Probable Cause To Search

"There may be probable cause to search without probable cause to arrest, and vice-versa."[1]

While there are many similarities between probable cause to search and probable cause to arrest—and even though each of them frequently triggers the other[2]—they are entirely separate determinations with significantly different requirements. As the Sixth Circuit observed, "The two determinations are measured by similar objective standards but contain different inquiries."[3] The essential difference is that probable cause to arrest requires a link between the crime and the suspect, while probable cause to search requires a link between the evidence and the place to be searched."Mere evidence of a suspect's guilt," said the California Supreme Court, "provides no cause to search his residence."[4]

How can officers establish the necessary link between certain evidence and a particular location? As we will discuss in this article, it requires proof of three things: (1) that the evidence exists, (2) that it was once located at the place to be searched, and (3) it is still there.[5] As the Supreme Court explained:

> The critical element in a reasonable search is that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought.[6]

In some cases, all three requirements can be satisfied easily if an officer, informant, victim, or witness saw the evidence in the location and the search occurred immediately or so quickly thereafter that it was reasonable to believe it was still there. This commonly occurs when an officer stops a car and sees a gun or drugs in the passenger compartment.[7]

But the situation becomes much more complicated if no reliable source had seen the evidence or knew its current whereabouts. That's because it will be necessary for officers to establish probable cause by means of circumstantial proof, reasonable inference, or both. The question, then, is what must officers do—while writing a search warrant affidavit or testifying at a suppression hearing—to establish probable cause in this manner? There are essentially two things: (1) set forth the facts upon which the conclusion was based, and (2) provide the court with reasons to believe the conclusion is sound.

The Evidence Exists

It probably sounds obvious, but it is something that is frequently overlooked with dire consequences: probable cause to search for certain evidence requires proof that the evidence exists. As the court noted in *Fitzgerald v. City of Los Angeles*, "[P]olice may not conduct a search based on probable cause to believe a crime has been committed when no physical evidence exists for that crime."[8] This requirement can, of course, be easily satisfied by direct observation of the evidence by an officer, reliable informant, victim, or witness. Otherwise, officers must rely on logical inference which is usually based on the nature of the crime under investigation or a reliable source who saw, heard, or smelled something—at the crime scene or anywhere else—that sufficiently signified the existence of the evidence.

Inference based on nature of crime

When officers have probable cause to believe that a certain crime was committed they may usually infer

[1] *U.S. v. Rodgers* (9th Cir. 2011) 656 F.3d 1023, 1029.
[2] *People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 85 ["there is "no discernable distinction between probable cause to believe a person is carrying narcotics and probable cause to arrest for carrying narcotics"].
[3] *Green v. Reeves* (6th Cir. 1996) 80 F.3d 1101, 1106.
[4] *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206.
[5] See *Florida v. Harris* (2013) __ U.S. __ [133 S.Ct. 1050, 1055]; *People v. Frank* (1985) 38 Cal.3d 711, 727 ["the standard of probable cause is whether the affidavit [1] states facts [2] that make it substantially probable [3] that there is specific property [4] lawfully subject to seizure [5] presently located [6] in the particular place for which the warrant is sought"].
[6] *Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 556 [Edited].
[7] See *California v. Carney* (1985) 471 U.S. 386, 395.
[8] (C.D. Cal. 2007) 485 F.Supp.2d 1137, 1149.

the existence of items that are commonly used to commit or facilitate such a crime; i.e., the "instrumentalities" of the crime. As the Court of Appeal explained, "[R]easonable inferences may be indulged as to the presence of articles known to be usually accessory to or employed in the commission of a specific crime."[9] For example, the courts have ruled that officers who have proved that a certain crime was committed might reasonably infer the existence of the following:

Evidence of drug trafficking: If there is probable cause to believe that a suspect was trafficking in illegal drugs, it follows that he uses the types of things that most drug traffickers use, such as scales, packaging materials, and "business" records. For example, in *U.S. v. Riley* the court ruled that officers reasonably inferred the existence of drug sales paraphernalia inside the defendant's storage locker because the defendant had "negotiated for the acquisition of, and accepted delivery of large quantities of narcotics."[10] Similarly, if there was probable cause to believe that a drug lab was operational in a certain place, officers may reasonably infer that the place contains the types of laboratory equipment, chemicals, and supplies that are commonly used in such labs.[11] Finally, having probable cause to believe that a suspect was cultivating marijuana, it may be reasonable to infer the existence of equipment that is necessary to grow marijuana.[12]

Incriminating business records: If there is reason to believe that certain premises are being used in conjunction with a criminal conspiracy or other ongoing crime, it is usually reasonable to infer the existence of records that such criminal enterprises usually keep; e.g., e.g., pay-and-owe sheets, "trick books." See "Existence of records based on common practice," below.

