Arrests

"An arrest is distinguished by the involuntary, highly intrusive nature of the encounter."[1]

There is hardly anything that is more likely to louse up a criminal's day than hearing the words: "You're under arrest." After all, it means the miscreant is now subject to an immediate, complete, and sometimes permanent loss of freedom. As the United States Supreme Court observed, an arrest is "the quintessential seizure of the person."[2]

For these reasons, arrests are subject to several requirements that, as the Court explained, are intended "to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime."[3] As we will discuss in this article, these requirements can be divided into three categories:

(1) **GROUNDS FOR ARREST**: Grounds for an arrest means having probable cause.

(2) **MANNER OF ARREST**: The requirements pertaining to the arrest procedure include giving notice, the use of deadly and non-deadly force, the issuance and execution of arrest warrants, restrictions on warrantless misdemeanor arrests, searches incident to arrest, and entries of homes to arrest an occupant.

(3) **POST-ARREST PROCEDURE**: In this category are such things as booking, phone calls, attorney visits, disposition of arrestees, probable cause hearings, arraignment, and even "perp walks."

Before we begin, it should be noted that there are technically three types of arrests. The one we will be covering in this article is the conventional arrest, which is defined as a seizure of a person for the purpose of making him available to answer pending or anticipated criminal charges.[4] A conventional arrest ordinarily occurs when the suspect was told he was under arrest, although the arrest does not technically occur until the suspect submits to the officer's authority or is physically restrained.[5]

The other two are de facto and traffic arrests. De facto arrests occur inadvertently when a detention becomes excessive in its scope or intrusiveness.[6] Like all arrests, de facto arrests are unlawful unless there was probable cause. A traffic arrest occurs when an officer stops a vehicle after seeing the driver commit an infraction. This is deemed an arrest because the officer has probable cause, and the purpose of the stop is to enforce the law, not conduct an investigation.[7] Still, these stops are subject to the rules pertaining to investigative detentions.[8]

Probable Cause

Perhaps the most basic principle of criminal law is that an arrest requires probable cause. In fact, this requirement and the restrictions on force and searches are the only rules pertaining to arrest procedure that are based on the Constitution, which means they are enforced by the exclusionary rule. All the others are based on state statutes.[9]

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[1] *Cortez* v. *McCauley* (10th Cir. 2007) 478 F.3d 1108, 1115.
[2] *California* v. *Hodari D.* (1991) 499 U.S. 621, 624.
[3] *Brinegar* v. *United States* (1949) 338 U.S. 160, 176.
[4] See *Virginia* v. *Moore* (2008) __ U.S. __ [2008 WL 1805745] ["Arrest ensures that a suspect appears to answer charges and does not continue a crime"]; *Terry* v. *Ohio* (1968) 392 U.S. 1, 16 ["[I]n traditional terminology," arrests are "seizures of the person which eventuate in a trip to the station house and prosecution for crime"].
[5] See *California* v. *Hodari* (1991) 499 U.S. 621, 626; Pen. Code §§ 841, 835.
[6] See *Dunaway* v. *New York* (1979) 442 U.S. 200, 212 ["the detention of petitioner was in important respects indistinguishable from a traditional arrest"]; *People* v. *Campbell* (1981) 118 Cal.App.3d 588, 597.
[7] See *People* v. *Hubbard* (1970) 9 Cal.App.3d 827, 833 ["[T]he violator is, during the period immediately preceding his execution of the promise to appear, under arrest."]; *U.S.* v. *$404,905* (8th Cir. 1999) 182 F.3d 643, 648 ["A traffic stop is not investigative; it is a form of arrest, based upon probable cause"].
[8] See *Berkemer* v. *McCarty* (1984) 468 U.S. 420, 439, fn.29.
[9] See *People* v. *McKay* (2002) 27 Cal.4th 601, 613-14 ["[N]early every circuit to address the issue [has] held that, once the officer has probable cause to believe a violation of law has occurred, the constitutionality of the arrest does not depend upon compliance with state procedures that are not themselves compelled by the Constitution."].

Although we covered the subject of probable cause at length in a series of articles last year, there are some things that should be noted here.

DEFINED: Probable cause to arrest exists if there was a "fair probability" or "substantial chance" that the suspect committed a crime.[10]

WHAT PROBABILITY IS REQUIRED: Probable cause requires neither a preponderance of the evidence, nor "any showing that such belief be correct or more likely true than false."[11] Consequently, it requires something less than a 51% chance.[12]

ARRESTS "FOR INVESTIGATION": Unlike officers on television and in movies, real officers cannot arrest suspects "for investigation" or "on suspicion" in hopes of obtaining incriminating evidence by interrogating them, putting them in a lineup, or conducting a search incident to arrest.[13] This is because probable cause requires reason to believe the person actually *committed* a crime, not that he might have. As the Supreme Court said, "It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge."[14]

MISTAKES OF LAW: There are two types of mistakes of law that can occur when officers arrest someone. First, there are mistakes as to the crime he committed; e.g., officers arrested the suspect for burglary, but the crime he actually committed was defrauding an innkeeper. These types of mistakes are immaterial so long as there was probable cause to arrest for *some* crime.[15]

The other type of mistake occurs when officers were wrong in their belief that there was probable cause to arrest. These types of mistakes render the arrest unlawful.[16]

PREMATURE WARRANTLESS ARRESTS: Although officers may consider their training and experience in determining whether probable cause to arrest exists, they must not jump to conclusions or ignore information that undermines probable cause. This is especially true if there was time to conduct further investigation before making the arrest. As the Seventh Circuit pointed out, "A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued."[17]

For example, in *Gillan* v. *City of San Marino*[18] a young woman told officers that, several months earlier while attending high school, she had been sexually molested by Gillan, her basketball coach. So they arrested him—even though the woman was unable to provide many details about the crime, even though some of the details she provided were inconsistent, even though she had a motive to lie (she had "strong antipathy" toward Gillian because of his coaching decisions), and even though they surreptitiously heard Gillan flatly deny the charge when confronted by the woman. After the DA refused to file charges, Gillan sued the officers for false arrest, and the jury awarded him over $4 million.

On appeal, the court upheld the verdict, noting that the information known to the officers was "not sufficiently consistent, specific, or reliable" to constitute probable cause. Among other things, the court noted that "[s]ome of the allegations were generalized and not specific as to time, date, or other details, including claims of touching in the gym. Other accusations concerning more specific events either lacked sufficient detail or were inconsistent in the details provided."

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[10] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 244; *U.S.* v. *Brooks* (9th Cir. 2004) 367 F3 1128, 1133-34.
[11] *Texas* v. *Brown* (1983) 460 U.S. 730, 742.
[12] See *People* v. *Alcorn* (1993) 15 Cal.App.4th 652, 655 [there was probable cause when only a 50% chance existed]; *People* v. *Tuadles* (1992) 7 Cal.App.4th 1777, 1783 ["requires less than a preponderance of the evidence"].
[13] See *Henry* v. *United States* (1959) 361 U.S. 98, 101 ["Arrest on mere suspicion collides violently with the basic human right of liberty."]; *People* v. *Gonzalez* (1998) 64 Cal.App.4th 432, 439 ["Arrests made without probable cause in the hope that something might turn up are unlawful."].
[14] *Gerstein* v. *Pugh* (1975) 420 U.S. 103, 120, fn.21.
[15] See *People* v. *White* (2003) 107 Cal.App.4th 636, 641 ["[A]n officer's reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant's conduct."]; *U.S.* v. *Turner* (10th Cir. 2009) __F.3d__ [2009 WL 161737] ["[T]he probable cause inquiry . . . requires merely that officers had reason to believe that a crime—any crime—occurred."].
[16] See *People* v. *Teresinski* (1982) 30 Cal.3d 822, 831.
[17] *BeVier* v. *Hucal* (7th Cir. 1986) 806 F.2d 123, 128.
[18] (2007) 147 Cal.App.4th 1033.

In another case, *Cortez* v. *McCauley,*[19] a woman brought her two-year old daughter to an emergency room in New Mexico because her daughter had said that Cortez, an acquaintance, "hurt her pee pee." A nurse at the hospital notified police who immediately arrested Cortez at his home. After prosecutors refused to file charges against him, Cortez sued the officers for false arrest.

In ruling that the officers were not entitled to qualified immunity, the Tenth Circuit pointed out that they "did not wait to receive the results of the medical examination of the child (the results were negative), did not interview the child or her mother, and did not seek to obtain a warrant." Said the court, "We believe that the duty to investigate prior to a warrantless arrest is obviously applicable when a double-hearsay statement, allegedly derived from a two-year old, is the only information law enforcement possesses."

Warrantless Arrests

When officers have probable cause to arrest, the courts prefer that they seek an arrest warrant.[20] But they also understand that a rule prohibiting warrantless arrests would "constitute an intolerable handicap for legitimate law enforcement."[21] Consequently, warrantless arrests are permitted regardless of whether officers had time to obtain a warrant.[22] As we will discuss, however, there are certain statutory restrictions if the crime was a misdemeanor.

