officers saw the plants from the second floor of the house next door whose owner had consented to their entry.

What if the officers did not have the neighbor's permission to be on his property? It would not affect the admissibility of evidence against the defendant because the "victim" of the trespass would have been the neighbor, not the defendant. As the Court of Appeal pointed out:

"[A] search does not violate the Fourth Amendment simply because police officers trespassed onto a neighbor's property when making their observations."⁷⁹

"Open fields"

The courts use the term "open field" to designate any undeveloped private property outside the curtilage of a home; i.e., beyond the immediate side and back yards.⁸⁰ As a practical matter, most "open fields" consist of large parcels of land located in rural areas.

It is easy to determine when officers need a warrant to walk onto an open field: never.⁸¹ The reason, said the Supreme Court, is that "open fields do not provide the setting for those intimate activi-

⁷⁴ (1983) 149 Cal.App.3d 705, 707. ALSO SEE *People v. Lovelace* (1981) 116 Cal.App.3d 541, 548 [reasonable expectation of privacy because the fence surrounding the backyard "was repaired and tightened up in order to shield the backyard from public view"].

⁷⁵ (1965) 238 Cal.App.2d 292, 307. ALSO SEE *U.S. v. Raines* (8th Cir. 2001) 243 F.3d 419, 421 [unable to contact the occupant at the front door, the officer did not violate the Fourth Amendment "when he, in good faith, went unimpeded" to the back yard].

⁷⁶ See *People v. Vermouth* (1974) 42 Cal.App.3d 353, 362 ["plain and unobstructed view from a neighbor's backyard."]; *People v. Shaw* (2002) 97 Cal.App.4th 833 [with permission of a neighbor, officers standing behind a fence looked into the common area of defendant's apartment]; *People v. Smith* (1986) 180 Cal.App.3d 72, 83-84.

⁷⁷ (1974) 37 Cal.App.3d 836, 839.

⁷⁸ (1972) 7 Cal.3d 304, 311.

⁷⁹ *People v. Claeys* (2002) 97 Cal.App.4th 55, 59. ALSO SEE *People v. Superior Court (Stroud)* (1974) 37 Cal.App.3d 836, 839.

⁸⁰ See *People v. Barbarick* (1985) 168 Cal.App.3d 731, 741, fn.3 ["To the extent the garden was outside the curtilage it was an open field"]; *People v. Freeman* (1990) 219 Cal.App.3d 894, 901 ["An open field need be neither 'open' nor a 'field'"].

⁸¹ See *U.S. v. Dunn* (1987) 480 US 294, 304 ["there is no constitutional difference between police observations conducted while in a public place and while standing in the open fields"]; *People v. Shaw* (2002) 97 Cal.App.4th 833, 838 ["A warrantless observation made by law enforcement from an open field enjoys the same constitutional protection as the one made from a public place."].

ties that the Fourth Amendment is intended to shelter from governmental interference or surveillance.”⁸² This holds true even if the field was surrounded by fencing and posted with “No Trespassing” signs.⁸³

For example, in *U.S. v. Dunn*⁸⁴ DEA agents entered a 198-acre field that was “completely enclosed by a perimeter fence” and “several interior fences” with “multiple strands of barbed wire.” After climbing the fences, the agents saw Dunn’s PCP lab in a barn, and this led to his arrest. On appeal to the Supreme Court, Dunn argued that the sighting constituted a search, but the Court disagreed, noting that it had previously “rejected the argument that the erection of fences on an open field—at least of the variety involved in those cases and in the present case—creates a constitutionally protected privacy interest.” “It follows,” said the Court, “that no constitutional violation occurred here.”

Apartments and motels

The residents and registered guests of apartments, condominiums, motels, and hotels have the same privacy expectations as do people in single family homes.⁸⁵ Likewise, casual guests and “mere visitors” can expect no privacy in the living areas except for their personal belongings.⁸⁶ Furthermore, neither a

resident nor a guest can reasonably expect privacy in common areas, such as hallways, garages, and recreation areas.⁸⁷

Two questions arise: Can motel and hotel guests have standing if they obtained the room by fraud? And do they maintain standing after checkout time? The answer to both is that the occupants retain their privacy rights until management has taken affirmative steps to reassert exclusive control. As the Ninth Circuit explained in *U.S. v. Cunag*, “[E]ven if the occupant of a hotel room has procured that room by fraud, the occupant’s protected Fourth Amendment expectation of privacy is not finally extinguished until the hotel justifiably takes affirmative steps to repossess the room”⁸⁸

This does not mean that the occupants may continue to expect privacy until management actually begins legal eviction proceedings. Instead, it is sufficient that management, (1) was aware that grounds to evict existed, (2) had decided to evict the occupants, (3) had asked officers to assist with the eviction or at least stand by while a manager did so, and (4) had notified the occupants that they were being evicted.⁸⁹ “The critical determination,” said the Ninth Circuit, “is whether or not management had justifiably terminated [the guest’s] control of the room through private acts of dominion.”⁹⁰

⁸² *Dow Chemical v. U.S.* (1986) 476 US 227, 235.

⁸³ See *Oliver v. U.S.* (1984) 466 US 170, 179 [Court notes that “fences or ‘No Trespassing’ signs” do not ordinarily “effectively bar the public from viewing open fields”]; *U.S. v. Rapanos* (6th Cir. 1997) 115 F.3d 367, 372 [“The rather typical presence of fences, closed or locked gates, and ‘no trespassing’ signs on an otherwise open field therefore has no constitutional import.”].

⁸⁴ (1987) 480 US 294.

⁸⁵ See *U.S. v. Bautista* (9th Cir. 2004) 362 F.3d 584, 589 [Fourth Amendment “extends to such places as hotel or motel rooms”].

⁸⁶ See *U.S. v. Williams* (8th Cir. 2008) 521 F.3d 902, 906; *U.S. v. Sturgis* (8th Cir. 2001) 238 F.3d 956, 958.

⁸⁷ See *People v. Szabo* (1980) 107 Cal.App.3d 419, 429 [apartment garage]; *People v. Galan* (1985) 163 Cal.App.3d 786, 793 [condominium garage]; *People v. Arango* (1993) 12 Cal.App.4th 450 455 [“open carport area”].

⁸⁸ (9th Cir. 2004) 386 F.3d 888, 895.