Workplace violence: As an example of more complex reasoning, the California Supreme Court ruled that, because officers had probable cause to believe that the defendant shot and killed fellow employees at his workplace, they could reasonably infer the existence of "weapons and explosives, photographs and documents" related to the business, and documents "concerning his employment at [the business]."[13]

Existence based on close association

The existence of some types of evidence may be based solely or partly on the discovery of another item or condition at the crime scene, in the suspect's possession, or elsewhere, if the two items are closely associated. In other words, if A and B are usually found together, and if officers found A, it may be reasonable to believe that B exists

Drug cases: Establishing probable cause by means of association is commonly used in drug cases where the following combinations of items and conditions are closely associated.

Drug packaging > Drugs: Officers may reasonably believe there are drugs inside a container based on its unusual characteristics; e.g., tiny baggies,[14] "rectangular kilogram size packages,"[15] "small intricately folded papers" ("bindles"),[16] "translucent condoms containing a powdery substance and tied off at the ends."[17] Thus, in *Texas v. Brown* the Supreme Court noted that "the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer."[18] However, containers commonly used for a legitimate purpose may not satisfy this requirement; e.g., film canisters.[19]

Drugs for sale > Sales paraphernalia: See "Inference based on nature of crime," above.

[9] *People v. Senkir* (1972) 26 Cal.App.3d 411, 421. Also see *U.S. v. Spilotro* (9th Cir. 1986) 800 F.2d 959, 964.
[10] (2nd Cir. 1990) 906 F.2d 841, 84. Also see *People v. Sloss* (1973) 34 Cal.App.3d 74, 82-83.
[11] See *People v. McNabb* (1991) 228 Cal.App.3d 462, 46.
[12] See *People v. Senkir* (1972) 26 Cal.App.3d 411, 420-21; *People v. Vermouth* (1974) 42 Cal.App.3d 353, 362.
[13] See *People v. Farley* (2009) 46 Cal.4th 1053, 1099.
[14] See *People v. Nonnette* (1990) 221 Cal.App.3d 659, 666.
[15] See *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 546-47. Also see *People v. Arango* (1993) 12 Cal.App.4th 450, 455.
[16] See *People v. Clayton* (1970) 13 Cal.App.3d 335, 337-38.
[17] See *People v. Parra* (1973) 30 Cal.App.3d 729, 735.
[18] (1983) 460 U.S. 730, 743. Also see *United States. v. Jacobsen* (1984) 466 U.S. 109, 121.
[19] See *People v. Holt* (1989) 212 Cal.App.3d 1200, 1205; *People v. Valdez* (1987) 196 Cal.App.3d 799, 806-7.

DRUGS FOR SALE > WEAPONS: Because drug sales and weapons are closely associated, it is usually reasonable to infer that weapons are on the premises where drugs are produced or sold.[20] "Illegal drugs and guns," said the court in *People v. Simpson*, "are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons."[21]

DRUG USE PARAPHERNALIA > DRUGS: If officers find paraphernalia that is closely associated with a certain drugs, it is usually reasonable to believe that such drugs are nearby. For example, in *Wyoming v. Houghton* the Supreme Court ruled that, because officers saw a hypodermic syringe in the driver's shirt pocket, they reasonably believed there were injectable drugs in the vehicle.[22]

DRUG ODOR > DRUGS: A distinctive odor of drugs emanating from a place or container (whether detected by an officer or K9[23]) may establish probable cause to search for that type of drug.[24] As the Court of Appeal observed, "Odors may constitute probable cause if the magistrate finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify [drugs]."[25]

NON-DRUG CASES: Inferences based on close association may also be employed in other crimes.

WOUND OR INJURY > DEVICE THAT CAUSED IT: The existence of a particular type of murder or assault weapon may be based on the cause of death or injury. For example, in *People v. Schilling,* the court ruled that the existence of a "medium caliber handgun" could be inferred from the autopsy results;[26] and in *People v. Frank* the court ruled that the existence of pliers, rope, and pieces of flesh was proven by the condition of the victim's body.[27]

CRIME IN REMOTE AREA > MAPS: If the crime under investigation occurred in a remote location, it may be reasonable to infer that the perpetrator had maps or diagrams of the area. For example, in *People v. Carpenter*, because a series of murders occurred near remote hiking trails in Marin County (the "Trailside Murders"), it was reasonable to believe that the perpetrator possessed maps, books, and schedules pertaining to hiking in the area.[28]

AMMUNITION > FIREARMS: If officers saw ammunition in the suspect's car, it may be reasonable to infer there was a firearm in the passenger compartment.[29]

ALCOHOL ODOR > OPEN CONTAINER: Officers who smell fresh beer in the passenger compartment of a car may infer there is also an open container.[30]

Existence based on physiology or physics

Officers may infer the existence of trace evidence at certain crime scenes based on human physiology and basic physics. For example, it is usually reasonable to infer that fingerprints and DNA will be left at crime scenes where the perpetrator likely touched something. Similarly, at the scene of a shooting it is usually reasonable to infer there will be trace blood spatters, powder burns, and gunshot residue.[31]

Existence of data from common practice

The existence of certain data and documents may be based on inferences as to what types of records people, businesses, and agencies ordinarily possess, such as the following:

INDICIA: Probable cause to search for indicia in homes, cars, and businesses is commonly based solely on reasonable inference because, although officers seldom know exactly what indicia they will find, they can be fairly certain that they will find something. "[C]ommon experience tells us," said the Court of

[20] See *People v. Glaser* (1995) 11 Cal.4th 354, 367; *People v. Thurman* (1989) 209 Cal.App.3d 817, 822.
[21] (1998) 65 Cal.App.4th 854, 862.
[22] (1999) 526 U.S. 295.
[23] See *Illinois v. Caballes* (2005) 543 U.S. 405, 410; *People v. Stillwell* (2011) 197 Cal.App.4th 996, 1005-1006.
[24] See *United States v. Johns* (1985) 469 U.S. 478, 482; *People v. Waxler* (2014) 224 Cal.App.4th 712, 719.
[25] *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273.
[26] (1987) 188 Cal.App.3d 1021, 1026, 1030.
[27] (1985) 38 Cal.3d 711, 722.
[28] (1999) 21 Cal.4th 1016, 1043. Also see *U.S. v. Wong* (9th Cir. 2003) 334 F.3d 831, 836.
[29] See *People v. DeCosse* (1986) 183 Cal.App.3d 404, 411; *U.S. v. Doward* (1st Cir. 1994) 41 F.3d 789, 793.
[30] See *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042; *People v. Evans* (1973) 34 Cal.App.3d 175; Veh. Code §§ 23222-23226.
[31] See *People v. Schilling* (1987) 188 Cal.App.3d 1021, 1031; *People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 101.

Appeal that houses and vehicles ordinarily contain evidence establishing the identities of those occupying or using them."[32]

Records for legitimate businesses: If there is probable cause to seize or copy the records of a legitimate business, the existence of certain records may be based on common business practices; e.g., accounting and incorporation records, names and addresses of owners, suppliers, and customers.[33]

Government records: The existence of certain government records can also be inferred based on common practices of the governmental agency. For example, it is obviously reasonable to infer that a suspect's DMV records contain his photo, physical description, and current address.

"Deleted" computer files: Because "deleted" computer files are not necessarily deleted from a computer's hard drive, officers may ordinarily infer that they continued to exist, at least until is becomes reasonably likely that they had been overwritten.[34]

Where there's some, there's probably more

This is one of the most common inferences as to the existence and whereabouts of contraband: When officers are searching a home, business, or vehicle and they find contraband (usually drugs, illegal weapons, or stolen property) they can usually infer there is more of it nearby. Thus, in ruling that officers had probable cause to search, the courts have noted the following:

Drugs

- We find that a person of ordinary caution would conscientiously entertain a strong suspicion that even if defendant makes only personal use of the marijuana found in his day planner, he might stash additional quantities for future use in other parts of the vehicle, including the trunk."[35]
- "Numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place of operations."[36]
- "We have all handled enough narcotics cases and thus gained knowledge of the habits of peddlers, that we may perhaps reasonably suspect that such a person who deals a small amount of merchandise from his home, has more where it came from."[37]
- "It requires no perspicacious intellect to reason the person smoking one marijuana cigarette may well want another and will carry sufficient marijuana to satisfy his appetite of the moment."[38]

Illegal weapons and explosives

- "[G]iven Bowen's possession of one illegal gun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police, a reasonable officer could conclude that there would be additional illegal guns."[39]
- "[T]he presence of one weapon may justifiably arouse concern that there may be more in the vicinity."[40]
- "[H]aving already arrested appellant for possession of one weapon, the deputy could have reasonably suspected the vehicle would contain other weapons."[41]
- When the deputy "found the loaded shotgun, probable cause to search the rest of the van was created."[42]

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[32] *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1009. Also see *U.S. v. Crews* (9th Cir. 2007) 502 F.3d 1130, 1137.
[33] See *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1782, 1785; *People v. McEwen* (1966) 244 Cal.App.2d 534, 536; *U.S. v. Spilotro* (8th Cir. 1986) 800 F.2d 959, 964.
[34] See *U.S. v. Valley* (7th Cir. 2014) 755 F.3d 581, 586 ["This court has discussed the persistence of digital storage, noting that in only the 'exceptional case' will a delay between the electronic transfer of an image and a search of the computer "destroy probable cause to believe that a search of the computer will turn up the evidence sought." Citation omitted.]; *U.S. v. Seiver* (7th Cir. 2012) 692 F.3d 774, 776 ["And since a deleted file is not overwritten at all at once, it may be possible to reconstruct it from the bits of data composing it (called 'slack data'), which are still retrievable because they have not yet been overwritten"].
[35] *People v. Dey* (2000) 84 Cal.App.4th 1318, 1322.
[36] *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 413.
[37] *People v. Golden* (1971) 20 Cal.App.3d 211, 218-19 (dis. opn. of Kaus. J.).
[38] *People v. Brocks* (1981) 124 Cal.App.3d 959, 963.
[39] *Messerschmidt v. Millender* (2012) __ U.S. __ [132 S.Ct. 1235, 1246].
[40] *U.S. v. Christian* (D.C. Cir. 1999), 187 F.3d 663, 669.
[41] See *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1669; *People v. Nicholson* (1989) 207 Cal.App.3d 707, 712.
[42] *People v. Benites* (1992) 9 Cal.App.4th 309, 328.