Arrests for felonies and "wobblers"

If the suspect was arrested for a felony, the only requirement under the Fourth Amendment and California law is that they have probable cause.[23] That's also true if the crime was a "wobbler," meaning a crime that could have been prosecuted as a felony or misdemeanor.[24] Accordingly, if the crime was a felony or wobbler, officers may make the arrest at any time of the day or night,[25] and it is immaterial that the crime did not occur in their presence.[26]

Arrests for misdemeanors

Because most misdemeanors are much less serious than felonies, there are three requirements (in addition to probable cause) that must be satisfied if the arrest was made without a warrant.

TIME OF ARREST: The arrest must have been made between the hours of 6 A.M. and 10 P.M. There are, however, four exceptions to this rule. Specifically, officers may make a warrantless misdemeanor arrest at any time in any of the following situations:

(1) IN THE PRESENCE: The crime was committed in the officers' presence. (See the "in the presence rule," below.)

(2) DOMESTIC VIOLENCE: The crime was a domestic assault or battery.

(3) CITIZEN'S ARREST: The arrest was made by a citizen.

(4) PUBLIC PLACE: The suspect was arrested in a public place.[27]

What is a "public" place? In the context of the Fourth Amendment, it is broadly defined as any place in which the suspect cannot reasonably expect privacy.[28] Thus, a suspect is in a "public" place if he was on the street or in a building open to the public. Furthermore, the walkways and pathways in front of a person's home usually qualify as "public places" because the public is impliedly invited to use them.[29] In fact, the Supreme Court has ruled that a suspect who is standing at the threshold of his front door is in a "public place."[30]

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[19] (10th Cir. 2007) 478 F.3d 1108.
[20] See *Wong Sun* v. *United States* (1963) 371 U.S. 471, 481-82 ["The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police"].
[21] *Gerstein* v. *Pugh* (1975) 420 U.S. 103, 113.
[22] See *United States* v. *Watson* (1976) 423 U.S. 411, 423; *U.S.* v. *Bueno-Vargas* (9th Cir. 2004) 383 F.3d 1104, 1107, fn.4.
[23] See *Carroll* v. *United States* (1925) 267 U.S. 132 156; Pen. Code § 836(a)(3).
[24] See *People* v. *Stanfill* (1999) 76 Cal.App.4th 1137, 1144.
[25] See Pen. Code § 840 ["An arrest for the commission of a felony may be made on any day and at any time of the day or night."].
[26] See Pen. Code § 836(a)(2).
[27] See Pen. Code §§ 836(1); 840; *People* v. *Graves* (1968) 263 Cal.App.2d 719, 730.
[28] See *United States* v. *Santana* (1976) 427 U.S. 38, 42.
[29] See *Lorenzana* v. *Superior Court* (1973) 9 Cal.3d 626, 629
[30] See *United States* v. *Santana* (1976) 427 U.S. 38, 42.

THE "IN THE PRESENCE" RULE: As a general rule, officers may not make warrantless misdemeanor arrests unless they have probable cause to believe the crime was committed in their "presence."[31] In discussing this requirement, the Court of Appeal explained, "This simply means that such an arrest may be made when circumstances exist that would cause a reasonable person to believe that a crime has been committed in his presence."[32] If the crime was not committed in the officers' presence, and if they believe the suspect should be charged, they will ordinarily submit the case to prosecutors for review. They may not issue a citation in lieu of arrest.[33]

Although the "in the presence" requirement is an "ancient common-law rule,"[34] it is not mandated by the Fourth Amendment.[35] Instead, it is based upon a California statute,[36] which means that evidence cannot be suppressed for a violation of this rule.[37]

What is "presence?" A crime is committed in the "presence" of officers if they saw it happening, even if they needed a telescope.[38] A crime is also committed in the officers' presence if they heard or smelled something that reasonably indicated the crime was occurring; e.g., officers overheard a telephone conversation in which the suspect solicited an act of prostitution, officers smelled an odor of marijuana.[39]

The question arises: Is a crime committed in the officers' presence if they watched a video of the suspect committing it at an earlier time? It appears the answer is no.[40] What if officers watched it live on a television or computer monitor? While there is no direct authority, it would appear that the crime would be occurring in their presence because there does not seem to be a significant difference between watching a crime-in-progress on a computer screen and watching it through a telescope.

While the courts frequently say that the "in the presence" requirement must be "liberally construed,"[41] it will not be satisfied unless officers can testify, "based on [their] senses, to acts which constitute every material element of the misdemeanor."[42] In making this determination, however, officers may rely on circumstantial evidence and reasonable inferences based on their training and experience.

For example, in *People* v. *Steinberg*[43] an LAPD officer received information that the defendant was a bookie and that he was working out of his rooming house. The officer went there and, from an open window, saw the defendant sitting near several items that indicated to the officer, an expert in illegal gambling, that the defendant was currently engaged in bookmaking. As the officer testified, the room "contained all the equipment and accoutrement commonly found in the rendezvous of the bookmaker." In ruling that the crime of bookmaking had been committed in the officer's presence, the court noted, "In the room where appellant had been seen engaged in his operations, the telephone was on his desk on which lay the National Daily Reporter and nearby were racing forms, pencils and ball point pens. . . . One sheet of paper was an 'owe sheet' on which was a record of the moneys owed by the bettors to the bookmaker, or the sum due from the latter to the bettors."

Similarly, in a shoplifting case, *People* v. *Lee*,[44] an officer in an apparel store saw Lee walk into the

[31] See Pen. Code § 836(a)(1); *People* v. *Johnson* (1981) 123 Cal.App.3d 495, 499.
[32] *People* v. *Bradley* (1957) 152 Cal.App.2d 527, 532.
[33] See Penal Code § 853.6(h) [notice to appear is authorized only if the suspect is "arrested"]
[34] *United States* v. *Watson* (1976) 423 U.S. 411, 418.
[35] See *Barry* v. *Fowler* (9th Cir. 1990) 902 F.2d 770, 772; *Woods* v. *City of Chicago* (7th Cir. 2001) 234 F.3d 979 995; *U.S.* v. *McNeill* (4th Cir. 2007) 484 F.3d 301, 311. **NOTE**: The United States Supreme Court has not ruled on the issue. See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 340, fn11.
[36] Pen. Code § 836(a)(1).
[37] See *People* v. *McKay* (2002) 27 Cal.4th 601, 608.
[38] See *Royton* v. *Battin* (1942) 55 Cal.App.2d 861, 866 [officer observed fish and game code violations by means of telescope].
[39] See *People* v. *Cahill* (1958) 163 Cal.App.2d 15, 19 [officer overheard solicitation of prostitution]; *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 ["The test is whether the misdemeanor is apparent to the officer's senses."].
[40] See *Forgie-Buccioni* v. *Hannaford Brothers, Inc.* (1st Cir. 2005) 413 F.3d 175, 180 ["Although Officer Tompkins watched a partial videotape of Plaintiff allegedly shoplifting, neither Officer Tompkins nor any other police officer *observed* Plaintiff shoplifting."].
[41] See *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 ["The term 'in his presence' is liberally construed."].
[42] *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 713.
[43] (1957) 148 Cal.App.2d 855. ALSO SEE *People* v. *Bradley* (1957) 152 Cal.App.2d 527 [bookmaking].
[44] (1984) 157 Cal.App.3d Supp. 9.

fitting room carrying five items of clothing. But when she left the room, she was carrying only three, which she returned to the clothing racks. The officer then checked the fitting room and found only one item, which meant that one was unaccounted for. So when Lee left the store, the officer arrested her and found the missing item in her purse. On appeal, Lee claimed the arrest was unlawful because the officer had not actually seen her conceal the merchandise in her purse. It didn't matter, said the court, because the term "in the presence" has "historically been liberally construed" and thus "[n]either physical proximity nor sight is essential."

EXCEPTIONS TO THE "IN THE PRESENCE" RULE: Arrests for the following misdemeanors are exempt from the "in the presence" requirement,[45] presumably because of the overriding need for quick action:

ASSAULT AT SCHOOL: Assault or battery on school property when school activities were occurring.[45]

CARRYING LOADED GUN: Carrying a loaded firearm in a public place.

GUN IN AIRPORT: Carrying a concealed firearm in an airport.

DOMESTIC VIOLENCE PROTECTIVE ORDER: Violating a domestic violence protective order or restraining order if there was probable cause to believe the arrestee had notice of the order.

DOMESTIC VIOLENCE: Assault on a spouse, cohabitant, or the other parent of the couple's child.

ASSAULT ON ELDER: Assault or battery on any person aged 65 or older who is related to the suspect by blood or legal guardianship.

ASSAULT ON FIREFIGHTER, PARAMEDIC: Assault on a firefighter, EMT, or paramedic engaged in the performance of his duties.

DUI *PLUS*: Even though officers did not see the suspect driving a vehicle, they may arrest him for DUI if, (1) based on circumstantial evidence, they had probable cause to believe he had been driving while under the influence; and (2) they had probable cause to believe that one or more of the following circumstances existed:

- He had been involved in an auto accident.
- He was in or about a vehicle obstructing a roadway.
- He would not be apprehended unless he was immediately arrested.
- He might harm himself or damage property if not immediately arrested.
- He might destroy or conceal evidence unless immediately arrested.
- His blood-alcohol level could not be accurately determined if he was not immediately arrested.