⁸⁹ See *U.S. v. Cunag* (9th Cir. 2004) 386 F.3d 888, 895 [“[A] justifiable affirmative act of repossession by the lessor is the factor that finally obliterates any cognizable expectation of privacy a lessee might have.”]; *U.S. v. Young* (9th Cir. 2009) 573 F.3d 711, 716-17 [guest retained a reasonable expectation of privacy in his hotel room and the luggage he left there “because hotel staff had not evicted him from the room”]; *U.S. v. Bautista* (9th Cir. 2004) 362 F.3d 584, 590 [“The critical determination is whether or not management had justifiably terminated Bautista’s control of the room through private acts of dominion.”]; *U.S. v. Dorais* (9th Cir. 2001) 241 F.3d 1124, 1128 [“[A] defendant has no reasonable expectation of privacy in a hotel room when the rental period has expired and the hotel has taken affirmative steps to repossess the room.”]; *People v. Satz* (1998) 61 Cal.App.4th 322 [motel manager asked police “to assist in appellant’s eviction”]. COMPARE *U.S. v. Young* (9th Cir. 2009) 573 F.3d 711, 716-17 [“The hotel had not taken any affirmative act that was a clear and unambiguous sign of eviction.”]; *U.S. v. Molsbarger* (8th Cir. 2009) 551 F.3d 809, 812 [“Any right Molsbarger had to be free of government intrusion into the room ended when the hotel manager, properly exercising his authority, decided to evict the unruly guests and asked the police to help him do so.”]; *People v. Minervini* (1971) 20 Cal.App.3d 832, 840; *People v. Munoz* (2008) 167 Cal.App.4th 126, 133 [“we cannot infer that Munoz actually knew she was passing counterfeit currency” and thus “we cannot conclude she intended to defraud the motel”].

⁹⁰ *U.S. v. Bautista* (9th Cir. 2004) 362 F.3d 584, 590.

Motor vehicles

The registered owner may ordinarily challenge a search of the vehicle, even if he was not present when the search occurred. As for other occupants, they are permitted to challenge car stops and vehicle searches under the following circumstances:

STANDING TO CHALLENGE THE CAR STOP: When officers make a car stop, everyone in the vehicle has standing to challenge the justification for the stop and whether the officers carried out the detention in a reasonable manner.⁹¹ As the Sixth Circuit observed, “[E]ven in cases where no reasonable expectation of privacy exists, a passenger may still challenge the stop and detention.”⁹²

PASSENGERS: STANDING TO CHALLENGE SEARCHES: A person who was merely a passenger will, of course, have standing to challenge an intrusion into his personal belongings. He may not, however, challenge searches of other places and things in the vehicle, such as the glove box, under the seats, or the trunk.⁹³ Thus, in the landmark case of *Rakas v. Illinois*, the United States Supreme Court ruled that the passengers lacked standing to challenge a search under the front passenger seat because they “asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.”⁹⁴

BORROWERS: STANDING TO CHALLENGE SEARCHES: When the owner of a vehicle permits another person to use it temporarily, that person will have standing to challenge the legality of any search.⁹⁵ As the court noted in *People v. Leonard*, “A person who has the owner’s permission to use a vehicle and is exercising control over it has a legitimate expectation of privacy in it.”⁹⁶ A borrower will, however, lack standing if he absconded with the vehicle and the registered owner requested that officers assist in recovering it.⁹⁷

RENTAL CARS: A person who rents a car and any authorized drivers may challenge a search of it unless the rental period had expired and the rental company had requested police assistance in recovering the vehicle.⁹⁸ As for unauthorized drivers, there are two views: The majority view is that they do not have standing.⁹⁹ Thus, one of the courts in the majority, the Tenth Circuit, ruled in *United States v. Roper* that Roper lacked standing because the vehicle “had been rented by Griffin’s common law wife in California. Neither Roper nor Griffin was listed as an additional driver in the rental contract.”¹⁰⁰ In contrast, the Eighth and Ninth Circuits have ruled that unauthorized drivers may have standing if they were driving with the consent of the person who rented the vehicle.¹⁰¹

⁹¹ See *Brendlin v. California* (2007) 551 US 249; *U.S. v. Diaz-Castaneda* (9th Cir. 2007) 494 F.3d 1146, 1150.

⁹² *U.S. v. Torres-Ramos* (6th Cir. 2008) 536 F.3d 542, 549.

⁹³ See *People v. Valdez* (2004) 32 Cal.4th 73, 122 [passenger “lacked a reasonable expectation of privacy in the area under the driver’s side seat”]; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1370 [“Appellant was merely a guest-passenger”]; *People v. Nelson* (1985) 166 Cal.App.3d 1209, 1214 [passenger had no reasonable expectation of privacy in the glove compartment or under the seats].

⁹⁴ (1978) 439 US 128, 148.

⁹⁵ See *People v. Carvajal* (1988) 202 Cal.App.3d 487, 495 [borrower had standing because he “was driving the vehicle with the owner’s permission, and apparently possessed keys to the [vehicle]”]; *U.S. v. Soto* (10th Cir. 1993) 988 F.2d 1548, 1554 [“Because defendant presented evidence that he was in lawful possession of the car at the time of the stop, his expectation of privacy in the contents of the car [including secret compartment] was objectively reasonable.”].

⁹⁶ (1987) 197 Cal.App.3d 235, 239.

⁹⁷ See *U.S. v. Bouffard* (1st Cir. 1990) 917 F.2d 673, 676-77 [defendant retained possession “beyond the bailment term” and the owner “requested and received police assistance in recovering the vehicle”].

⁹⁸ See *U.S. v. Bouffard* (1st Cir. 1990) 917 F.2d 673, 676-77.

⁹⁹ See *U.S. v. Smith* (6th Cir. 2001) 263 F.3d 571, 586 [“We acknowledge that as a general rule, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle.”]; *U.S. v. Wellons* (4th Cir. 1994) 32 F.3d 117, 119 [“appellant, as an unauthorized driver of the rented car, had no legitimate privacy interest in the car”]; *U.S. v. Boruff* (5th Cir. 1990) 909 F.2d 111, 117 [“Boruff had no legitimate expectation of privacy in the rental car. Under the express terms of the rental agreement, Lawless was the only legal operator”].

¹⁰⁰ (10th Cir. 1990) 918 F.2d 885, 887-88.

¹⁰¹ See *U.S. v. Thomas* (9th Cir. 2006) 447 F.3d 1191, 1198 [unauthorized driver “may still have standing to challenge a search, upon a showing of ‘joint control’ or ‘common authority’ over the property searched.”]; *U.S. v. Best* (8th Cir. 1998) 135 F.3d 1223, 1225 [“If [the renter] had granted Best permission to use the automobile, Best would have a privacy interest giving rise to standing.”].

STOLEN CARS: Although the occupants of a stolen car have standing to challenge the propriety of their detention, they do not have standing to challenge a search of the vehicle.¹⁰² As the court observed in *People v. Melnyk*, “[A]n auto thief, like a second-story man apprehended in the victimized premises, has no standing to assert a reasonable expectation of privacy in the stolen car.”¹⁰³

Businesses

The principles that apply to searches of businesses and the personal workspaces of owners and employees are essentially the same as any other place: the person will have standing if he reasonably expected privacy in workspace or thing that was intruded upon.