STOLEN PROPERTY

- "[Having] probable cause that the automobile contained stolen property and dangerous weapons, the officers were reasonably justified in continuing their search for other property that might have been stolen or other dangerous instrumentalities."[43]
- Probable cause to search the suspects' motel room was based on probable cause that they "were participants in a wide scheme of credit card fraud" and, when arrested earlier, they were carrying "numerous counterfeit credit and identification cards, large amounts of cash [suggesting] that additional items of that sort existed elsewhere."[44]
- Having found $21,000 in cash in the suspect's car, and having probable cause to believe it was loot from a robbery, officers could search for more.[45]
- "The presence of some stolen property in [the home] reasonably could have suggested to the magistrate judge that other contraband was not far away."[46]

The "boilerplate" problem

Before moving on, a word about a related subject known as "boilerplate." In the context of probable cause to search, the term "boilerplate" means a list of evidence—usually lengthy—that officers copied verbatim or otherwise lifted from other search warrants for the same or similar crime.[47] The problem with boilerplate is that, unless the list is carefully edited, it will usually include evidence whose existence has not been established in the affidavit. For example, in *People v. Holmsen*[48] an officer obtained a warrant to search Holmsen's house for cocaine and "papers showing or tending to show the trafficking of cocaine." Although the officer had probable cause to search for cocaine, the court suppressed all of the papers they found because the affidavit contained nothing to indicate that Holmsen was involved in any sort of conspiracy.

A more egregious example is found in *People v. Frank* in which the California Supreme Court ruled that a search warrant was overbroad because "nowhere in all these 24 pages [of the affidavit] was there alleged one single fact that gave probable cause to believe that any of the boilerplate allegations of the warrant were true."[49] As we will discuss later, however, there are some situations in which boilerplate may be appropriate.

Location of the Evidence

In addition to proving the evidence exists, officers must prove there is a fair probability that it was manufactured or transported to the place to be searched. This, too, can be established by direct proof, as when an officer or other reliable source saw the evidence in the location. But, lacking an eyewitness, officers will need to invoke the "nexus" rule.

The "nexus" rule

The "nexus" rule essentially says that probable cause to believe that evidence was taken to or produced at a certain place can be established by means of a "nexus"—meaning a sufficient link or connection—between the sought-after evidence and the place or thing to be searched.[50] And, as the Ninth Circuit explained, such a nexus may be established by direct proof or reasonable inference:

> The required nexus between the items to be seized and the place to be searched rests not only on direct observation, but on the type of crime, the nature of [the evidence], the extent of the suspects' opportunity for concealment, and normal inferences as to where a criminal would be likely to hide [the evidence].[51]

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[43] *People v. Stafford* (1973) 29 Cal.App.3d 940, 948.
[44] *U.S. v. Holzman* (8th Cir. 1989) 871 F.2d 1496, 1506.
[45] *People v. Evans* (1973) 34 Cal.App.3d 175, 180.
[46] *U.S. v. Jones* (3d Cir. 1993) 994 F.2d 1051, 1057.
[47] See *U.S. v. Ribeiro* (1st Cir. 2005) 397 F.3d 43, 51; *Cassady v. Goering* (10th Cir. 2009) 567 F.3d 628, 636, fn.5.
[48] (1985) 173 Cal.App.3d 1045.
[49] (1985) 38 Cal.3d 711, 728.
[50] See *People v. Garcia* (2003) 111 Cal.App.4th 715, 721 ["The affidavit must establish a nexus between the criminal activities and the place to be searched."]; *U.S. v. Fernandez* (8th Cir. 2004) 388 F.3d 1199, 1254 ["[W]e require only a reasonable nexus between the activities supporting probable cause and the location to be searched."].
[51] *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722. Also see *Johnson v. Walton* (8th Cir. 2009) 558 F.3d 1106, 1111.

THE NEED FOR SPECIFICS: To establish the required nexus, officers must set forth in an affidavit or in testimony at a suppression hearing exactly what circumstances they relied upon in satisfying this requirement. An example of a failure to do so is found in *People v. Hernandez* [52] in which two confidential informants made controlled purchases of drugs from a man named Chavelo. After the first sale, Chavelo drove to a vacant house on Balboa Street where he parked his car. After the second sale, he parked another car behind a house at 610 Orange Drive. Over the next several days, officers saw both cars parked behind the house on Orange Drive and, based on this information, they obtained a warrant to search the house.