In addition, officers who have probable cause to arrest a juvenile for the commission of any misdemeanor may do so regardless of whether the crime was committed in their presence.[46]

"STALE" MISDEMEANORS: Even though a misdemeanor was committed in the officers' presence, there is a long-standing rule that they may not arrest the suspect if they delayed doing so for an unreasonably long period of time.[47] This essentially means that officers must make the arrest before doing other things that did not appear to be urgent. As the court explained in *Jackson* v. *Superior Court*, "[T]he officer must act promptly in making the arrest, and as soon as possible under the circumstances, and before he transacts other business."[48]

Note that because this rule is not based on the Fourth Amendment, a violation cannot result in the suppression of evidence. Still, a lengthy delay should be considered by officers in determining whether the suspect should be cited and released.

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[45] See Pen. Code § 243.5 [school assault]; Pen. Code § 12031(a)(3) [loaded firearm]; Pen. Code § 836(e) [firearm at airport]; Pen. Code § 836(c)(1) [domestic violence protective order]; Pen. Code § 836(d) [domestic violence]; Pen. Code § 836(d) [assault on elder]; Pen. Code § 836.1 [assault on firefighter, paramedic]; Veh. Code § 40300.5 [DUI].

[46] See Welf. & Inst. Code § 625; *In re Samuel V.* (1990) 225 Cal.App.3d 511.

[47] See *People* v. *Craig* (1907) 152 Cal. 42, 47; *Hill* v. *Levy* (1953) 117 Cal.App.2d 667, 671; *Green* v. *DMV* (1977) 68 Cal.App.3d 536, 541; *People* v. *Hampton* (1985) 164 Cal.App.3d 27, 30 ["Such an arrest must be made at the time of the offense or within a reasonable time thereafter."]. **NOTE**: The rule seems to have been traceable to the common law. See *Regina* v. *Walker* 25 Eng.Law&Eequity 589. ALSO SEE *Wahl* v. *Walter* (1883) 16 N.W. 397, 398 ["The officer must at once set about the arrest, and follow up the effort until the arrest is effected."]; *Jackson* v. *Superior Court* (1950) 98 Cal.App.2d 183, 188 ["such limitation . . . has for long been a part of the common-law preceding the statutes in the various states"].

[48] (1950) 98 Cal.App.2d 183, 185. Quoting from *Oleson* v. *Pincock* (1926) 251 P. 23, 26.

Warrant Arrests

As noted earlier, an arrest is lawful under the Fourth Amendment if officers have probable cause. What, then, is the purpose of seeking an arrest warrant? After all, the United States Supreme Court has pointed out that it "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant."[49]

There are esentially four situations in which officers will apply for a warrant. First, if the suspect has fled or if officers will otherwise be unable to make an immediate arrest, they may seek a warrant in order to download the arrest authorization into an arrest-warrant database such as NCIC. Second, as we will discuss later, an arrest warrant will ordinarily be required if officers will need to forcibly enter the suspect's residence to make the arrest. Third, as discussed earlier, a warrant may be required if the crime was a misdemeanor that was not committed in an officer's presence. Finally, if officers are uncertain about the existence of probable cause, they may seek an arrest warrant so as to obtain a judge's determination on the issue which, in most cases, will also trigger the good faith rule.[50]

Apart from these practical reasons for seeking an arrest warrant, there is a philosophical one: the courts prefers that officers seek warrants when possible because, as the United States Supreme Court explained, they prefer to have "a neutral judicial officer assess whether the police have probable cause."[51]

The basics

Before we discuss the various types of arrest warrants that the courts can issue, it is necessary to cover the basic rules and principles that govern the issuance and execution of arrest warrants.

WARRANTS ARE COURT ORDERS: An arrest warrant is a court order directing officers to arrest a certain person if and when they locate him.[52] Like a search warrant, an arrest warrant "is not an invitation that officers can choose to accept, or reject, or ignore, as they wish, or think, they should."[53]

WHEN A WARRANT TERMINATES: An arrest warrant remains valid until it is executed or recalled.[54]

CHECKING THE WARRANT'S VALIDITY: Officers are not required to confirm the propriety of a warrant that appears valid on its face.[55] They may not, however, ignore information that reasonably indicates the warrant was invalid because, for example, it had been executed or recalled, or because probable cause no longer existed.[56] [Case-in-point: The Carter County Sheriff's Department in Tennessee recently discovered an outstanding warrant for the arrest of J.A. Rowland for passing a $30 bad check. The warrant had been issued in *1928*, and was payable to a storage company that ceased to exist decades ago. Said the sheriff with tongue in cheek, "This is still a legal document. We'll have to start a manhunt for this guy."]

INVESTIGATING THE ARRESTEE'S IDENTITY: An arrest will ordinarily be upheld if the name of the arrestee and the name of the person listed on the warrant

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[49] *Gerstein* v. *Pugh* (1975) 420 U.S. 103, 113.
[50] See *United States* v. *Leon* (1984) 468 U.S. 897; *People* v. *Palmer* (1989) 207 Cal.App.3d 663, 670.
[51] *Steagald* v. *United States* (1981) 451 U.S. 204, 212. ALSO SEE *Wong Sun* v. *United States* (1963) 371 U.S. 471, 481-82 ["The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess and weight and credibility of the information which the complaining officer adduces as probable cause."].
[52] See Pen. Code §§ 816 ["A warrant of arrest shall be directed generally to any peace officer … and may be executed by any of those officers to whom it may be delivered."].
[53] *People* v. *Fisher* (2002) 96 Cal.App.4th 1147, 1150. ALSO SEE Code of Civil Procedure § 262.1 ["A sheriff or other ministerial officer is justified in the execution of, and shall execute, all process and orders regular on their face"].
[54] See *People* v. *Bittaker* (1989) 48 Cal.3d 1046, 1071 ["Once an individual is arrested and is before the magistrate, the 'complaint' is *functus officio*" ["having served its purpose"]; *People* v. *Case* (1980) 105 Cal.App.3d 826, 834.
[55] See *Herndon* v. *County of Marin* (1972) 25 Cal.App.3d 933, 937 ["It is not [the officer's] duty to investigate the procedure which led to the issuance of the warrant, nor is there any obligation on his part to pass judgment upon the judicial act of issuing the warrant or to reflect upon the legal effect of the adjudication. On the contrary, it is his duty to make the arrest."].
[56] See *Milliken* v. *City of South Pasadena* (1979) 96 Cal.App.3d 834, 842 ["But if [the officer] had actual knowledge that the arrest warrant *did not constitute the order of the court* because it had been recalled, then he could not rely upon the warrant."]; *People* v. *Fisher* (2002) 96 Cal.App.4th 1147, 1151 [court notes that "perhaps there could be circumstances where law enforcement officers, at the time they execute a warrant, are confronted with facts that are so fundamentally different from those upon which the warrant was issued that they should seek further guidance from the court"].

were the same.[57] But officers may not ignore objective facts that reasonably indicate the person they were arresting was not, in fact, the person named in the warrant; e.g., discrepancy in physical description, date of birth.[58]

CONFIRMING THE WARRANT: To make sure that an arrest warrant listed in a database had not been executed or recalled, officers will ordinarily confirm that it is still outstanding.[59]

WARRANTS SENT BY EMAIL OR FAX: An arrest warrant or a warrant abstract sent from one agency to another via email or fax has the same legal force as the original warrant.[60]

TIME OF ARREST: Officers may serve felony arrest warrants at any hour of the day or night.[61] However, misdemeanor warrants may not be served between the hours of 10 P.M. and 6 A.M. unless, (1) officers made the arrest in a public place, (2) the judge who issued the warrant authorized night service, or (3) the arrestee was already in custody for another offense.[62]

The question has arisen on occasion: If officers are inside a person's home after 10 P.M. because, for instance, they are taking a crime report, can they arrest an occupant if they should learn that he is wanted on a misdemeanor warrant that is not endorsed for night service? Although there is no case law directly on point, the California Court of Appeal has pointed out that the purpose of the time limit on misdemeanor arrests "is the protection of an individual's right to the security and privacy of his home, particularly during night hours and the avoidance of the danger of violent confrontations inherent in unannounced intrusion at night."[63] It is at least arguable that none of these concerns would be implicated if officers had been invited in. But, again, the issue has not been decided.

Conventional arrest warrants

A conventional arrest warrant—also known as a complaint warrant—is issued by a judge after prosecutors charged the suspect with a crime.[64] Such a warrant will not, however, be issued automatically simply because a complaint had been filed with the court. Instead, a judge's decision to issue one—like the decision to issue a search warrant—must be based on facts that constitute probable cause.[65] For example, a judge may issue a conventional arrest warrant based on information contained in an officer's sworn declaration, which may include police reports and written statements by the victim or witnesses, so long as there is reason to believe the information is accurate. As the California Supreme Court explained:

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[57] See *Powe* v. *City of Chicago* (7th Cir. 1981) 664 F.2d 639, 645 ["An arrest warrant that correctly names the person to be arrested generally satisfies the fourth amendment's particularity requirement, and no other description of the arrestee need be included in the warrant."]; *Wanger* v. *Bonner* (5th Cir. 1980) 621 F.2d 675, 682 ["Generally, the inclusion of the name of the person to be arrested on the arrest warrant constitutes a sufficient description"].

[58] See *Robinson* v. *City and County of San Francisco* (1974) 41 Cal.App.3d 334, 337 ["the police officers did not consider any of the proffered identification when making the arrest"]; *Smith* v. *Madruga* (1961) 193 Cal.App.2d 543, 546 ["[T]he arrest was unlawful if the arresting officer failed to use reasonable prudence and diligence to determine whether the party arrested was actually the one described in the warrant."].