AREAS OPEN TO THE PUBLIC: No one can reasonably expect privacy in areas that are open to the public.¹⁰⁴ Thus, in *Maryland v. Macon* the Supreme Court ruled that officers did not conduct a search when they entered the defendant’s bookstore and examined some books on display to determine if they contained pornography. This was because, said the Court, the owner “did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business.”¹⁰⁵

PRIVATE ENCLOSED AREAS: A corporate or business owner may reasonably expect privacy in all buildings that are not expressly or impliedly open to the public. Thus, in *Dow Chemical v. United States*, the Supreme Court summarily ruled that Dow “plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings.”¹⁰⁶

COMMERCIAL CURTILAGE: As a general rule, an owner or employee cannot reasonably expect privacy as to things and conditions on the private property immediately surrounding a business (i.e., the “commercial curtilage”). Consequently, officers may ordinarily enter parking lots and other adjoining commercial land unless the owner had taken reasonable steps to prevent entry.¹⁰⁷

EMPLOYEE’S PERSONAL PROPERTY: Employees may reasonably expect privacy as to the contents of their personal belongings in the workplace.¹⁰⁸

EMPLOYEES’ WORKSPACES: The most problematic situation pertaining to standing in the workplace occurs when an employer authorizes officers to search places or things that are owned by the employer but used by the employee-suspect. The reason these situations present problems is that privacy expectations will necessarily depend on the nature

¹⁰² See *People v. Carter* (2005) 36 Cal.4th 1114, 1141 [“To accept defendant’s assertion that he had a legitimate expectation of privacy while driving a stolen vehicle would be to overlook the word ‘unreasonable’ in the Fourth Amendment’s proscription against ‘unreasonable searches and seizures.’”]; *People v. Shepherd* (1994) 23 Cal.App.4th 825, 828 [“[D]efendant had no legitimate expectation of privacy in the stolen truck.”]; *U.S. v. Tropiano* (2nd Cir. 1995) 50 F.3d 157, 161 [“[W]e think it obvious that a defendant who knowingly possesses a stolen car has no legitimate expectation of privacy in the car.”].

¹⁰³ (1992) 4 Cal.App.4th 1532, 1533.

¹⁰⁴ See *Donovan v. Dewey* (1981) 452 US 594, 598-99 [“[T]he expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual’s home”]; *Vega-Rodriguez v. Puerto Rico telephone Co.* (1st Cir. 1997) 110 F.3d 174, 178-79 [“Generally speaking, business premises invite lesser privacy expectations than do residences. Still, deeply rooted societal expectations foster some cognizable privacy interests in business premises.”].

¹⁰⁵ (1985) 472 US 463, 469.

¹⁰⁶ (1986) 476 US 227, 236. ALSO SEE *U.S. v. Hall* (11th Cir. 1995) 47 F.3d 1091, 1096 [“[T]he owner of commercial property has a reasonable expectation of privacy in those areas immediately surrounding the property only if affirmative steps have been taken to exclude the public.”]; *U.S. v. Leary* (10th Cir. 1988) 846 F.2d 592, 596 [“[A] corporate defendant has standing with respect to searches of corporate premises”]; *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 698 [small business owners have standing throughout when they exercise “daily management and control”].

¹⁰⁷ See *Dow Chemical Co. v. U.S.* (1986) 476 US 227, 236 [“The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and building of a manufacturing plant.”]; *U.S. v. Reed* (8th Cir. 1984) 733 F.2d 492, 501 [“[T]here was no indication that the back parking lot was ‘private’ to the owners or to those specifically authorized to use it . . . [I]t served as a common loading area for C.D.Y. and a carpet business located to the immediate west of C.D.Y.”]; *U.S. v. Edmonds* (5th Cir. 1980) 611 F.2d 1386, 1388 [no reasonable expectation of privacy in loading dock/parking lot area of a business].

¹⁰⁸ See *O’Connor v. Ortega* (1987) 480 US 709, 716; *U.S. v. Anderson* (10th Cir. 1998) 154 F.3d 1225, 1231 [“It may be significant, therefore, that this item is a personal possession of the defendant and not something connected with the operation of the business.”].

of the area or thing, its function in the workplace, the extent to which other employees also use it, and the particular circumstances surrounding the intrusion. As the Supreme Court pointed out, because of the “great variety of work environments,” this issue must be decided “on a case-by-case basis.”¹⁰⁹

Before going further, it should be noted that there are essentially two legal issues in these situations. First, did the employee have a reasonable expectation of privacy over the place or thing that was intruded upon? If not, he cannot challenge the intrusion. Second, if the employee had a reasonable expectation of privacy, the employer may nevertheless consent to a search of it if it reasonably appeared that the employer had “common authority” over it.¹¹⁰ (The subject of common authority and apparent authority were covered in the article on consent searches in the Summer 2007 edition.)

Back to standing. If a court rules that the employer’s consent was ineffective because he did not have common authority over the place or thing that was searched, the evidence will ordinarily be suppressed unless the employee could not have reasonably expected privacy in the place or thing.

As a general rule, employees can expect privacy as to the contents of their desks, file cabinets, and other containers in their offices and other enclosed places that they use exclusively. “It is well established,” said the Tenth Circuit, “that an employee has a reasonable expectation of privacy in his office.”¹¹¹ Thus, in *U.S. v. SDI Future Health, Inc.*, the court summarily ruled that two managers of the corporate defendant had standing to challenge a search of “their own personal, internal offices.”¹¹²

An employee might also reasonably expect privacy in an office or thing that he uses jointly with a small number of other employees. For example, in *United States v. Taketa* the Ninth Circuit ruled that a DEA agent retained a reasonable expectation of privacy in his office even though other agents would enter now and then on official business. Said the court:

[E]ven private business offices are often subject to the legitimate visits of coworkers, supervisors, and the public, without defeating the expectation of privacy.¹¹³

However, an employee in a more bustling or centralized office may be denied standing if the “operational realities of the workplace” made his privacy expectations unreasonable.¹¹⁴ For example, in *Sacramento County Deputy Sheriffs’ Assn. v. County of Sacramento* the Court of Appeal ruled that a sheriff’s deputy could not reasonably expect privacy from video surveillance in the county jail’s “release office” because the office “was not exclusively assigned to him” and it was “accessible to any number of people, including other jail employees, inmates on cleaning detail and outside personnel.”¹¹⁵

Finally, an employee who had been given exclusive, or nearly exclusive, use or control of an area in the workplace may be denied standing if both of the following circumstances existed: (1) he was given notice of a company policy or practice by which intrusions “of the type to which he was subjected might occur from time to time for work-related purposes”;¹¹⁶ and (2) intrusions of that sort did, in fact, occur periodically and were thus not merely a remote possibility.

