Crime Scene Searches

There is no "murder scene" exception to the warrant requirement.[1]

When someone commits a serious crime inside a home or business it might seem as if the officers would automatically have a right to enter and search for evidence pertaining to the crime. In reality, however, searches of crime scenes are subject to the same rules as any other search of private property. As we will discuss, those rules cover just about everything that officers might need to do, including (1) getting inside, (2) conducting protective sweeps, (3) conducting warrantless searches, (4) securing the premises pending issuance of a warrant, (5) vacating the premises, and (6) reentering after vacating.

Making Entry

The main legal grounds for making a warrantless entry into a crime scene are consent and exigent circumstances.

CONSENT: The initial entry by officers is often based on express or implied consent given by a resident or other person who answers the door. Express consent typically occurs when officers are invited in or when their request to enter is granted. In contrast, implied consent results if the person said or did something from which permission to enter will be implied.[2] As the Tenth Circuit explained, "Consent may be granted through gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer."[3]

For example, in *People v. Frye*[4] an officer knocked on the door of an apartment in response to a domestic violence call. A woman opened the door and the officer saw that her face was "bruised and swollen." When he asked who had hurt her, "she stepped back and pointed to defendant lying on the couch inside." The officer entered.

In ruling that the officer reasonably believed the woman had invited him in, the California Supreme Court said, "Here, the record shows that when officers standing outside the open door of the apartment asked [the woman] who had hurt her, she stepped back and pointed to defendant lying on the couch inside, letting officers step into the apartment to see who she was pointing at. Such actions provide sufficient indication of her consent to the entry."

Similarly, in *U.S. v. Risner*[5] the defendant's girlfriend, Deborah Dean, called 911 but hung up before talking to the operator. Officers were dispatched to the residence and were met outside by Dean who said she lived with Risner, that he was inside, and that he had just assaulted and choked her. Having noticed injuries to her face that were consistent with an assault, they entered, located Risner and arrested him. They also saw a firearm which they seized because Risner was a convicted felon.

Risner argued that the officers' entry was unlawful because Dean had not expressly consented to their entry. That was true, said the Seventh Circuit, but "any reasonable person would infer from [the victim's] communications that she consented to the police entry into her home to arrest Risner. In fact, we have trouble imagining why [the victim] would have provided [the officers] such information if she was not actually requesting that the police enter her home and arrest Risner."

One of the trickiest things about implied consent in domestic violence cases is whether officers may enter if one of the parties consented but the other objected. In these situations, the Supreme Court has ruled that officers may not enter if three things happen: (1) the objecting spouse expressly informed the officers that he objected to their entry, (2) the objection was made in the officers' presence, and (3) the purpose of their entry was to obtain evidence

[1] *People v. Timms* (1986) 179 Cal.App.3d 86, 90-91. Also see *Mincey v. Arizona* (1978) 437 U.S. 385, 395.
[2] See *People v. Justin* (1983) 140 Cal.App.3d 729; *People v. Timms* (1986) 179 Cal.App.3d 86.
[3] *U.S. v. Guerrero* (10th Cir. 2007) 472 F.3d 784, 789-90.
[4] (1998) 18 Cal.4th 894, 990.
[5] (7th Cir. 2010) 593 F.3d 692, 694.

against the objecting spouse.[6] But when, as is often the case, the officers entered for a purpose other than to obtain evidence—such as discussing the problem, keeping the peace, protecting the consenting party, or arresting the nonconsenting party—this restriction does not apply.

EXIGENT CIRCUMSTANCES: A warrantless entry is also permitted if officers reasonably believed there was a compelling need for an immediate entry but there was no time to secure a warrant; e.g., a violent crime had just occurred inside.[7] Thus, the California Supreme Court in *People v. Ray*[8] ruled that Richmond police officers had sufficient reason to enter the defendant's residence without a warrant based on a report from neighbors that "the door has been open all day and it's all a shambles inside." Similarly, an imminent threat will automatically exist if officers had probable cause to believe there was a lab inside that was being used to produce incendiary drugs, such as meth or PCP.[9]

In contrast, in *U.S. v. Davis*[10] officers in Kansas were dispatched at about 5:30 A.M. to a report of "possible domestic violence" at the home in which Jason Davis and Desiree Coleman lived. When they arrived they "heard no noise and saw no evidence of a disturbance." But just then, Davis walked outside and appeared to be drunk. He claimed that Coleman was out of town, at which point Coleman opened the door and said that she and Davis "had been arguing." An officer requested that she consent to their entry, but she refused. Nevertheless he entered and found drugs in plain view.