The search netted some heroin and sales paraphernalia, but the only person in the house was Hernandez. So the officers arrested him and he was later convicted after his motion to suppress was denied. On appeal, Hernandez argued that the evidence should have been suppressed because there was an insufficient connection between Chavelo's drug business and the house on Orange Drive. The court agreed, saying that the officers "failed to establish a nexus between the criminal activities and the residence. No information was presented that Chavelo owned the vehicles, lived at the 610 Orange Drive residence, received mail or phone calls at the residence, or was seen carrying packages to and from it."

SEARCHING MULTIPLE LOCATIONS FOR ONE ITEM: It has been argued that a warrant to search two or more places for the same item is necessarily invalid because it is impossible for the evidence to be located in two places at the same time. The courts have, however, consistently rejected these arguments, ruling that multiple locations may be searched so long as there is a fair probability that the evidence was taken to, or manufactured in, each place. As the Ninth Circuit put it, officers "need not confine themselves to chance by choosing only one location for a search."[53]

For example, in *People v. Easley*[54] the defendant, a contract killer, murdered two people in Modesto after binding them with wire. Having developed probable cause to arrest him for the murders, officers obtained a warrant to search for a pair of wire cutters in four places: the house in which he lived just before the murders, the apartment he rented four days later, and both of his cars. The cutters were found in one of the cars. On appeal, Easley argued that the evidence should have been suppressed because "authorization to search four different places demonstrates that the affiant did not know where the sought-after property was located." The California Supreme Court rejected the argument, saying, "There is no logical inconsistency in the conclusion that an affidavit establishes probable cause to believe that evidence of a crime will be in any one of a suspect's homes or vehicles." What matters, said the court, is whether it was reasonable to look for the evidence in each location.

SEARCHING A THIRD PERSON'S PROPERTY: If officers have probable cause to search a certain home or business, it does not matter that the owner or occupant is not a suspect in the crime under investigation.[55] As the Supreme Court observed, "[T]he State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not."[56] For example, if officers have probable cause to believe that a murder weapon is inside a residence, it is immaterial that the residence belongs to an innocent friend or relative of the suspect.

Circumstantial proof

As noted earlier, in the absence of direct proof as to where the evidence was taken or produced, officers may rely on reasonable inference (discussed in the following section) or circumstantial proof. In this context, circumstantial proof consists of information that tends to—but does not directly—indicate where the evidence was taken or produced. The following are examples of such circumstantial proof:

CRIMINAL FRONTS AND HIDEOUTS: If officers have proof that the perpetrators used a certain location as a front for their criminal activities—such as a home or business—it will ordinarily be reasonable to be-

[52] (1994) 30 Cal.App.4th 919. Also see *Alexander v. Superior Court* (1973) 9 Cal.3d 387, 391; *People v. Garcia* (2003) 111 Cal.App.4th 715, 722.
[53] *U.S. v. Hillyard* (9th Cir. 1982) 677 F.2d 1336, 1339.
[54] (1983) 34 Cal.3d 858.
[55] See *U.S. v. Harris* (10th Cir. 2013) 735 F.3d 1187, 1191-92.
[56] *Zurcher v. Stanford Daily* (1978) 436 U.S. 547, 555.

lieve that the fruits and instrumentalities of the crimes were taken there.[57] The following are some examples of information that established such a likelihood:

- A drug dealer repeatedly went in and out of the home or business just before or after he sold drugs to an undercover officer.[58]
- A drug dealer "went directly from the apartment to the bar, where the deal was consummated."[59]
- After fleeing from officers, a suspect in a murder drove directly to a certain auto shop that had been the front for illegal activity in the past; the officers knew that violent criminals sometimes use places like auto shops to hide incriminating evidence.[60]
- Narcotics officers saw a drug dealer visit a certain apartment on two occasions during the progress of negotiations for the sale of drugs.[61]
- Even though a numbers operator usually took his bets in a bar, it was reasonable to believe that evidence of the crime was also inside his home because he had taken some numbers-related phone calls there.[62]

STORAGE LOCKERS: It may be reasonable to believe that a suspect had taken evidence of the crime to a storage locker, especially if he had rented it shortly before or after the crime. For example, in *People v. Farley*[63] the court ruled it was reasonable to believe that evidence pertaining to the murder of several people at a business would be found in a storage locker rented by the suspect three days before the killings. Said the court, "[I]n light of the circumstance that any items stored in the locker were placed there sometime during the three days preceding the shootings, a magistrate reasonably could conclude there was probable cause to believe incriminating evidence would be found in the storage locker."

CARS USED AS INSTRUMENTALITIES: If the perpetrator used a vehicle to transport contraband or otherwise used it as an instrumentality of a crime, it may be reasonable to believe that contraband or other evidence is kept there. For example, in *People v. McNabb* the court ruled it was reasonable to believe that chemicals would be found in the suspect's vehicle because he had used it to transport equipment and chemicals to a clandestine lab.[64] Similarly, in *U.S. v. Smith* the court ruled that it was reasonable to believe that drugs would be found in the suspect's car because officers obtained reliable information that he "owned a number of vehicles, transported drugs in vehicles, and sold drugs out of vehicles."[65]

COMPUTERS: If officers have proof that evidence such as child pornography or any other incriminating graphics or data were downloaded to a certain computer, they will ordinarily have probable cause to believe the data was stored there.[66]

For example, in *People v. Ulloa*[67] officers obtained a warrant to search the home computer of a child molesting suspect based on information that he "had been communicating with the [victim] through AOL's instant messaging service." In ruling that this information established a sufficient link between the messages and the suspect's computer, the court said the officers "could reasonably conclude that examination of defendant's computer would either confirm or dispel the allegations of a relationship between defendant and the minor."