¹⁰⁹ *O’Connor v. Ortega* (1987) 480 US 709, 718.

¹¹⁰ See *U.S. v. Matlock* (1974) 415 US 164, 171, fn.7 [“The authority which justifies third-party consent [rests] on mutual use of the property by persons generally having joint access or control for most purposes.”]; *Illinois v. Rodriguez* (1990) 497 US 177, 185; *People v. Welch* (1999) 20 Cal.4th 701, 748 [“The person in control of the premises may consent to a search thereof.”]; *People v. Clark* (1993) 5 Cal.4th 950, 979 [“[O]bjects left in any area of common use or control may be within the scope of the consent given by a third party”].

¹¹¹ *U.S. v. Anderson* (10th Cir. 1998) 154 F.3d 1225, 1230.

¹¹² (9th Cir. 2009) 568 F.3d 684, 699. ALSO SEE *Schowengerdt v. General Dynamics, Inc.* (9th Cir. 1987) 823 F.2d 1328, 1335.

¹¹³ (9th Cir. 1991) 923 F.2d 665, 673. NOTE: An employee cannot expect privacy over a place merely because he had access, even if he worked there regularly with others. See *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 696 [“[M]ere access to, and even use of, the office of a co-worker does not lead us to find an objectively reasonable expectation of privacy.”]; *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 671 [mere access “does not lead us to find an objectively reasonable expectation of privacy”].

¹¹⁴ *O’Connor v. Ortega* (1987) 480 US 709, 717.

¹¹⁵ (1996) 51 Cal.App.4th 1468, 1482.

¹¹⁶ *Schowengerdt v. General Dynamics, Inc.* (9th Cir. 1987) 823 F.2d 1328, 1335. ALSO SEE *Veda-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 180 [“PRTC notified its work force in advance that video cameras would be installed and disclosed the cameras’ field of vision.”].

Difficulty of Observation

Until now, we have been discussing the legitimate privacy expectations inherent in certain places and things. But even if a certain place or thing was not technically “private” because there was a vantage point from which it could be seen, the defendant may have standing nevertheless if the observation could only have been made with great difficulty or (with increasing frequency) by means of high-tech electronic devices. As the Supreme Court remarked in *Dow Chemical, Inc. v. U.S.*:

It may well be that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.¹¹⁷

So, what is the test for determining whether the difficulty of observation was so great that, despite a nearby vantage point, the defendant could nevertheless expect privacy? It appears to be as follows: A search will result if the amount of required effort was beyond that which a moderately inquisitive person—utilizing generally available resources—would have expended.

EVIDENCE IN PLAIN VIEW: By its very nature, an officer’s observation of evidence in plain view requires little or no effort. For that reason, a search will not result if the evidence could be readily seen from a place that officers accessed without violating the defendant’s Fourth Amendment rights.¹¹⁸ For

example, an officer’s use of an electronic tracking device on a vehicle will not constitute a search (even if the driver utilized countersurveillance measures¹¹⁹) so long as the driver stayed on streets, sidewalks, parking lots, and other places in public view.¹²⁰ Furthermore, even if a place or thing was not fully exposed, it may be deemed in plain view if it could have been seen with little effort; e.g., bending down, standing on tiptoes.¹²¹

EVIDENCE MAGNIFIED: Using a common visual aid to magnify or clarify evidence that could have been seen without it (albeit less clearly) does not constitute a search because such an intrusion is reasonably foreseeable. As the Court of Appeal explained in *People v. St. Amour*:

So long as the object which is viewed is perceptible to the naked eye, the person has no reasonable expectation of privacy and as a consequence, the government may use technological aid of whatever type without infringing on the person’s Fourth Amendment rights.¹²²

Thus, the Supreme Court has explained that “the use of bifocals, field glasses or the telescope to magnify the object of a witness’ vision is not a forbidden search or seizure.”¹²³ (As for the use of magnification devices to look inside homes, see “Inside homes” on page 5.)

EVIDENCE ILLUMINATED: Using a flashlight or spotlight “to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.”¹²⁴

¹¹⁷ (1986) 476 US 227, 238.

¹¹⁸ *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1229 [“Information or activities which are exposed to public view cannot be characterized as something in which a person has a subjective expectation of privacy.”].

¹¹⁹ See *U.S. v. Knotts*, (1983) 460 US 276, 285 [“Insofar as respondent’s complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation.”].

¹²⁰ See *U.S. v. Knotts* (1983) 460 US 276, 281 [“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”]; *U.S. v. Dubrofsky* (9th Cir. 1978) 581 F.2d 208, 211.

¹²¹ See *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1501 [“tip toes”]; *U.S. v. Elkins* (6th Cir. 2002) 300 F.3d 638, 654 [“Any contortions [the officer] made to peer through the opening did not change the ‘plain view’ character of his observation”].

¹²² (1980) 104 Cal.App.3d 886, 893.

¹²³ *On Lee v. U.S.* (1952) 343 US 747, 754. ALSO SEE *People v. Arno* (1979) 90 Cal.App.3d 505, 509 [“[I]f the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion.”]; *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 426 [binoculars merely provided “greater detail”].

¹²⁴ *Texas v. Brown* (1983) 460 US 730, 740. ALSO SEE *U.S. v. Dunn* (1987) 480 US 294, 305 [“[T]he officers’ use of the beam of a flashlight, directed through the essentially open front of respondent’s barn, did not transform their observations into an unreasonable search”]; *People v. Superior Court (Mata)* (1970) 3 Cal.App.3d 636, 639 [“Observation of that which is in view is lawful, whether the illumination is daylight, moonlight, lights with the vehicle, lights from street lamps, neon signs, or lamps, or the flash of lights from adjacent vehicles.”].