Prosecutors argued that warrantless entries into homes in which domestic violence had just been reported were necessarily justified. The court disagreed, saying that prosecutors were essentially asking "for a special rule for domestic calls because they are inherently violent" and thus "officers are automatically at greater risk." But the court pointed out that "granting unfettered permission" to enter "based only upon a general assumption domestic calls are always dangerous would violate the Fourth Amendment."

What about 911 hangup calls? While they do not automatically constitute an exigent circumstance, they would if there was some objective reason to believe that the caller or other occupant was in need of emergency assistance. Some examples:

- No one answered the callback number and no one answered the door when officers knocked.[11]
- When 911 operators called back, someone picked up the phone but then hung up.[12]
- The caller's demeanor was consistent with the nature of the emergency such as a call at 5 A.M. by an hysterical person who screamed "get the police over here now."[13]

Protective Sweeps

When officers enter a crime scene, they seldom know for sure whether there is someone "lurking on the premises" who poses a threat.[14] Worse yet, they "will rarely be familiar" with the physical layout, which means any such person has a tactical advantage.[15] For this reason, officers who have lawfully entered a crime scene may conduct a protective search of the

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[6] See *Georgia v. Randolph* (2006) 547 U.S. 103, 108, 120, 122; *U.S. v. Moore* (9th Cir. 2014) 770 F.3d 809, 813.
[7] See *Michigan v. Tyler* (1978) 436 U.S. 499, 509; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 291-92.
[8] (1999) 21 Cal.4th 464, 478 [disapproved on other grounds *in People v. Ovieda* (2019) 7 Cal.5th 1034, 1048].
[9] (10th Cir. 2002) 290 F.3d 1239, 1244. Also see *People v. Duncan* (1986) 42 Cal.3d 91, 105 [chemicals "involved in the production of drugs such as PCP and methamphetamine creates a dangerous environment."]; *People v. Messina* (1985) 165 Cal. App.3d 937, 943 ["[T]he types of chemicals used to manufacture methamphetamines are extremely hazardous to health."].
[10] (10th Cir. 2002) 290 F.3d 1239, 1244.
[11] See *Hanson v. Dane County* (7th Cir. 2010) 608 F.3d 335, 337 ["A lack of an answer on the return of an incomplete emergency call implies that the caller is unable to pick up the phone—because of injury, illness (a heart attack, for example), or a threat of violence."]; *Johnson v. City of Memphis* (6th Cir. 2010) 617 F.3d 864, 869.
[12] See *U.S. v. Najar* (10th Cir. 2006) 451 F.3d 710, 720 ["Even more alarming, someone was answering the phone but immediately placing it back on the receiver."].
[13] *U.S. v. Snipe* (9th Cir. 2008) 515 F.3d 947.
[14] *State v. Murdock* (Wis. 1990) 455 N.W.2d 618, 624. Edited.
[15] *U.S. v. Nascimento* (1st Cir. 2007) 491 F.3d 25, 49.

premises if they reasonably believed (1) there was someone on the premises who had not made himself known, and (2) they reasonably believed that that person constituted a threat to them or others.[16] As the Fourth Circuit explained, "The question is whether there was a reasonable basis for the officers to believe that there could be other individuals in the residence who might resort to violence."[17]

An exception is made, however, for warrantless entries into the scenes of homicides because it is almost always reasonable to believe that someone other than the victim might have been injured, or that the perpetrator or an accomplice is on the scene. For these reasons, the Supreme Court ruled, "When the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if the killer is still on the premises."[18]

Regardless of the nature of the crime under investigation, protective sweeps must be limited to a quick inspection of those places in which a person might be hiding. Thus, sweeps "may extend only to a cursory inspection of those spaces where a person may be found,"[19] and they "may last no longer than is necessary to dispel the reasonable suspicion of danger."[20] For example, in rejecting arguments that a sweep was too intrusive, the courts have noted that the sweep "lasted no more than three to five minutes,"[21] the officer "moved briefly through two bedrooms, the bathroom and kitchen,"[22] and "the officers did not dawdle in each room looking for clues, but proceeded quickly."[23] In contrast, the Tenth Circuit invalidated a sweep because it "was not minimally intrusive; rather it was the commencement of a fishing expedition."[24]

Warrantless Searches

Because there is no "crime scene" exception to the warrant requirement, a warrantless search for evidence at a crime scene is seldom permitted unless officers had obtained valid consent or there were exigent circumstances. In some cases, however, a limited search for evidence may be permitted if the officers, after entering legally, developed probable cause to believe that an immediate search was reasonably necessary. Although this doesn't happen often, it certainly did in the case of *People v. Macioce*.[25]

Here, San Jose police were dispatched to the apartment of Giovanni and Thereza Macioce who had been reported missing by friends. After speaking with the friends, the officers entered and conducted a sweep of the premises. On the kitchen floor they found Giovanni's body, but there was no sign of Mrs. Macioce. A detective testified that he did not know whether Mrs. Macioce had been abducted or killed, or whether she was the killer. Consequently, he ordered a warrantless search of the apartment for "things to lead us to her location and possibly rescue her from any harm."