[59] See *U.S.* v. *Martin* (7th Cir. 2005) 399 F.3d 879, 881 ["Police guarded against that risk [of recall of execution] by checking to see whether the charge remained unresolved."].

[60] See Pen. Code § 850; *People* v. *McCraw* (1990) 226 Cal.App.3d 346, 349 ["A warrant may be sent by any electronic method and is just as effective as the original."].

[61] See Pen. Code § 840; *People* v. *Schmel* (1975) 54 Cal.App.3d 46, 51.

[62] See Pen. Code § 840. **NOTE**: No suppression: A violation of the time restriction will not result in suppression. See *People* v. *McKay* (2002) 27 Cal.4th 601, 605 ["[C]ompliance with state arrest procedures is not a component of the federal constitutional inquiry."]; *People* v. *Whitted* (1976) 60 Cal.App.3d 569, 572 ["The limitation on night-time arrest under misdemeanor warrants is of statutory, rather than constitutional, origin."].

[63] *People* v. *Whitted* (1976) 60 Cal.App.3d 569, 572.

[64] See Pen. Code §§ 806, 813(a).

[65] See *Steagald* v. *United States* (1981) 451 U.S. 204, 213 ["An arrest warrant is issued upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense."]; *People* v. *Case* (1980) 105 Cal.App.3d 826, 832 [court notes that *Ramey* arrest warrants are "generally accompanied by copies of police reports, which advised the magistrate of the factual basis for the complainant's belief that the named individual had committed a felony offense."].

> The information in the complaint or affidavit in support thereof must either (1) state facts within the personal knowledge of the affiant or complainant directly supportive of allegations in the complaint that the defendant committed the offense; or (2) when such stated facts are not within the personal knowledge of the affiant or complainant, further state facts relating to the identity and credibility of the source of the directly incriminating information.[66]

MISDEMEANOR WARRANTS: Warrants may be issued for misdemeanors, as well as felonies.[67]

REQUIRED INFORMATION: The warrant must include the name of the person to be arrested, the date and time it was issued, the city or county in which it was issued, the name of the court, and the judge's signature.[68] The warrant must also contain the amount of bail or a "no bail" endorsement.[69]

JOHN DOE WARRANTS: If officers don't know the suspect's name, they may obtain a John Doe warrant, but it must contain enough information about the suspect to sufficiently reduce the chances of arresting the wrong person.[70] As the court explained in *People* v. *Montoya*, "[A] John Doe warrant must describe the person to be seized with reasonable particularity. The warrant should contain sufficient information to permit his identification with reasonable certainty."[71] Similarly, the court in *Powe* v. *City of Chicago* noted that, "[w]hile an arrest warrant may constitutionally use such arbitrary name designations, it may do so only if, in addition to the name, it also gives some other description of the intended arrestee that is sufficient to identify him."[72]

For example, in *U.S.* v. *Doe*, where the person named on the arrest warrant was identified only as "John Doe a/k/a Ed," the court ruled the warrant was invalid because "the description did not reduce the number of potential subjects to a tolerable level."[73] Thus, a John Doe warrant should include, in addition to a physical description, any information that will help distinguish the arrestee, such as his home or work address, a description of the vehicles he drives, the places where he hangs out, and the names of his associates.[74] Whenever possible, a photo of the suspect should also be included.

IF THE WARRANT CONTAINS AN ADDRESS: There are two reasons for including the suspect's address on an arrest warrant. First, as just noted, if it's a John Doe warrant an address may be necessary to help identity him.[75] Second, the address may assist officers in locating the suspect. Otherwise, an address on a warrant serves no useful purpose. As the court observed in *Cuerva* v. *Fulmer*, "In an arrest warrant, unlike a search warrant, the listed address is irrelevant to its validity and to that of the arrest itself."[76]

The question has arisen: Does the inclusion of an address on a warrant constitute authorization to enter and search the premises for the arrestee? The answer is no.[77] As we will discuss later, officers cannot enter a residence to execute an arrest warrant unless they have probable cause to believe that the suspect lives there, and that he is now inside. Thus, the legality of the entry depends on whether the officers have this information, not whether the residence is listed on the warrant.

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[66] *In re Walters* (1975) 15 Cal.3d 738, 748.

[67] See Pen. Code §§ 813 [felony warrants], 1427 [misdemeanor warrants]; *U.S.* v. *Clayton* (8th Cir. 2000) 210 F.3d 841, 843 ["We agree with those courts that have held that [the arrest warrant requirement is satisfied] with equal force to misdemeanor warrants." Citations omitted]; *U.S.* v. *Spencer* (2nd Cir. 1982) 684 F.2d 220, 224 ["In determining reasonableness, the nature of the underlying offense is of no moment."]; *Howard* v. *Dickerson* (10th Cir. 1994) 34 F.3d 978, 981 [misdemeanor warrant is sufficient].

[68] See Pen. Code § 815.

[69] See Pen. Code § 815a.

[70] See Pen. Code § 815 [if the arrestee's name is unknown, he "may be designated therein by any name"].

[71] (1967) 255 Cal.App.2d 137, 142.

[72] (7th Cir. 1981) 664 F.2d 639, 647.

[73] (3d Cir. 1983) 703 F.2d 745, 748.

[74] See *People* v. *Montoya* (1967) 255 Cal.App.2d 137, 142 [an arrestee might be sufficiently identified "by stating his occupation, his personal appearance, peculiarities, place or residence or other means of identification"].

[75] See *U.S.* v. *Stinson* (D. Conn. 1994) 857 F.Supp. 1026, 1031, fn.8 ["[T]he address may play a vital role where the officers have a John Doe warrant."].

[76] (E.D. Pa. 1984) 596 F.Supp. 86, 90.

[77] See *Wanger* v. *Bonner* 621 F.2d 675, 682 [court rejects the argument that "the inclusion of an address for the person to be arrested in the warrant provided the deputies with a reasonable basis for the belief that the [arrestee] could be found within the premises"].

Ramey warrants

In contrast to conventional arrest warrants, *Ramey* warrants are issued *before* a complaint has been filed against the suspect. The question arises: Why would officers seek a *Ramey* warrant instead of a conventional warrant? The main reason is that they cannot obtain a conventional warrant because, although they have probable cause, they do not have enough incriminating evidence to meet the legal standard for charging. So they seek a *Ramey* warrant—also known as a "Warrant of Probable Cause for Arrest"[78]—in hopes that by questioning the suspect in a custodial setting, by placing him in a physical lineup, or by utilizing some other investigative technique, they can convert their probable cause into proof beyond a reasonable doubt.

The procedure for obtaining a *Ramey* warrant—felony or misdemeanor[79]—is essentially the same as the procedure for obtaining a search warrant. Specifically, officers must do the following:

(1) **Prepare declaration**: Officers must prepare a "Declaration of Probable Cause" setting forth the facts upon which probable cause is based.

(2) **Prepare *Ramey* warrant**: Officers will also complete the *Ramey* warrant which must contain the following: the arrestee's name, the name of the court, name of the city or county in which the warrant was issued, a direction to peace officers to bring the arrestee before a judge, the signature and title of issuing judge, the time the warrant was issued, and the amount of bail (if any).[80] See page 11 for a sample *Ramey* warrant.

(3) **Submit to judge**: Officers submit the declaration and warrant to a judge. This can be done in person, by fax, or by email.[81]

Other arrest warrants

The following are the other kinds of warrants that constitute authorization to arrest:

***STEAGALD* WARRANT**: This is a combination search and arrest warrant which is required when officers forcibly enter the home of a third person to arrest the suspect; e.g., the home of the suspect's friend or relative. See "Entering a Home to Arrest an Occupant," below. Also see Page 11 for a sample *Steagald* warrant.

INDICTMENT WARRANT: An indictment warrant is issued by a judge on grounds that the suspect had been indicted by a grand jury.[82]

PAROLE VIOLATION WARRANT: Issued by the parole authority when there is probable cause to believe that a parolee violated the terms of release.[83]

PROBATION VIOLATION WARRANT: Issued by a judge based on probable cause to believe that a probationer violated the terms of probation.[84]

BENCH WARRANT: Issued by a judge when a defendant fails to appear in court.[85]

WITNESS FTA WARRANT: Issued by a judge for the arrest of a witness who has failed to appear in court after being ordered to do so.[86]

Arrest Formalities

Under California law, there are three technical requirements with which officers must comply when making an arrest. They are as follows:

NOTIFICATION: Officers must notify the person that he is under arrest.[87] While this is usually accomplished directly ("You're under arrest"), any other words or conduct will suffice if it would have indicated to a reasonable person that he was under arrest; e.g., suspect was apprehended following a pursuit,[88] officer took the suspect by the arm and

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[78] Pen. Code § 817.
[79] See Pen. Code §§ 817(a)(2), 840.
[80] See Pen. Code §§ 815, 815a, 816; *People* v. *McCraw* (1990) 226 Cal.App.3d 346, 349.
[81] See Pen. Code § 817(c). **NOTE**: For information on the procedure for obtaining a warrant by fax or email, see the chapter on arrest warrants in *California Criminal Investigation*.
[82] See Pen. Code § 945.
[83] See Pen. Code § 3060.
[84] See Pen. Code § 1203.2.
[85] See Pen. Code §§ 978.5; 813(c); 853.8; 983; *Allison* v. *County of Ventura* (1977) 68 Cal.App.3d 689, 701-2
[86] See Code of Civil Procedure § 1993.
[87] See Pen. Code § 841.
[88] See *People* v. *Sjosten* (1968) 262 Cal.App.2d 539, 545; *Lowry* v. *Standard Oil Co.* (1942) 54 Cal.App.2d 782, 791.

told him he had a warrant for his arrest.[89] Furthermore, notification is unnecessary if the suspect was apprehended while committing the crime.[90]

SPECIFY AUTHORITY: Officers must notify the suspect of their authority to make the arrest.[91] Because this simply means it must have been apparent to the suspect that he was being arrested by a law enforcement officer, this requirement is satisfied if the officer was in uniform or he displayed a badge.[92]

SPECIFY CRIME: If the suspect wants to know what crime he is being arrested for, officers must tell him.[93] (As noted earlier, it is immaterial that officers specified the "wrong" crime.)