Similarly, in *U.S. v. Cartier*[68] the court ruled that FBI agents had probable cause to search the defendant's home computer for child pornography because they received information from a law enforcement officer in Spain that child pornography originating in Spain had been downloaded to that computer.

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[57] See *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48; *People v. Watson* (1979) 89 Cal.App.3d 376, 384-85.
[58] See *Segura v. United States* (1984) 468 U.S. 796, 810-11. Also see *People v. Fernandez* (1989) 212 Cal.App.3d 984, 989.
[59] *People v. Hernandez* (1974) 43 Cal.App.3d 581, 585.
[60] *U.S. v. Harris* (10th Cir. 2013) 735 F.3d 1187.
[61] *People v. Dickinson* (1974) 43 Cal.App.3d 1034, 1037.
[62] *U.S. v. Martinez* (8th Cir. 1979) 588 F.2d 1277.
[63] (2009) 46 Cal.4th 1053, 1100.
[64] (1991) 228 Cal.App.3d 462, 469.
[65] (6th Cir. 2007) 510 F.3d 641, 649. Also see *U.S. v. Archibald* (6th Cir. 2012) 685 F.3d 553, 558.
[66] See *U.S. v. Vosburgh* (3d Cir. 2010) 602 F.3d 512, 527; *U.S. v. Haymond* (10th Cir. 2012) 672 F.3d 948, 959.
[67] (2002) 101 Cal.App.4th 1000, 1006.
[68] (8th Cir. 2008) 543 F.3d 442.

Reasonable inference (Likely hiding places)

Even if officers cannot directly or circumstantially link the sought-after evidence to a certain place, they may nevertheless establish probable cause to search the place based on a reasonable inference; i.e., that it was likely that he had taken it there.[69] As the Court of Appeal explained:

> The connection between the items to be seized and the place to be searched need not rest on direct observation. It may be inferred from the type of crime involved, the nature of the item, and the normal inferences as to where a criminal might likely hide incriminating evidence.[70]

As we will now discuss, the most common inference is that the evidence is located in the suspect's home.

THE SUSPECT'S HOME: Unless there was reason to believe otherwise, it is usually reasonable for officers to infer that, based on their training and experience,[71] the perpetrator of a crime took the evidence to his home.[72] That is because most homes are fairly secure and readily accessible to the owners.[73]

Such an inference may be invoked when the evidence consists of the fruits or instrumentalities of a crime (such as robbery, burglary, or murder) or contraband (such as drugs, illegal weapons, or stolen property). Thus, in *People v. Koch* the Court of Appeal explained that "the total circumstances surrounding an arrest or other criminal conduct can, without more, support a magistrate's probable cause finding that the culprit's home is a logical place to search for specific contraband."[74] Likewise, in a drug case the D.C. Circuit pointed out, "For the vast majority of drug dealers the most convenient location to secure items is the home. After all, drug dealers don't tend to work out of office buildings."[75]

SUSPECT'S CAR: A suspect's vehicle may also be a logical location because cars are convenient, fairly secure, and mobile. Thus, in *People v. Dumas*[76] the California Supreme Court ruled that officers reasonably believed that stolen bonds would be found inside the suspect's car because "we cannot disregard the likelihood that person who holds stolen property he wishes to sell will attempt to conceal it in a place under his control that is nearby and apparently secure." For example, in *U.S. v. Brown*[77] an officer found a fake driver's license and credit card in the passenger compartment of a car he had stopped. The names on both documents were the same, so he figured the suspect was an identity thief and that he was using the cards to buy things. Where might those things be? "Everyone knows," said the court, "that drivers who lawfully purchase items at stores often place their purchases in the trunks of their cars. Nothing in common experience suggests that criminals act any differently."

PERSONAL CONTAINERS: If there is probable cause to believe that a suspect had evidence in his possession, it usually reasonable to believe it is located in one or more personal containers in his possession if the evidence was small enough to be concealed inside them; e.g., a handgun, drugs.[78]

SUSPECT'S COMPUTER: If there is probable cause to search for information or graphics in the suspect's possession, it is usually reasonable to infer that at least some of it is stored on his computer or other digital storage device.[79]