In ruling that the sweep was lawful, the court explained that "an exigency existed with regard to the whereabouts of Macioce herself. She was missing and [the detective] had every reason to believe [she] was in serious trouble. True, statistically, she might also have been the killer [she was], but they didn't know that at the time."

Sealing the Premises

After officers have lawfully entered a crime scene without a warrant, they will often determine there

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[16] See *Maryland v. Buie* (1990) 494 U.S. 325, 334 [only reasonable suspicion is required]; *People v. Werner* (2012) 207 Cal.App.4th 1195, 1209 ["Here, there were no particularized facts supporting a reasonable suspicion that there was a dangerous person inside defendant's home."]; *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 314 [the "mere possibility without more" that others are in a house is not enough].

[17] *U.S. v. Jones* (4th Cir. 2012) 667 F.3d 477, 484. Edited.

[18] *Mincey v. Arizona* (1978) 437 U.S. 385, 392.

[19] *Maryland v. Buie* (1990) 494 U.S. 325, 335. Also see *U.S. v. Henderson* (7th Cir. 2014) 748 F.3d 788, 793. ["The sweep was cursory and lasted no longer than five minutes."].

[20] *U.S. v. Gould* (5th Cir. en banc 2004) 364 F.3d 578, 587.

[21] *U.S. v. Delgado* (11th Cir. 1990) 903 F.2d 1495, 1502.

[22] *US v. Richards* (7th Cir. 1991) 937 F.2d 1287, 1292.

[23] *U.S. v. Arch* (7th Cir. 1993) 7 F.3d 1300, 1304.

[24] *U.S. v. Shrum* (10th Cir. 2018) 908 F.3d 1219, 1232.

[25] (1987) 197 Cal.App.3d 262.

is probable cause to seek one. When this happens, they may take steps to locate and remove anyone on the premises pending issuance of the warrant if (1) they were diligent in applying for the warrant, and (2) they did not search or otherwise "exploit their presence simply because the warrant application process has begun."[26] As we will now discuss, there are two ways to secure the premises.

SECURING FROM THE OUTSIDE: If officers have determined there is no one on premises who has a motive to destroy evidence, they may post officers at strategic positions outside the building to make sure that no one enters pending issuance of a warrant. As the California Supreme Court observed, if "the investigating officers conclude that a search of the dwelling is called for, permitting the officers to bar entry will give the officers sufficient time to seek a warrant, thereby allowing a neutral and detached magistrate to determine whether the officers have probable cause to search."[27]

SECURING FROM THE INSIDE: To secure a residence from the inside means entering the premises and conducting a sweep or "walk through" during which officers briefly look in places where a person might be hiding. And if they find anyone, they will either arrest, detain, or release them. Securing from the inside constitutes a search and seizure of the premises. Consequently, officers must have *probable cause* to believe that evidence would be destroyed, hidden, or compromised if they abandoned the crime scene.[28]

For example, in *Illinois v. McArthur*[29] the Supreme Court ruled that the temporary seizure of McArthur's home was lawful because the officers had seen drugs in plain view and, therefore, they "had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant.

In contrast, in *U.S. v. Etchin* the court ruled there was insufficient proof of a threat because it was based solely on an officer's report that she "heard a man's voice inside," and thought he might be try to destroy any evidence inside. These facts, said the court, are "too vague to justify a finding that there was an ongoing crime in the house requiring immediate entry."[30]

Vacating the Premises

Officers who have entered a home or business pursuant to exigent circumstances must leave within a reasonable amount of time after the threat to people, property, or evidence has been eliminated. Consequently, officers must stay alert to the possibility that the circumstances that justified their initial entry never existed or had been resolved, in which case they may be required to leave within a reasonable amount of time. Although the point at which an emergency ends depends on the facts of each case, the following examples are illustrative.