Searches Incident to Arrest

When officers arrest a suspect, they may ordinarily conduct a limited search to locate any weapons or destructible evidence in the arrestee's possession and in the immediate vicinity. This type of search—known as a search incident to arrest—may be made as a matter of routine, meaning that officers will not be required to prove there was reason to believe they would find weapons or evidence in the places they searched. As the United States Supreme Court explained:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.[94]

Requirements

Officers may conduct a search incident to arrest if the following circumstances existed:

(1) **Probable cause**: There must have been probable cause to arrest the suspect.

(2) **Custodial arrest**: The arrest must have been "custodial" in nature, meaning that officers had decided to transport the arrestee to jail, a police station, a detox facility, or a hospital.

(3) **Contemporaneous search**: The search must have occurred promptly after the arrest was made.[95]

Scope of search

The following places and things may be searched incident to an arrest:

ARRESTEE'S CLOTHING: Officers may conduct a "full search" of the arrestee.[96] Although the term "full search" is vague, the courts have ruled that it permits a more intensive search than a pat down; and that it entails a "relatively extensive exploration" of the arrestee, including his pockets.[97]

A more invasive search can never be made as a routine incident to an arrest.[98] For example, officers may not conduct a partial strip search or reach under the arrestee's clothing. Such a search would almost certainly be permitted, however, if, (1) officers had probable cause to believe the suspect was concealing a weapon or evidence that could be destroyed or corrupted if not seized before the suspect was transported, and (2) they had probable cause to believe the weapon or evidence was located

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[89] See *People* v. *Vasquez* (1967) 256 Cal.App.2d 342

[90] See *People* v. *Kelley* (1969) 3 Cal.App.3d 146, 151.

[91] Pen. Code § 841.

[92] See *People* v. *Logue* (1973) 35 Cal.App.3d 1, 5 ["A police officer's uniform is sufficient indicia of authority to make the arrest."].

[93] Pen. Code § 841. **NOTE**: Specifying the crime is not required under the Fourth Amendment, but it is considered "good police practice." See *Devenpeck* v. *Alford* (2004) 543 U.S. 146, 155 ["While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required."].

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

[95] See *United States* v. *Robinson* (1973) 414 U.S. 218, 234-35 ["It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station."]; *Gustafson* v. *Florida* (1973) 414 U.S. 260, 265.

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

[97] *United States* v. *Robinson* (1973) 414 U.S. 218, 227.

[98] See *United States* v. *Robinson* (1973) 414 U.S. 218, 236 ["While thorough, the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause"].

Insert Ramey and Steagald Warrants

in the place or thing that was searched.[99] Moreover, such a search would have to be conducted in a place and under circumstances that would adequately protect the arrestee's privacy.[100]

CONTAINERS: Officers may search containers in the arrestee's immediate control when he was arrested (e.g., wallet, purse, backpack, hide-a-key box, cigarette box, pillbox, envelope[101]), even if he was not carrying the item when he was arrested, and even if officers knew he was not the owner.[102]

CELL PHONES: This is currently a hot topic: Can officers search the arrestee's cell phone for evidence pertaining to the crime for which he was arrested?[103] At least two federal circuit courts have upheld such searches in published opinions,[104] while some district courts have ruled otherwise.[105] Stay tuned.

PAGERS: There is limited authority for retrieving numerical data from pagers in the arrestee's possession if such information would constitute evidence of the crime under investigation.[106]

ITEMS TO GO WITH ARRESTEE: If the arrestee wants to take an item with him, and if officers permit it, they may search the item.[107]

VEHICLES: Officers may search the passenger compartment of a vehicle in which the arrestee was an occupant.[108]

RESIDENCES: If the suspect was arrested inside a residence, officers may search places and things in the area within his grabbing or lunging distance at the time he was arrested.[109] Officers may also search the area "immediately adjoining" the place of arrest—even if it was not within his immediate control—but these searches must be limited to spaces in which a potential attacker might be hiding.[110] [For a more detailed discussion of this subject, see the 2005 article entitled "Searches Incident to Arrest" on Point of View Online.]

Use of Force

It is, of course, sometimes necessary to use force to make an arrest.[111] In fact, the Eleventh Circuit pointed out that "the use of force is an expected, necessary part of a law enforcement officer's task of subduing and securing individuals suspected of committing crimes."[112] The question arises: How does the law distinguish between permissible and excessive force? The short answer is that force is permissible if it was reasonably necessary.[113] "When we analyze excessive force claims," said the Ninth Circuit, "our initial inquiry is whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting them."[114]

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[99] **NOTE**: While more intrusive searches based on reasonable suspicion are permitted at jail before the arrestee is admitted into the general population (see Pen. Code § 4030(f)), we doubt that anything less than probable cause would justify such a search in the field.
[100] See *Illinois* v. *Lafayette* (1983) 462 U.S. 640, 645 ["[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street"].
[101] See *United States* v. *Robinson* (1973) 414 U.S. 218, 223; *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243.
[102] See *Chimel* v. *California* (1969) 395 U.S. 752, 763.
[103] See *U.S.* v. *Skinner* (E.D. Tenn. 2007) 2007 WL 1556596] ["To say that case law is substantially undeveloped as to what rights are accorded a cell phone's user, particularly in these circumstances, would be an understatement."].
[104] See *U.S.* v. *Finley* (5th Cir. 2007) 477 F.3d 250, 260; *U.S.* v. *Murphy* (4th Cir. 2009) __ F.3d __ [2009 WL 94268].
[105] See, for example, *U.S.* v. *Park* (N.D. Cal. 2007) 2007 WL 1521573; *U.S.* v. *Wall* (S.D. Fla. 2008) [2008 WL 5381412]. ALSO SEE *U.S.* v. *Zavala* (5th Cir. 2008) 541 F.3d 562 [search of cell phone unlawful because officers did not have probable cause to arrest].
[106] See *U.S.* v. *Ortiz* (7th Cir. 1996) 84 F.3d 977, 984 ["[I] is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence."]; *U.S.* v. *Reyes* (S.D. N.Y. 1996) 922 F.Supp. 818, 833 ["[T]he search of the memory of Pager #1 was a valid search incident to Reyes' arrest."]; *U.S.* v. *Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["The search conducted by activating the pager's memory is therefore valid."].
[107] See *People* v. *Topp* (1974) 40 Cal.App.3d 372, 378; *U.S.* v. *Garcia* (9th Cir. 2000) 205 F.3d 1182.
[108] See *New York* v. *Belton* (1981) 453 U.S. 454.
[109] See *Chimel* v. *California* (1969) 395 U.S. 752, 763.
[110] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.
[111] See *Graham* v. *Connor* (1989) 490 U.S. 386, 396 ["[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."]; Pen. Code § 835a [the officer "need not retreat or desist from his efforts by reason of the resistance or threatened resistance"].
[112] *Lee* v. *Ferraro* (11th Cir. 2002) 284 F.3d 1188, 1200.
[113] See *Saucier* v. *Katz* (2001) 533 U.S. 194, 202; *Graham* v. *Connor* (1989) 490 U.S. 386, 395.
[114] *Tatum* v. *City and County of San Francisco* (9th Cir. 2006) 441 F.3d 1090, 1095.

Like the other police actions that are governed by the standard of "reasonableness," the propriety of the use of force is intensely fact-specific. Thus, in applying this standard in a pursuit case, the U.S. Supreme Court began by noting, "[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'"[115] The problem for officers is that their decisions on the use of force must be made quickly and under extreme pressure, which means there is seldom time for "sloshing."[116] Taking note of this problem, the Court ruled that a hypertechnical analysis of the circumstances is inappropriate:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[117]

For this reason, an officer's use of force will not be deemed excessive merely because there might have been a less intrusive means of subduing the suspect.[118] As noted in *Forrester* v. *City of San Diego*, "Police officers are not required to use the least intrusive degree of force possible. Rather, the inquiry is whether the force that was used to effect a particular seizure was reasonable."[119]

Because the reasonableness of any use of force will ultimately depend on the severity or "quantum" of the force utilized by officers, the courts usually begin their analysis by determining whether the force was deadly, non-deadly, or insignificant.[120]

Non-deadly force

Force is deemed "non-deadly" if it does not create a substantial risk of causing death or serious bodily injury.[121] To determine whether non-deadly force was reasonably necessary, the courts apply a balancing test in which they examine both the need for the force and its severity. And if need outweighs or is proportionate to the severity, the force will be deemed reasonable.[122] Otherwise, it's excessive. As the United States Supreme Court explained in *Graham* v. *Connor*:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.[123]

THE NEED FOR FORCE: The first issue in any use-of-force case is whether there was an objectively reasonable need for force. As the Ninth Circuit observed, "[I]t is the need for force which is at the heart of [the matter]."[124] In most cases, the need will be based solely on the suspect's physical resistance to

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[115] *Scott* v. *Harris* (2007) 550 U.S. 372, __.