ELECTRONIC VISUAL SURVEILLANCE: Although electronic surveillance technology can be highly intrusive, it is constantly becoming more affordable and more readily available to the general public. For that reason, the law is having to periodically adjust its idea of how much privacy people can reasonably expect from electronic surveillance and, therefore, what types of surveillance will require a warrant or other court authorization.¹²⁵

At present, the prevalent view seems to be that people must expect that officers will utilize technology that is in “general use,”¹²⁶ provided it was not used to look at something in a private place. For example, not long ago night-vision binoculars and Forward Looking Infrared (FLIR) technology would have been deemed too intrusive to be permitted without a search warrant. But nowadays they are considered fairly common, so that their use is not apt to be deemed a search if officers were looking at a place in which privacy expectations were minimal or nonexistent.¹²⁷

On the other hand, in *Kyllo v. United States* the Supreme Court ruled that officers conducted a search when they used a thermal imaging device to locate and measure the heat sources inside a residence. Said the Court, “Where, as here, the Government uses a device that is not in general public use,

to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”¹²⁸

What about video cameras? Because overt and hidden cameras are so prevalent, their use does not constitute a search if they only cover places that cannot support a reasonable expectation of privacy; e.g., places open to the public, non-private workspaces. Thus, the Tenth Circuit ruled that a warrant was not required where the cameras “were incapable of viewing inside the houses, and were capable of observing only what any passerby would easily have been able to observe.”¹²⁹

This holds true even if it is unlikely that covert cameras are in operation. Thus, the court in *United States v. McIver* ruled that the defendant could not reasonably expect that he would not be watched as he tended to a marijuana garden in a national forest. Said the court:

We reject the notion that the visual observation of the site became unconstitutional merely because law enforcement chose to use a most cost-effective “mechanical eye” to continue the surveillance.¹³⁰

AUDIO ELECTRONIC SURVEILLANCE: Although low-cost electronic eavesdropping devices (e.g., para-

¹²⁵ See *Kyllo v. U.S.* (2001) 533 US 27, 33-34 [“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”]; *Dean v. Superior Court* (1973) 35 Cal.App.3d 112, 116 [“Judicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance.”]; *U.S. v. Hill* (9th Cir. 2006) 459 F.3d 966, 979 [“Technology is rapidly evolving and the concept of what is reasonable for Fourth Amendment purposes will likewise have to evolve.”]; *U.S. v. Kim* (D. Haw. 1976) 415 F.Supp 1252, 1257 [“[A]s the technological capability of law enforcement agencies increases, the Fourth Amendment must likewise grow in response.”].

¹²⁶ See *Kyllo v. U.S.* (2001) 533 US 27, 39, fn.6 [in determining whether the use of electronic surveillance technology constitutes a search, the courts may consider whether the technology was in “general public use”]; *Dow Chemical v. U.S.* (1986) 476 US 227, 238 [“It may well be that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.”]; *U.S. v. Ishmael* (5th Cir. 1995) 48 F.3d 850, 855 [“[T]he mere fact that the police have employed relatively sophisticated forms of technological surveillance does not render the surveillance unconstitutional. While technology certainly gives law enforcement a leg up on crime, the Supreme Court has never equated police efficiency with unconstitutionality.”]; *U.S. v. Scott* (1st Cir. 1992) 975 F.2d 927, 930 [“There is no constitutional requirement that police techniques in the detection of crime must remain stagnant while those intent on keeping their nefarious activities secret have the benefit of new knowledge.”].

¹²⁷ See *U.S. v. Dellas* (N.D. Cal. 2005) 355 F.Supp.2d 1095, 1107 [“[N]ight vision goggles merely amplify ambient light to allow the wearer to see in relative darkness.”]; *Oregon v. Wacker* (1993) 317 Or. 419, 429 [no reasonable expectation of privacy when officers used night-vision binoculars to observe narcotics activity inside a car in a public parking lot].

¹²⁸ (2001) 533 US 27, 40. ALSO SEE *People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1231.

¹²⁹ *U.S. v. Jackson* (10th Cir. 2000) 213 F.3d 1269, 1281. ALSO SEE *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 181; *Sacramento County Deputy Sheriff's Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1478-84 [concealed camera in jail release office]; *U.S. v. Gonzalez* (9th Cir. 2003) 328 F.3d 543, 548 [covert video surveillance of hospital mailroom].

¹³⁰ (9th Cir. 1999) 186 F.3d 1119, 1125.

bolic microphones, sonic wave detectors) are widely available, the courts have never suggested that people who communicate privately must expect that their conversations will be intercepted by such means. On the contrary, the court in *People v. Henderson* ruled that “the use of equipment to hear what the unaided ear cannot hear violates reasonable expectations of privacy.”¹³¹

AERIAL SURVEILLANCE: People cannot reasonably expect that officers will not see things that could be observed from an airplane or helicopter (with or without visual aids) provided the aircraft, (1) was flown in accordance with FAA regulations, and (2) was not flown in an intrusive manner.¹³² The latter requirement is directed at police helicopters, mainly because they can hover at low altitudes. In fact, one of the many frightening images from George Orwell’s *1984* was the following: “In the far distance a helicopter skimmed down between the roofs. [I]t was the Police Patrol, snooping into people’s windows.” Although it turned out that this image was farfetched, a search is apt to result if a helicopter pilot engages in “interminable hovering,” “persistent overfly,” or “treetop observation.”¹³³

CANINE SNIFFING: Although modern technology cannot match the smelling capability of even the most unaccomplished mutt, it is settled that a search does not result when officers use a dog to detect drugs or explosives in a place in which the officers have a right to be.¹³⁴

Standing Forfeited

A defendant who has standing may lose it if he did or said something before the evidence was discovered that eliminated his privacy expectations in the evidence or in the place in which the evidence was found. Standing can be relinquished in the following ways.

Evidence abandoned

The most common way in which defendants lose standing is by abandoning the evidence before officers seized it. As used here, the term “abandonment” means relinquishing possession of evidence (permanently or temporarily) under circumstances that make it unreasonable to expect that others will not see or take it.¹³⁵ As the court observed in *People v. Dagggs*, “[N]o one has a reasonable expectation of privacy in property that has been abandoned.”¹³⁶

Before we discuss how evidence is usually abandoned, it should be noted that, while most abandonment is intentional, an intent to abandon is not a requirement that prosecutors must prove. Instead, evidence will be deemed abandoned if it *reasonably appeared* that the defendant intended to do so.¹³⁷ “Whether an abandonment has occurred,” said the court in *United States v. Tugwell*, “is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner’s subjective intent.”¹³⁸ As we will now discuss, abandonment can occur in several ways.

¹³¹ (1990) 220 Cal.App.3d 1632, 1644.

¹³² See *California v. Ciraolo* (1986) 476 US 207, 215 [“The Fourth Amendment simply does not require the police traveling in the public airways at this altitude [1,000 feet] to obtain a warrant in order to observe what is visible to the naked eye.”]; *People v. Romo* (1988) 198 Cal.App.3d 581, 586 [“the helicopter was operating lawfully . . . *Ciraolo* requires no more”].

¹³³ *People v. Sabo* (1986) 185 Cal.App.3d 845, 854. COMPARE *Florida v. Riley* (1989) 488 US 445, 452 [“[T]here was no undue noise, and no wind, dust, or threat of injury.”]; *People v. Romo* (1988) 198 Cal.App.3d 581, 587 [“[The helicopter] did not hover over defendant’s backyard . . . No maneuvering was required”]; *Dean v. Superior Court* (1973) 35 Cal.App.3d. 112, 117 [“When the police [in a helicopter] have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is no search in a constitutional sense”].