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[69] *U.S. v. Lucarz* (9th Cir. 1970) 430 F.2d 1051, 1055.
[70] *People v. Miller* (1978) 85 Cal.App.3d 194, 201. Also see *People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1315.
[71] See *People v. Cleland* (1990) 225 Cal.App.3d 388, 392-93; *U.S. v. Orozco* (7th Cir. 2009) 576 F.3d 745, 750.
[72] See *People v. Pressey* (2002) 102 Cal.App.4th 1178, 1185 ["evidence of drug dealing, by itself, can furnish probable cause to search the dealer's residence"]; *People v. Thuss* (2003) 107 Cal.App.4th 221, 235; *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 414 ["Numerous cases have upheld search warrants on the theory that one who sells narcotics may have more at his residence or place or operations."]; *U.S. v. Sanchez* (10th Cir. 2009) 555 F.3d 910, 914 ["we think it merely common sense that a drug supplier will keep evidence of his crimes at his home."].
[73] See *People v. Superior Court (Brown)* (1975) 49 Cal.App.3d 160, 167; *People v. Garcia* (2003) 111 Cal.App.4th 715, 721.
[74] (1989) 209 Cal.App.3d 770, 779. Also see *People v. Carrington* (2009) 47 Cal.4th 145, 163; *People v. Schilling* (1987) 188 Cal.App.3d 1021, 1030; *People v. Koch* (1989) 209 Cal.App.3d 770, 780; *U.S. v. Chavez-Miranda* (8th Cir. 2002) 306 F.3d 973, 978.
[75] *U.S. v. Spencer* (D.C. Cir. 2008) 530 F.3d 1003, 100.
[76] (1973) 9 Cal.3d 871, 855.
[77] (D.C. Cir. 2004) 374 F.3d 1326, 1329.
[78] See *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 345-46; *In re Joseph G.* (1995) 32 Cal.App.4th 1735, 1741-42.
[79] See *U.S. v. Gomez-Soto* (8th Cir. 1984) 723 F.2d 649, 655; *U.S. v. Lucas* (8th Cir. 1991) 932 F.2d 1210, 1216.

Suspect's storage locker: Depending on the nature of the crime, it may be reasonable to infer that the suspect is storing evidence in his storage locker. "A storage locker," said the Second Circuit, "is surely a location where drugs held for distribution or items purchased with drug proceeds might reasonably be stored."[80] This is especially true if an earlier search of the suspect's home was not productive.

Suspect's business: If the evidence consists of documents pertaining to the suspect's business, it is reasonable to infer they will be found at his office.[81]

Getaway cars: If officers stopped a getaway car shortly after the crime occurred, they may infer that the fruits and instrumentalities of the crime are still inside.[82]

Process of elimination: If officers have determined that evidence for which probable cause exists is not located in the most likely place, it may be reasonable to infer that it is located in the next logical location.[83]

The Evidence is Still There

In addition to establishing a fair probability that the evidence exists and that it was once located at a certain place, officers must prove it is probably still there.[84] As the court observed in *U.S. v. Freeman*, "Although probable cause may exist at one point to believe that evidence will be found in a given place, the passage of time may render the original information insufficient to establish probable cause at the later time."[85]

This is seldom an issue if the search occurred quickly after the evidence was discovered (e.g., inside a stopped car), or if the suspect was in jail and had no access to the evidence, or if officers had secured the location while they sought a search warrant. Instead, it is ordinarily limited to cases in which the officers, having probable cause to search a certain place, reasonably believed it was necessary to delay the search until an ongoing investigation had been completed. In such cases, the defendant may claim the affidavit no longer established probable cause because it was based on information that was too old or "stale." As the Court of Appeal observed, "The general rule is that information that is remote in time may be deemed to be stale and therefore unreliable."[86] Similarly, the D.C. Circuit noted that, "Everything else being equal, dated information is less likely to show probable cause than fresh evidence."[87]

Nevertheless, there are several other circumstances that may make it reasonable to believe the evidence had not been moved despite the passage of time—even weeks or months. That is because some kinds of evidence will ordinarily be kept at one place for relatively long periods, and also because officers may reasonably belive that the suspect was not in a hurry to dispose of it. As the Maryland Court of Appeals articulated this idea:

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc.[88]

Nature of crime

When a suspect is engaged in ongoing criminal activity at a certain location, it will often be reasonable to infer that the instrumentalities of the crime, and sometimes its fruits, will be stored thereh for a fairly long time.[89] "As is only logical," said the Tenth Circuit, "ongoing and continuous activity makes the

[80] *U.S. v. Riley* (2nd Cir. 1990) 906 F.2d 841, 845.
[81] See *People v. Farley* (2009) 46 Cal.4th 1053, 1101; *U.S. v. Word* (6th Cir. 1986) 806 F.2d 658, 662.
[82] See *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48; *People v. Chavers* (1983) 33 Cal.3d 462, 467.
[83] See *People v. Dumas* (1973) 9 Cal.3d 871, 885; *People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1669.
[84] See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298; *People v. Mesa* (1975) 14 Cal.3d 466, 470.
[85] *U.S. v. Freeman* (5th Cir. 1982) 685 F.2d 942, 951 [edited].
[86] *People v. Gibson* (2001) 90 Cal.App.4th 371, 380. Also see *People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564.
[87] *U.S. v. Johnson* (D.C. Cir. 2006) 437 F.3d 69, 72
[88] *Andresen v. State* (1975) 24 Md.App. 128, 172.
[89] See *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652; *People v. Jones* (2013) 217 Cal.App.4th 735, 741.