[116] See *Waterman* v. *Batton* (4th Cir. 2005) 393 F.3d 471, 478 ["Of course, the critical reality here is that the officers did not have even a moment to pause and ponder these many conflicting factors."].

[117] *Graham* v. *Connor* (1989) 490 U.S. 386, 396-97. ALSO SEE *Thompson* v. *County of Los Angeles* (2006) 142 Cal.App.4th 154, 165 [courts must view the facts "from the perspective of the officer at the time of the incident and not with the benefit of hindsight"]; *Phillips* v. *James* (10th Cir. 2005) 422 F.3d 1075, 1080 ["What may later appear to be unnecessary when reviewed from the comfort of a judge's chambers may nonetheless be reasonable under the circumstances presented to the officer at the time."].

[118] See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 350; *People* v. *Bell* (1996) 43 Cal.App.4th 754, 761, fn.1.

[119] (9th Cir. 1994) 25 F.3d 804, 807.

[120] See *Deorle* v. *Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1279 ["We first assess the quantum of force used to arrest Deorle by considering the type and amount of force inflicted."]. **NOTE**: If the force was insignificant or de minimis, it will ordinarily be considered justifiable if there were grounds to arrest the suspect. See *Zivojinovich* v. *Barner* (11th Cir. 2008) 525 F.3d 1059, 1072 ["De minimis force will only support a Fourth Amendment excessive force claim when an arresting officer does not have the right to make an arrest."]; *Graham* v. *Connor* (1989) 490 U.S. 386, 396 ["Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment."].

[121] See *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 705.

[122] See *Scott* v. *Harris* (2007) 550 U.S. 372, __ ["we must balance the nature and quality of the intrusion . . . against the importance of the governmental interests alleged"]; *Tekle* v. *U.S.* (9th Cir. 2006) 511 F.3d 839, 845 ["[W]e must balance the force used against the need"]; *Miller* v. *Clark County* (9th Cir. 2003) 340 F.3d 959, 964 ["[W]e assess the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted."].

[123] (1989) 490 U.S. 386, 396.

[124] *Drummond* v. *City of Anaheim* (9th Cir. 2003) 343 F.3d 1052, 1057.

arrest;[125] e.g., the arrestee "spun away from [the arresting officer] and continued to struggle,"[126] the arrestee "stiffened her arm and attempted to pull free."[127]

On the other hand, if the suspect was not resisting, there would be no need for any force, other than the *de minimis* variety. Thus, in *Drummond* v. *City of Anaheim*, the court ruled that an officer's use of force was unreasonable because, "once Drummond was on the ground, he was not resisting the officers; there was therefore little or no need to use any further physical force."[128] Similarly, in *Parker* v. *Gerrish* the court observed, "In some circumstances, defiance and insolence might reasonably be seen as a factor which suggests a threat to the officer. But here [the suspect] was largely compliant and twice gave himself up for arrest to the officers."[129]

Although force is seldom necessary if the arrestee was not presently resisting, there may be a need for it if the suspect had been actively resisting and, although he was not combative at the moment, he was not yet under the control of the arresting officers. This is especially true if there was probable cause to arrest him for a serious felony.[130] For example, in ruling that officers did not use excessive force in pulling a bank robbery suspect from his getaway car, the court in *Johnson* v. *County of Los Angeles* noted that, even though the suspect was not "actively resisting arrest," it is "very difficult to imagine that any police officer facing a moving, armed bank robbery suspect would have acted any differently—at least not without taking the very real risk of getting himself or others killed. The need to quickly restrain Johnson by removing him from the car and handcuffing him was paramount."[131]

The need for force will increase substantially if the suspect's resistance also constituted a serious and imminent threat to the safety officers or others.[132] Thus, in *Scott* v. *Harris*, a vehicle pursuit case, the Supreme Court upheld the use of the PIT maneuver to end a high-speed chase because, said the court, "[I]t is clear from the videotape [of the pursuit] that [the suspect] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."[133] Similarly, in *Miller* v. *Clark County*, the court noted that Miller attempted "to flee from police by driving a car with a wanton or willful disregard for the lives of others."[134]

PROPORTIONATE RESPONSE BY OFFICERS: Having established a need for some force, the courts will look to see whether the amount of force utilized was commensurate with that need.[135] As the court explained in *Lee* v. *Ferraro*, "[T]he force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for the force, which is measured by the severity of the crime, the danger to the officer, and the risk of flight."[136] For

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[125] See *Graham* v. *Connor* (1989) 490 U.S. 386, 396 [courts must consider whether the suspect "is actively resisting arrest"]; *Miller* v. *Clark County* (9th Cir. 2003) 340 F.3d 959, 964 ["we assess . . . whether the suspect was actively resisting arrest or attempting to evade arrest by flight"].

[126] *Tatum* v. *City and County of San Francisco* (9th Cir. 2006) 441 F.3d 1090, 1097.

[127] *Arpin* v. *Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 921.

[128] (9th Cir. 2003) 343 F.3d 1052, 1058. ALSO SEE *Casey* v. *City of Federal Heights* (10th Cir. 2007) 509 F.3d 1278, 1282 ["[W]e are faced with the use of force—an arm-lock, a tackling, a Tasering, and a beating—against one suspected of innocuously committing a misdemeanor, who was neither violent nor attempting to flee."]; *Meredith* v. *Erath* (9th Cir. 2003) 342 F.3d 1057, 1061 [suspect "passively resisted" but "did not pose a safety risk and made no attempt to leave"].

[129] (1st Cir. 2008) 547 F.3d 1, 10.

[130] See *Thompson* v. *County of Los Angeles* (2006) 142 Cal.App.4th 154, 163 [courts considers "the severity of the crime at issue"]; *Tekle* v. *U.S.* (9th Cir. 2007) 511 F.3d 839, 844 ["Factors to be considered [include] the severity of the crime at issue"]; *Miller* v. *Clark County* (9th Cir. 2003) 340 F.3d 959, 964 [court considers "the severity of the crime at issue"].

[131] (9th Cir. 2003) 340 F.3d 787, 793.

[132] See *Graham* v. *Connor* (1989) 490 U.S. 386, 396 [courts must consider "whether the suspect poses an immediate threat to the safety of the officers or others"]; *Miller* v. *Clark County* (9th Cir. 2003) 340 F.3d 959, 964 ["we assess . . . whether the suspect posed an immediate threat to the safety of the officers or others"].

[133] (2007) 550 U.S. 372, __.

[134] (9th Cir. 2003) 340 F.3d 959, 965.

[135] See *Forrester* v. *City of San Diego* (9th Cir. 1994) 25 F.3d 804, 807 ["[T]he force consisted only of physical pressure administered on the demonstrators' limbs in increasing degrees, resulting in pain."].

[136] (11th Cir. 2002) 284 F.3d 1188, 1198.

example, utilizing a control hold,[137] pepper stray,[138] "hard pulling,"[138] or a trained police dog[140] will often be deemed reasonably necessary if officers were facing resistance that was moderate to severe.

TASERS: Although the shock caused by tasers is currently classified as non-deadly force,[141] the courts are aware that it is quite painful and that the consequences are not always predictable. In fact, some people have died after being tased. As a result, some courts have classified tasers as "intermediate" force, which requires a demonstrably greater need than non-deadly force.[142] As the court in *Beaver* v. *City of Federal Way* observed:

> While the advent of the Taser has undeniably provided law enforcement officers with a useful tool to subdue suspects with a lessened minimal risk of harm to the suspect or the officer, it is equally undeniable that being "tased" is a painful experience. The model used by [the officer] delivers a full five-second cycle of electrical pulses of a maximum of 50,000 volts at very low amperage that interrupts a target's motor system and causes involuntary muscle contraction.[143]

Still, tasing is often deemed justified when there was significant resistance, especially if officers had been unable to control the arrestee by other means. Thus, the Eleventh Circuit noted, "[I]n a difficult, tense and uncertain situation the use of a taser gun to subdue a suspect who has repeatedly ignored police instructions and continues to act belligerently toward police is not excessive force."[144]

For example, in *Draper* v. *Reynolds*[145] the court ruled that the use of a taser to subdue a suspect was proportionate because, among other things, the suspect "was hostile, belligerent, and uncooperative. No less than five times, [the officer] asked [the suspect] to retrieve documents from the truck cab, and each time [the suspect] refused to comply. . . . [The suspect] used profanity, moved around and paced in agitation, and repeatedly yelled at [the officer]." Said the court, "Although being struck by a taser gun is an unpleasant experience, the amount of force [the officer] used—a single use of the taser gun causing a one-time shocking—was reasonably proportionate to the need for force and did not inflict any serious injury."