¹³⁴ See *Illinois v. Caballes* (2005) 543 US 405, 410; *Indianapolis v. Edmond* (2000) 531 US 32, 40.

¹³⁵ See *Abel v. U.S.* (1960) 362 US 217, 241.

¹³⁶ (2005) 133 Cal.App.4th 361, 365. ALSO See *People v. Parson* (2008) 44 Cal.4th 332, 345 [“a person has no reasonable expectation of privacy in [abandoned] property”].

¹³⁷ See *People v. Parson* (2008) 44 Cal.4th 332, 347 [“abandonment is primarily a question of the defendant’s intent, as determined by objective factors such as the defendant’s words and actions.”]; *People v. Dagggs* (2005) 133 Cal.App.4th 361, 365 [“[T]he intent to abandon is determined by objective factors, not the defendant’s subjective intent.”]; *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1048 [court rejects argument that abandonment does not occur “unless the actor intends to permanently relinquish control over the object”]; *U.S. v. Alexander* (7th Cir. 2009) 573 F.3d 465, 472 [“We consider only the external manifestations of the defendant’s intent as judged by a reasonable person possessing the same knowledge available to the searching officer.”].

¹³⁸ (8th Cir. 1997) 125 F.3d 600, 602.

ORDINARY ABANDONMENT: The most common form of abandonment occurs when a person intentionally leaves the evidence in a public place, or in a private place over which he had no control. Examples include leaving evidence in a garbage can at the curb for pickup;¹³⁹ leaving evidence in a motel room after check out or after the guest demonstrated by words or actions that he did not intend to return.¹⁴⁰ (As for unintentional abandonment, see “Lost property” on page 18.)

POST-PURSUIT ABANDONMENT: This type of abandonment occurs at the end of a car chase when the suspect bails out and leaves the evidence inside the vehicle. Thus, when this occurred in *United States v. Edwards*, the Fifth Circuit ruled that the “[d]efendant’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.”¹⁴¹ (As noted on page 12, if it turns out that the abandoned car was stolen, the suspect will never have had a reasonable expectation of privacy in its contents.)

PRE-ARREST ABANDONMENT: If often happens that a suspect, having suddenly become aware that he is about to be arrested, detained, or searched, will toss the evidence away or leave it unattended in a place

he does not control.¹⁴² This is another form of abandonment. “It is, of course, well established,” said the Court of Appeal, “that property is abandoned when a defendant voluntarily discards it in the face of police observation, or imminent lawful detention or arrest, to avoid incrimination.”¹⁴³ The following are some examples:

- As officers approached the defendant, he stopped “busying himself with the contents of the gym bag” and left the bag “on the floor of a public hallway.”¹⁴⁴
- Having seen that a drug-sniffing dog had alerted to his suitcase, a bus passenger made an “abrupt departure.”¹⁴⁵
- While officers were executing a search warrant in a liquor store, the clerk kicked several bindles of cocaine under a counter.¹⁴⁶

DENIABILITY ABANDONMENT: Deniability abandonment occurs when a defendant hides the evidence (usually drugs) in a place he does not control in order to provide himself with deniability if it happened to be discovered by officers. For example, the courts have ruled that a street-level drug dealer had abandoned his stash by keeping it in a bag behind some bushes;¹⁴⁷ or when the defendant put drugs in a hole in the ground behind an apartment complex;¹⁴⁸ or when he hid stolen jewelry “in a cinder

¹³⁹ See *California v. Greenwood* (1988) 486 US 35, 40-41; *U.S. v. Scott* (1st Cir. 1992) 975 F.2d 927, 929 [defendant abandoned shredded documents he put in a garbage can outside his home]; *U.S. v. Hall* (11th Cir. 1995) 47 F.3d 1091, 1096.

¹⁴⁰ See *Abel v. U.S.* (1960) 362 US 217, 241; *U.S. v. De Parias* (11th Cir. 1986) 805 F.2d 1447, 1458 [defendant left the evidence in an apartment after moving out]; *People v. Parson* (2008) 44 Cal.4th 332, 346 [defendant vacated his hotel rooms without checking out, leaving some items behind]; *People v. Ingram* (1981) 122 Cal.App.3d 673, 680 [“All appearances created by defendant himself pointed to the fact that the room had been vacated.”]; *U.S. v. Dent* (1st Cir. 2010) __ F.3d __ [“Dent had instead left his pack behind in a house in which he had no property interest and no clearly defined social place.”].

¹⁴¹ (5th Cir. 1971) 441 F.2d 749, 751. ALSO SEE *U.S. v. Allen* (10th Cir. 2000) 235 F.3d 482, 489 [defendant abandoned his car when he bailed out during a pursuit].

¹⁴² See *People v. Brown* (1990) 216 Cal.App.3d 1442, 1451 [defendant dropped a paper bag containing rock cocaine “before making a last-ditch effort to evade the police”]; *People v. Thompson* (1988) 205 Cal.App.3d 1503, 1508 [defendant kicked bindles of cocaine underneath a counter in a liquor store]; *People v. Taylor* (1986) 178 Cal.App.3d 217, 230 [defendant tossed jewelry to the ground just before he was apprehended]; *People v. Haines* (1981) 123 Cal.App.3d 861, 868 [when he saw the officers, the suspect hid the evidence in a storage bin in his carport].

¹⁴³ *People v. Daggs* (2005) 133 Cal.App.4th 361, 365; *U.S. v. Paradis* (1st Cir. 2003) 351 F.3d 21, 31.

¹⁴⁴ *U.S. v. Thomas* (D.C. Cir. 1989) 864 F.2d 843, 846.

¹⁴⁵ *U.S. v. Tugwell* (8th Cir. 1997) 125 F.3d 600, 603.

¹⁴⁶ *People v. Thompson* (1988) 205 Cal.App.3d 1503, 1509.

¹⁴⁷ *In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045-46 [defendant “had taken pains to put out of his apparent possession and control, for the manifest purpose of maintaining deniability”]. ALSO SEE *U.S. v. Hayes* (2nd Cir. 2008) 551 F.3d 138 [defendant left drugs in a bag hidden in scrub brush on his property, but 65 feet from his house in an unfenced area].