passage of time less critical."[90] Crimes falling into the "ongoing" category include serial murders and other crime sprees,[91] drug trafficking,[92] identity theft,[93] business and consumer fraud,[94] production of child pornography,[95] and stalking.[96]

The nature of the evidence

Even if the information was not "fresh," it may be reasonable to infer that the evidence has not been moved based on the nature of the evidence. This is because some kinds of evidence will probably remain in one place for weeks, months, and even years; while others will normally be gone in a matter of hours. Again, this idea was skillfully expressed by the Maryland Court of Appeals:

> The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.[97]

The following are examples of evidence that will usually remain in one place for substantially longer than a "half-smoked" joint.

FIREARMS: Although it is possible that a criminal will quickly dispose of a firearm used in the commission of a crime, it is considered just as likely that he will retain the firearm because of its inherent value and usefulness.[98]

INSTRUMENTALITIES OF THE CRIME: It may be reasonable to believe that the perpetrator of a crime will retain other items that he had used to commit or facilitate a crime, such as keys to burglarized stores,[99] gloves used by a burglar,[100] clothing and masks worn during a robbery,[101] explosives,[102] incendiary materials used in arson,[103] handcuffs or duct tape used to bind victims,[104] records and email pertaining to an illegal business.[105]

STOLEN PROPERTY: Unlike small amounts of drugs that are usually used up quickly, stolen property may be kept for long periods because it may be difficult to fence or it might have enduring usefulness to the thief; e.g., large amount of money taken in bank robbery.[106]

BUSINESS RECORDS: Legitimate businesses almost always keep records of some sort, and they may keep them for a fairly long time.[107] In fact, the Court of Appeal observed that business and professional records "presumably would be retained unaltered for periods of several years."[108]

CHILD PORNOGRAPHY: People who download or otherwise obtain child pornography are notorious for considering it a valuable possession, and are therefore likely to keep it for a long time, often many years.[109] Thus, the Sixth Circuit noted that "the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography."[110] POV

[90] *U.S. v. Roach* (10th Cir. 2009) 582 F.3d 1192, 1201.
[91] See *People v. Cooks* (1983) 141 Cal.App.3d 224, 298; *People v. Miller* (1978) 85 Cal.App.3d 194, 204.
[92] See *United States v. Russell* (1973) 411 U.S. 423, 432; *People v. Wilson* (1986) 182 Cal.App.3d 742, 755.
[93] See *People v. Stipo* (2011) 195 Cal.App.4th 664, 672-73.
[94] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 782-83; *U.S. v. Snow* (10th Cir. 1990) 919 F.2d 1458, 1460/
[95] See *U.S. v. Schesso* (8th Cir. 2013) 730 F.3d 1040, 1047; *U.S. v. Darr* (8th Cir. 2011) 661 F.3d 375, 378.
[96] See *Wood v. Emmerson* (2007) 155 Cal.App.4th 1506, 1522.
[97] *Andresen v. State* (1975) 24 Md.App. 128, 172.
[98] See *People v. Bryant* (2014) __ Cal.4th __ [2014 WL 4197804]; *People v. Kraft* (2000) 23 Cal.4th 978, 1049.
[99] See *People v. Carrington* (2009) 47 Cal.4th 145, 163-64.
[100] See *People v. Gee* (1982) 130 Cal.App.3d 174, 182.
[101] *People v. Miller* (1978) 85 Cal.App.3d 194, 204; *U.S. v. Gann* (9th Cir. 1984) 732 F.2d 714, 722.
[102] See *People v. Barnum* (1980) 113 Cal.App.3d 340, 346.
[103] See *U.S. v. Aljabari* (7th Cir. 2010) 626 F.3d 940.
[104] See *People v. Webb* (1993) 6 Cal.4th 494, 521; *U.S. v. Laury* (5th Cir. 1993) 985 F.2d 1293, 1314.
[105] See *U.S. v. Feliz* (1st Cir. 1999) 182 F.3d 82, 87-88; *People v. Ulloa* (2002) 101 Cal.App.4th 1000, 1007.
[106] See *Chambers v. Maroney* (1970) 399 U.S. 42, 47-48; *People v. Gee* (1982) 130 Cal.App.3d 174, 182.
[107] See *Andresen v. Maryland* (1976) 427 U.S. 463, 478, fn.9; *U.S. v. Nguyen* (8th Cir. 2008) 526 F.3d 1129, 1134.
[108] *McKirdy v. Superior Court* (1982) 138 Cal.App.3d 12, 26.
[109] See *U.S. v. Vosburgh* (3d Cir. 2010) 602 F.3d 512, 528; *U.S. v. Pappas* (7th Cir. 2010) 592 F.3d 799, 803.
[110] *U.S. v. Paull* (6th Cir. 2009) 551 F.3d 516, 522.