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[137] See *Tatum* v. *City and County of San Francisco* (9th Cir. 2006) 441 F.3d 1090, 1097 ["Faced with a potentially violent suspect, behaving erratically and resisting arrest, it was objectively reasonable for [the officer] to use a control hold"]; *Zivojinovich* v. *Barner* (11th Cir. 2008) 525 F.3d 1059, 1072 ["using an uncomfortable hold to escort an uncooperative and potentially belligerent suspect is not unreasonable"].

[138] See *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 703-4; *McCormick* v. *City of Fort Lauderdale* (11th Cir. 2003) 333 F.3d 1234, 1245 ["Pepper spray is an especially noninvasive weapon and may be one very safe and effective method of handling a violent suspect who may cause further harm to himself or others."]; *Vinyard* v. *Wilson* (11th Cir. 2002) 311 F.3d 1340, 1348 ["[P]epper spray is a very reasonable alternative to escalating a physical struggle with an arrestee."]; *Gaddis* v. *Redford Township* (6th Cir. 2004) 364 F.3d 763, 775 ["[The officer] used an intermediate degree of nonlethal force to subdue a suspect who had previously attempted to evade arrest, was brandishing a knife, showed signs of intoxication or other impairment, and posed a clear risk of leaving the scene behind the wheel of a car."].

[139] *Johnson* v. *City of Los Angeles* (9th Cir. 2003) 340 F.3d 787, 793.

[140] See *Thompson* v. *County of Los Angeles* (2006) 142 Cal.App.4th 154, 167 [court notes that "the great weight of authority" holds that the "use of a trained police dog does not constitute deadly force"]; *People* v. *Rivera* (1992) 8 Cal.App.4th 1000, 1007 [officer testified that he hoped that by using the police dog to "search, bite and hold" a fleeing burglary suspect, he could "alleviate any shooting circumstance."]; *Kuha* v. *City of Minnetonka* (8th Cir. 2003) 365 F.3d 590, 597-98 ["No federal appeals court has held that a properly trained police dog is an instrument of deadly force, and several have expressly concluded otherwise." Citations omitted.]; *Quintanilla* v. *City of Downey* (9th Cir. 1996) 84 F.3d 353, 358 ["Moreover, the dog was trained to release on command, and it did in fact release Quintanilla on command."]; *Miller* v. *Clark County* (9th Cir. 2003) 340 F.3d 959, 963 ["[T]he risk of death from a police dog bite is remote. We reiterate that the possibility that a properly trained police dog could kill a suspect under aberrant circumstances does not convert otherwise nondeadly force into deadly force."].

[141] See *Sanders* v. *City of Fresno* (E.D. Cal. 2008) 551 F.Supp.2d 1149, 1168 ["[C]ase law indicates that Tasers are generally considered non-lethal or less lethal force." Citations omitted.].

[142] See *Sanders* v. *City of Fresno* (E.D. Cal. 2008) 551 F.Supp.2d 1149, 1168 ["The Court will view the use of a Taser as an intermediate or medium, though not insignificant, quantum of force that causes temporary pain and immobilization."].

[143] (W.D. Wash. 2007) 507 F.Supp.2d 1137, 1144.

[144] *Zivojinovich* v. *Barner* (11th Cir. 2008) 525 F.3d 1059, 1073. ALSO SEE *Miller* v. *Clark County* (9th Cir. 2003) 340 F.3d 959, 966 ["[W]e think it highly relevant here that the deputies had attempted several less forceful means to arrest Miller"].

[145] (11th Cir. 2004) 369 F.3d 1270.

Similarly, in *Sanders* v. *City of Fresno*[146] the court ruled that the use of a taser was reasonable because, among other things, the suspect "was agitated, did not obey the request to let [his wife] go, believed that the officers were there to kill him and/or take [his wife] away from him, appeared to be under the influence of drugs . . . "

MENTALLY UNSTABLE ARRESTEES: It should be noted that an officer's use of force will not be deemed excessive merely because the arrestee was mentally unstable. Still, it is a circumstance that should, when possible, be considered in deciding how to respond. As the Ninth Circuit observed:

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation . . . [147]

Deadly force

In the past, deadly force was defined as action that was "reasonably likely to kill."[148] Now, however, it appears that most courts define it more broadly as action that "creates a *substantial risk* of causing death *or* serious bodily injury."[149]

Under the Fourth Amendment, the test for determining whether deadly force was justified is essentially the same as the test for non-deadly force. In both cases, the use of force is lawful if it was reasonable under the circumstances.[150] The obvious difference is that deadly force cannot be justified unless there was an especially urgent need for it. As the United States Supreme Court observed, "[N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched."[151]

The Court has acknowledged, however, that there is "no obvious way to quantify the risks on either side," that there is no "magical on/off switch" for determining the point at which deadly force is justified,[152] and that the test is "cast at a high level of generality."[153] Still, it has ruled that the use of deadly force can be justified under the Fourth Amendment only if the following circumstances existed:

(1) **RESISTING ARREST**: The arrestee must have been fleeing or otherwise actively resisting arrest.

(2) **THREAT TO OFFICERS OR OTHERS**: Officers must have had probable cause to believe that the arrestee posed a significant threat of death or serious physical injury to officers or others.[154]

(3) **WARNING**: Officers must, "where feasible," warn the arrestee that they are about to use deadly force.[155]

As the Court observed in *Tennessee* v. *Garner*, "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[156]

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[146] (E.D. Cal. 2008) 551 F.Supp.2d 1149.
[147] *Deorle* v. *Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1282-3.
[148] See *Vera Cruz* v. *City of Escondido* (9th Cir. 1997) 139 F.3d 659, 660.
[149] *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 705 [emphasis added]. ALSO SEE *Thompson* v. *County of Los Angeles* (2006) 142 Cal.App.4th 154, 165.
[150] See *Scott* v. *Harris* (2007) 550 U.S. 372, __ ["*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test"].
[151] *Tennessee* v. *Garner* (1985) 471 U.S. 1, 10.
[152] *Scott* v. *Harris* (2007) 550 U.S. 372, __.
[153] *Brosseau* v. *Haugen* (2004) 543 U.S. 194, 199.
[154] See *Scott* v. *Harris* (2007) 550 U.S. 372, __, fn.9; *Munoz* v. *City of Union City* (2004) 120 Cal.App.4th 1077, 1103 ["An officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."]; *Smith* v. *City of Hemet* (9th Cir. 2005) 394 F.3d 689, 704 ["[A] police officer may not use deadly force unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."].
[155] See *Tennessee* v. *Garner* (1985) 471 U.S. 1, 11-12 ["some warning" must be given "where feasible"].
[156] (1985) 471 US 1, 11.

Although most threats that will justify deadly force pose an immediate threat to officers or others,[157] in some cases an impending or imminent threat will suffice. Such a threat may exist if officers reasonably believed—based on the nature of the suspect's crime, his state of mind, and any other relevant circumstances—that his escape would pose a severe threat of serious physical harm to the public. As the Supreme Court explained in *Scott* v. *Harris*, deadly force might be reasonably necessary "to prevent escape when the suspect is known to have committed a crime involving the infliction or threatened infliction of serious physical harm, so that his mere being at large poses an inherent danger to society."[158] (The Court in *Garner* ruled that a fleeing burglar did *not* present such a threat.[159]).

The use of deadly force will not, of course, be justified after the threat had been eliminated. For example, in *Waterman* v. *Batton* the Fourth Circuit ruled that, while officers were justified in firing at the driver of a car that was accelerating toward them, they were not justified in shooting him after he had passed by. Said the court, "[F]orce justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."[160]

It should be noted that the test for determining whether deadly force was reasonable under the Fourth Amendment is essentially the same as the test for determining whether officers may be prosecuted for using deadly force that results in the death of a suspect. Specifically, Penal Code § 196 has been interpreted to mean that officers cannot be criminally liable if the suspect was actively resisting and, (1) "the felony for which the arrest is sought is a forcible and atrocious one which threatens death or serious bodily harm," or (2) "there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another."[161]

Entering a home to arrest an occupant

In the past, officers could forcibly enter a residence to arrest an occupant whenever they had probable cause to arrest. Now, however, a forcible entry is permitted only if there were additional circumstances that justified the intrusion. As we will now explain, the circumstances that are required depend on whether officers enter the suspect's home or the home of a third person, such as a friend or relative of the suspect.

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[157] See *Martinez* v. *County of Los Angeles* (1996) 47 Cal.App.4th 334, 344 [man with a knife, high on PCP, refused the officers' commands to drop the weapon, said "Go ahead kill me or I'm going to kill you," advanced on officers to within 10-15 feet]; *Reynolds* v. *County of San Diego* (9th Cir. 1996) 84 F.3d 1162, 1168 [apparently deranged suspect suddenly swung a knife at an officer]; *Billington* v. *City of Boise* (9th Cir. 2002) 292 F.3d 1177, 1185 ["Hennessey was trying to get the detective's gun, and he was getting the upper hand. Hennessey posed an imminent threat of injury or death; indeed, the threat of injury had already been realized by Hennessey's blows and kicks."]; *McCormick* v. *City of Fort Lauderdale* (11th Cir. 2003) 333 F.3d 1234, 1246 [suspect in a violent felony, carrying a stick, advanced on an officer—"pumping or swinging the stick"—then charged the officer as he was falling]; *Sanders* v. *City of Minneapolis* (8th Cir. 2007) 474 F.3d 523, 526 [suspect in a vehicle was attempting to run down the arresting officers]; *Waterman* v. *Batton* (4th Cir. 2005) 393 F.3d 471, 478 [the suspect, after attempting to run an officer off the road, accelerated toward officers who were standing in front of him (although not directly in front); *Untalan* v. *City of Lorain* (6th Cir. 2005) 430 F.3d 312, 315 [man armed with a butcher knife lunged at the officer].