¹⁴⁸ *People v. Shaw* (2002) 97 Cal.App.4th 833, 839. ALSO SEE *People v. Ketchum* (1975) 45 Cal.App.3d 328, 330 [“The box was found in a stranger’s yard where Ketchum had attempted to hide it.”].

block on top of a peripheral wall separating her backyard from other properties”;¹⁴⁹ or when he transferred drugs to an associate, telling her that he would deny knowing her if she was detained, and that he would not associate with her on their trip.”¹⁵⁰

In contrast, the courts have ruled that deniability abandonment did not occur when, after a plain-clothes officer told the defendant to “come here a minute,” he threw the bag on the hood of his car and turned to face the officer;¹⁵¹ or when the defendant, upon seeing officers approach, put his drugs in a storage bin in his carport.¹⁵²

EVIDENCE LEFT AT CRIME SCENE: A defendant who fled the scene of his crime will ordinarily be deemed to have abandoned any evidence he left behind because it is highly unlikely that he will return to claim it (“Excuse me, but I forgot my burglar tools.”) The following are some examples:

- Defendant left his fingerprint-laden property at the scene of a murder he committed.¹⁵³
- Defendant left evidence at scene of a rape.¹⁵⁴
- Defendant left her purse in the truck she had stolen.¹⁵⁵
- Defendant accidentally dropped his cell phone at the scene of a robbery.¹⁵⁶

Lost property

A defendant cannot ordinarily expect privacy as to property that he lost or mislaid in a public place or

other location in which he could not reasonably expect privacy. Thus, in *People v. Juan* the court ruled that the defendant lacked standing to challenge a search of a jacket he had “left draped over a chair at an empty table in a restaurant.”¹⁵⁷

Property conveyed to third person

A defendant may forfeit standing to challenge a search of property that he had conveyed to a third person, especially if the third person had no duty to return the property or care for it. Some examples:

- Defendant “dumped” drugs into the purse of a woman he had known for only a few days.¹⁵⁸
- Defendant left an unsealed bag containing drugs in a drug buyer’s car.¹⁵⁹
- Defendant put drugs in a friend’s package of cigarettes.¹⁶⁰
- Defendant put an incriminating letter in the pocket of a fellow jail inmate.¹⁶¹
- Defendant gave a murder weapon to his cousin to hold for him, “knowing it would be kept by [his cousin] in a place both unknown to him and over which he had no control.”¹⁶²

A defendant may, however, retain a privacy interest in property that he had temporarily given to a third person for safekeeping or under other circumstances in which a continued expectation of privacy would be reasonable.¹⁶³ As the D.C. Circuit observed:

¹⁴⁹ *People v. Roybal* (1998) 19 Cal.4th 481, 507

¹⁵⁰ *U.S. v. McKennon* (11th Cir. 1987) 814 F.2d 1539, 1543. ALSO SEE *People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1241 [defendant “took all of the steps” to disassociate himself from a vehicle containing drugs by not registering it in his name and planning to have someone else drive it]; *U.S. v. Boruff* (5th Cir. 1990) 909 F.2d 111, 116.

¹⁵¹ *Smith v. Ohio* (1990) 494 US 541, 543.

¹⁵² *People v. Haines* (1981) 123 Cal.App.3d 861, 867.

¹⁵³ *People v. Ayala* (2000) 24 Cal.4th 243, 279.

¹⁵⁴ *U.S. v. James* (8th Cir. 2008) 534 F.3d 868, 873.

¹⁵⁵ *People v. Shepherd* (1994) 23 Cal.App.4th 825.

¹⁵⁶ *People v. Daggs* (2005) 133 Cal.App.4th 361.

¹⁵⁷ (1985) 175 Cal.App.3d 1064, 1069.

¹⁵⁸ *Rawlings v. Kentucky* (1980) 448 US 98, 105. ALSO SEE *People v. Clark* (1993) 5 Cal.4th 950, 979 [defendant left his clothing in a friend’s car]; *U.S. v. Fay* (9th Cir. 2005) 410 F.3d 589 [defendant left gun in open bag on a shelf in his girlfriend’s apartment]; *U.S. v. Crowder* (7th Cir. 2009) 588 F.3d 929, 935 [defendant turned his car over to a shipper who had the keys; “it was clear that the driver was authorized to act in direct contravention to Crowder’s privacy interest”].

¹⁵⁹ *People v. Root* (1985) 172 Cal.App.3d 774, 778.

¹⁶⁰ *People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742.

¹⁶¹ *People v. Burns* (1987) 196 Cal.App.3d 1440, 1453.

¹⁶² *People v. McPeters* (1992) 2 Cal.4th 1148, 1172.

¹⁶³ See *People v. Ybarra* (1991) 233 Cal.App.3d 1353, 1362; *U.S. v. Basinski* (7th Cir. 2000) 226 F.3d 829, 837 [“he entrusted the locked briefcase to a life long friend”].

We leave our bags with clerks at stores, museums, and restaurants; we check our luggage when we travel by train or by air; we park our cars at commercial garages. The suggestion that police in these situations may conduct warrantless searches of our belongings finds no support in precedent or in logic.¹⁶⁴

Transfer of information

Under the Fourth Amendment, people who send or otherwise reveal information to friends, relatives, associates, and businesses cannot reasonably expect that the recipient will not disclose it to officers.¹⁶⁵ Thus, the Supreme Court pointed out:

This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed.¹⁶⁶

For example, people cannot expect privacy as to personal and credit card information included on motel registration forms,¹⁶⁷ or information on sales transaction records, or information on mail covers (i.e., the information on the outside of an envelope

placed in the mail),¹⁶⁸ or internet subscriber information,¹⁶⁹ or information that people have made readily available to others on the internet; e.g., via file sharing, on a computer network.¹⁷⁰

Note, however, there are federal and state laws that restrict the disclosure of certain types of revealed information so that the possessor will often refuse to reveal it without a warrant; e.g., information transmitted to banks,¹⁷¹ and phone records, stored email, voicemail, and text messages.¹⁷²

Disclaimers and denials

It often happens that a suspect will tell officers that he does not own, possess, or control a container in which drugs or other evidence was found. The question arises: Does such a disclaimer deprive him of standing to challenge a search of the container? The answer depends on two things: (1) whether the disclaimer occurred before or after the evidence was found, and (2) whether the defendant merely denied ownership or whether he denied having any interest in it.

As for when the disclaimer occurred, a disclaimer will have no effect if it occurred *after* the officers discovered the evidence.¹⁷³ This is because a rule that deprived defendants of standing if they denied that

¹⁶⁴ *U.S. v. Most* (D.C. Cir. 1989) 876 F.2d 191, 198.

¹⁶⁵ See *Smith v. Maryland* (1979) 442 US 735, 743-44 [“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”]; *California v. Greenwood* (1988) 486 US 35, 41 [“[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”]; *People v. Workman* (1989) 209 Cal.App.3d 687, 696 [defendant sent an incriminating letter to an accomplice].

¹⁶⁶ *United States v. Miller* (1976) 425 US 435, 443.