SHOOTING INSIDE A RESIDENCE: The emergency ended after the victim had been removed and officers had determined there were no suspects or other victims on the scene.[31]

BURGLARY IN PROGRESS: The emergency ended after officers arrested the burglar and had determined there were no accomplices on the premises, and that the residents were not harmed.[32]

BARRICADED SUSPECT: The emergency ended after the suspect was arrested and officers determined there were no victims or other suspects.[33]

EXPLOSIVES: The emergency resulting from explosives or dangerous chemicals on the premises ended when the danger had been eliminated.[34]

STRUCTURE FIRES, EXPLOSIVES: The emergency created by a structure fire does not end with the

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[26] *U.S. v. Madrid* (8th Cir. 1998) 152 F.3d 1034, 1041.
[27] *People v. Bennett* (1998) 17 Cal.4th 373, 377.
[28] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.
[29] (2001) 531 U.S. 326.
[30] (7th Cir. 2010) 614 F.3d 726.
[31] See *People v. Amaya* (1979) 93 Cal.App.3d 424, 430-32; *People v. Boragno* (1991) 232 Cal.App.3d 378, 392.
[32] See *People v. Bradley* (1982) 132 Cal.App.3d 737.
[33] See *People v. Keener* (1983) 148 Cal.App.3d 73, 77.
[34] See *People v. Remiro* (1979) 89 Cal.App.3d 809, 830-31; *People v. Avalos* (1988) 203 Cal.App.3d 1517, 1523.

"dousing of the last flame."[35] Instead, the Supreme Court has ruled that investigators may remain on the premises to (1) determine the cause and origin of the fire, and (2) determine that the premises were safe for re-occupancy. As the Court later explained:

> Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction.[36]

The amount of time that is reasonably necessary for these purposes will depend on the size of the structure, conditions that made the investigation more time-consuming (e.g. heavy smoke, poor lighting), and whether there were other circumstances that delayed the investigation, such as the presence of explosives or dangerous chemicals.

Although officers may conduct a cause-and-origin investigation without a warrant, a warrant will be required if they determine that the cause was arson and that their primary objective had shifted from determining the cause to a search for incriminating evidence.[37]

Reentry

Officers and crime scene technicians at most crime scenes will necessarily leave the premises now and then. Unless they had vacated the premises or otherwise surrendered control, these reentries do not require authorization. Thus, in *San Francisco v. Sheehan*[38] the Supreme Court ruled that, because two entries by officers "were part of a single, continuous search or seizure," they "were not required to justify the continuing emergency with respect to the second entry."

Even if officers and technicians had temporarily vacated the premises, they may reenter without a warrant if they had good reason for vacating. Thus, the Court of Appeal noted, "California decisions uphold an officer's reentry to seize evidence observed in plain view during a lawful entry but not seized initially because the officer was performing a duty that took priority over the seizure of evidence."[39] Thus, in *People v. Superior Court (Quinn)*,[40] the court ruled that a sheriff's deputy in Plumas County "did not trench upon any constitutionally protected interest by returning for the single purpose of retrieving contraband he had observed moments before in the bedroom but had not then been in a position to seize."

A obvious need to reenter is found in the case of *Cleaver v. Superior Court.*[41] In this highly-publicized case, two men who were suspected of shooting two Oakland police officers had barricaded themselves in the basement of a home. At about 11 P.M., officers launched a tear gas canister into the building, resulting in a fire. One of the suspects was shot and killed as he fled; the other was arrested. Because of lingering smoke and tear gas, crime scene technicians were unable to retrieve evidence that officers had seen inside. So they waited. Then, about three hours later, a technician entered and seized some evidence but could not conduct a thorough search because of impaired visibility caused by lingering fumes. At about 8 A.M., officers entered and recovered additional evidence.

In upholding the reentries, the California Supreme Court said, "Since the officers had a conceded right to conduct a full and complete inspection of the basement at 11:30 P.M., we conclude that the subsequent searches of those same premises, occurring within a reasonable time thereafter and based upon a continued state of exigent circumstances, were reasonable under the foregoing constitutional provisions." POV

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[35] *Michigan v. Tyler* (1978) 436 U.S. 499, 510.
[36] See *Michigan v. Clifford* (1984) 464 U.S. 287, 293; *People v. Glance* (1989) 209 Cal.App.3d 836, 845.
[37] See *Michigan v. Tyler* (1978) 436 U.S. 499, 510, fn.6.
[38] (2015) 575 U.S. 600, __.
[39] *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1014.
[40] (1978) 83 Cal.App.3d 609.
[41] (1979) 24 Cal.3d 297.