¹⁶⁷ See *U.S. v. Cormier* (9th Cir. 2000) 220 F.3d 1103, 1108 [“a guest has no reasonable expectation of privacy in guest registration records”]; *U.S. v. Willis* (11th Cir. 1985) 759 F.2d 1486, 1498 [“We hold that Willis lacks standing to challenge the officers’ examination of the motel records.”].

¹⁶⁸ See *U.S. v. Hinton* (9th Cir. 2000) 222 F.3d 664, 674 [“A ‘mail cover’ is a term of art within the postal system ‘by which a nonconsensual record is made of any data appearing on the outside cover of any sealed or unsealed class of mail matter’”]; *People v. Reyes* (2009) 178 Cal.App.4th 1183, 1190 [private post office box mail cover].

¹⁶⁹ See *U.S. v. Bynum* (4th Cir. 2010) __ F.3d __ [2010 WL 1817763] [“Bynum voluntarily conveyed all this information to his internet and phone companies. In doing so, Bynum assumed the risk that those companies would reveal that information to police.”].

¹⁷⁰ See *U.S. v. Ganoë* (9th Cir. 2008) 538 F.3d 1117, 1127 [“we fail to see how this expectation [of privacy] can survive Ganoë’s decision to install and use file-sharing software”]; *U.S. v. Stults* (8th Cir. 2009) 575 F.3d 834, 842 [“Several federal courts have rejected the argument that an individual has a reasonable expectation of privacy in his or her personal computer when file-sharing software, such as LimeWire, is installed.” Citations omitted.]; *U.S. v. Heckenkamp* (9th Cir. 2007) 482 F.3d 1142, 1147 [“[P]rivacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential”]; *U.S. v. Meek* (9th Cir. 2004) 366 F.3d 705, 711 [“[E]ither party to a chat room exchange has the power to surrender each other’s privacy interest to a third party.”]; *U.S. v. King* (11th Cir. 2007) 509 F.3d 1338, 1342 [files shared on network].

¹⁷¹ See Gov. Code § 7485-7487.

¹⁷² See 18 USC § 2703(a), (d), (g); Pen. Code § 1524.3.

¹⁷³ See *People v. Dachino* (2003) 111 Cal.App.4th 1429, 1432.

they possessed evidence that had already been discovered would require them to either confess or stand mute in order to challenge the search.

As for the nature of the disclaimer, a defendant will automatically forfeit standing if he denied having any interest in the container; e.g., “I’ve never seen that backpack before.” When this happens, the defendant has, in effect, given officers “the green light” to search.¹⁷⁴ As the court explained in *People v. Dasilva*, “We will not extend California law to permit a defendant who disclaims possession of an object to take a contrary position in an effort to attain standing.”¹⁷⁵

For example, in *People v. Vasquez*¹⁷⁶ the court ruled that the defendants did not have standing to challenge the search of pillowcases that were filled with stolen property because, when the defendants saw the officers, they put the pillowcases on the ground and then claimed they had just found them in some bushes.

Similarly, in *United States v. Decoud*¹⁷⁷ a CHP officer in Riverside had just arrested Decoud for driving on a suspended license and was conducting an inventory search of his car when he saw a locked metal briefcase. When he asked Decoud about the briefcase, he claimed it did not belong to him, that he had borrowed the car, and that the briefcase “belonged to the owner.” The officer then forced it open and found a handgun and a “large supply” of cocaine. On appeal, the court ruled that Decoud lacked standing because he “gave up any expectation of privacy in the briefcase by unequivocally disclaiming ownership.”

On the other hand, if the defendant merely denied that he owned the container, he may have standing depending on the surrounding circumstances—but

his denial will be deemed a “strong indication” that he didn’t.¹⁷⁸ The reason a denial of ownership is not a death blow to standing is that a person who does not own an item may nevertheless have a reasonable expectation of privacy by virtue of his right to possess or control it; e.g., he had borrowed the car in which the evidence was found.¹⁷⁹

A denial of ownership will, however, render a defendant’s expectation of privacy unreasonable if he thereafter consented to a search of the place or thing. For example, in *U.S. v. Williams*¹⁸⁰ the defendant admitted FBI agents into his motel room to question him about a series of bank robberies. When an agent asked Williams about a briefcase sitting next to a nightstand, Williams said it did not belong to him, and he had no objection if the agent wanted to search it. Inside the briefcase, agents found dozens of credit cards and identification documents of people “from all parts of the country.” Although Williams had not denied having a possessory interest in the briefcase, the court ruled that his disclaimer was “analogous to abandonment.”

Contents disclosed

Finally, a person who owns or possesses a container cannot reasonably expect privacy as to its contents if it had been previously opened by a private party or a common carrier who saw the contents and notified officers. Said the Supreme Court, “Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information.”¹⁸¹ For the same reason, a defendant will lose standing to challenge a search of a container if he admitted to officers that it contained drugs or other evidence of a crime.¹⁸²

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¹⁷⁴ See *People v. Dees* (1990) 221 Cal.App.3d 588, 595. ALSO SEE *People v. Stanislawski* (1986) 180 Cal.App.3d 748, 757 [“It is settled law that a disclaimer of proprietary or possessory interest in the area searched or the evidence discovered terminates the legitimate expectation of privacy over such area or items.”]; *U.S. v. Adams* (6th Cir. 2009) 583 F.3d 457, 466 [While conducting a lawful search of a motel room with the consent of the renter, an officer asked all of the occupants of the room if a jacket on the floor belonged to any of them. Defendant answered no, and the officer searched it and found a gun].

¹⁷⁵ (1989) 207 Cal.App.3d 43, 49.

¹⁷⁶ (1983) 138 Cal.App.3d 995.

¹⁷⁷ (9th Cir. 2006) 456 F.3d 996.

¹⁷⁸ See *U.S. v. Hawkins* (11th Cir. 1982) 681 F.2d 1343, 1346; *U.S. v. Zapata* (1st Cir. 1994) 18 F.3d 971, 978.

¹⁷⁹ See *People v. Allen* (1993) 17 Cal.App.4th 1214, 1223; *People v. Dasilva* (1989) 207 Cal.App.3d 43, 48.

¹⁸⁰ (4th Cir. 1976) 538 F.2d 549, 550-51. ALSO SEE *U.S. v. Han* (4th Cir. 1996) 74 F.3d 537, 544.

¹⁸¹ *U.S. v. Jacobsen* (1984) 466 US 109, 117. ALSO SEE *Illinois v. Andreas* (1983) 463 US 765, 771.

¹⁸² See *People v. Haugland* (1981) 115 Cal.App.3d 248, 257; *U.S. v. Monghur* (9th Cir. 2009) 588 F.3d 975, 980.