[158] (2007) 550 U.S. 372, __, fn. 9.

[159] *Tennessee* v. *Garner* (1985) 471 U.S. 1, 21 ["While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force."].

[160] (4th Cir. 2005) 393 F.3d 471, 481.

[161] *Foster* v. *City of Fresno* (E.D. Cal. 2005) 392 F.Supp.2d 1140, 1159. ALSO SEE *Tennessee* v. *Garner* (1985) 471 U.S. 1, 16, fn. 15 ["[Under the California Penal Code] the police may use deadly force to arrest only if the crime for which the arrest is sought was a forcible and atrocious one which threatens death or serious bodily harm, or there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed."]; *Kortum* v. *Alkire* (1977) 69 Cal.App.3d 325, 333[deadly force against a fleeing felony suspect is permitted only if the felony is "a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another"]; *Ting* v. *U.S.* (9th Cir. 1991) 927 F.2d 1504, 1514 ["A law enforcement officer is authorized to use deadly force to effect an arrest only if the felony for which the arrest is sought is a forcible and atrocious one which threatens death or serious bodily harm, or there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another."].

Entering the suspect's home

To enter the suspect's home, officers must comply with the so-called *Ramey-Payton* rule,[162] under which a forcible entry is permitted only if both of the following circumstances existed:

(1) **WARRANT ISSUED**: A warrant for the suspect's arrest must have been outstanding. Either a conventional or *Ramey* warrant will suffice.[163]

(2) **ARRESTEE'S HOME**: Officers must have had "reason to believe" the suspect, (a) lived in the residence, and (b) was presently inside. Although most federal courts have ruled that the "reason to believe" standard is merely reasonable suspicion,[164] the Ninth Circuit ruled it means probable cause.[165] The California Supreme Court has not yet decided.[166]

Entering a third person's home

If the suspect is inside the home of a third person, such as a friend or relative, the so-called *Steagald* rule applies, which means that officers may enter only if they have a *search* warrant supported by an affidavit that establishes probable cause to believe, (1) the suspect committed the crime under investigation, and (2) he is presently inside the residence and will be there when the warrant is executed.[167] See page 11 for a sample *Steagald* warrant.

Other grounds for entering

There are essentially three situations in which officers without a warrant may enter a residence to arrest an occupant:

"HOT PURSUIT": Officers may enter if they are in "hot pursuit" of the suspect. In this context of executing arrest warrants, the term "hot pursuit" means a situation in which all of the following circumstances existed:

(1) PROBABLE CAUSE TO ARREST: Officers must have had probable cause to arrest the suspect for a felony or misdemeanor.

(2) ATTEMPT TO ARREST OUTSIDE: Officers must have attempted to make the arrest outside the residence.

(3) SUSPECT FLEES INSIDE: The suspect must have tried to escape or otherwise prevent an immediate arrest by going inside the residence.[168]

"FRESH PURSUIT": Officers may also enter a residence without a warrant to arrest an occupant if they are in "fresh pursuit." This essentially means they must have been actively attempting to locate the arrestee and, in doing so, were quickly responding to developing information as to his whereabouts. Although the courts have not established a checklist of requirements for fresh pursuits, the cases seem to indicate there are four:

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[162] See *People* v. *Ramey* (1976) 16 Cal.3d 263; *Payton* v. *New York* (1980) 445 U.S. 573.

[163] See *People* v. *Case* (1980) 105 Cal.App.3d 826, 831 ["From a practical standpoint the use of the *Ramey* Warrant form was apparently to permit, prior to an arrest, judicial scrutiny of an officer's belief that he had probable cause to make the arrest without involving the prosecutor's discretion in determining whether to initiate criminal proceedings." Quote edited]; *People* v. *Bittaker* (1980) 48 Cal.3d 1046, 1070; *Godwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 225 ["To comply with *Ramey* and *Payton*, prosecutors developed the use of a *Ramey* warrant form, to be presented to a magistrate in conjunction with an affidavit stating probable cause to arrest."].

[164] See *U.S.* v. *Route* (5th Cir. 1997) 104 F.3d 59, 62 ["All but one of the other circuits [the 9th] that have considered the question are in accord, relying upon the 'reasonable belief' standard as opposed to a probable cause standard. . . . [W]e adopt today the 'reasonable belief' standard of the Second, Third, Eighth, and Eleventh Circuits." Citations omitted].

[165] See *Cuevas* v. *De Roco* (9th Cir. 2008) 531 F.3d 726, 736; *Motley* v. *Parks* (9th Cir. en banc 2005) 432 F.3d 1072. **NOTE**: Because the United States Supreme Court used the words "reason to believe," and because the Court is familiar with the term "probable cause," it would seem that it meant something less than probable cause. See *U.S.* v. *Magluta* (11th Cir. 1995) 44 F.3d 1530, 1534 ["The strongest support for a lesser burden than probable cause remains the text of *Payton,* and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of 'reason to believe' over that of 'probable cause.'"].

[166] See *People* v. *Jacobs* (1987) 43 Cal.3d 472, 479, fn.4.

[167] See *Steagald* v. *United States* (1981) 451 U.S. 204. **NOTE**: Because it can be difficult to establish probable cause for a *Steagald* warrant, the Supreme Court has noted that there are at least two options: (1) wait until the arrestee is inside his own residence, in which case only an arrest warrant is required; wait until the arrestee leaves the third party's house or is otherwise in a public place, in which case neither an arrest warrant nor a *Steagald* warrant is required. See *Steagald* v. *United States* (1981) 451 U.S. 204, 221, fn.14 ["[I]n most situations the police may avoid altogether the need to obtain a search warrant simply by waiting for a suspect to leave the third party's home before attempting to arrest the suspect."].

[168] See *United States* v. *Santana* (1976) 427 U.S. 38, 43 ["[A] suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place." Edited]; *People* v. *Lloyd* (1989) 216 Cal.App.3d 1425, 1430.

(1) SERIOUS FELONY: Officers must have had probable cause to arrest the suspect for a serious felony, usually a violent one.
(2) DILIGENCE: Officers must have been diligent in attempting to apprehend the suspect.
(3) SUSPECT INSIDE: Officers must have had *probable cause* to believe the suspect was inside the structure.
(4) CIRCUMSTANTIAL EVIDENCE OF FLIGHT: Officers must have been aware of circumstances indicating the suspect was in active flight or that active flight was imminent.[169]

CONSENT: If officers obtained consent to enter from the suspect or other occupant, the legality of their entry will usually depend on whether they misled the consenting person as to their objective, so that an immediate arrest would have exceeded the scope of consent. For example, if officers said they merely wanted to enter ("Can we come in?") or talk ("We'd like to talk to you.), a court might find that they exceeded the permissible scope of the consent if they immediately arrested him.[170] But there should be no problem if officers intended to make the arrest only if, after speaking with the suspect, they believed that probable cause existed or continued to exist.[171]

[For a more detailed discussion of this subject, see the 2005 article "Entry to Arrest" on Point of View Online.]

Post-Arrest Procedure

Although the lawfulness of an arrest will depend on what the officers did at or near the time the suspect was taken into custody, there are certain procedural requirements that must be met after the arrest is made.

BOOKING: Booking is "merely a ministerial function"[172] which involves the "recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested."[173] While the California Penal Code does not require booking,[174] it is considered standard police procedure because one of its primary purposes is to confirm the identity of the arrestee.[175] For this reason, booking is permitted even if officers were aware that the arrestee would be posting bail immediately.[176]

PHONE CALLS: The arrestee has a right to make completed telephone calls to the following: an attorney, a bail bondsman, and a relative. Furthermore, he has a right to make these calls "immediately upon being booked," and in any event no later than three hours after the arrest except when it is "physically impossible."[177]

ATTORNEY VISITS: Officers must permit the arrestee to visit with an attorney if the arrestee or a relative requested it.[178]

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[169] See *People* v. *Manderscheid* (2002) 99 Cal.App.4th 355, 361-63; *People* v. *Amaya* (1979) 93 Cal.App.3d 424, 428 ["Thus, officers need not secure a warrant to enter a dwelling in fresh pursuit of a fleeing suspect believed to have committed a grave offense and who therefore may constitute a danger to others."].
[170] See *People* v. *Superior Court (Kenner)* (1977) 73 Cal.App.3d 65, 69 ["A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right of explanation or justification."]; *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130 ["A consent for the purpose of *talking* with a suspect is *not* a consent to enter for the purpose of making an arrest"].
[171] See *People* v. *Evans* (1980) 108 Cal.App3d. 193, 196 ["[The officers] were inside with consent, with probable cause to arrest but with the intent to continue the investigation"]; *People* v. *Patterson* (1979) 94 Cal.App.3d 456, 463 ["There is nothing in the record to indicate that the police intended to arrest Patterson immediately following the entry or that they were not prepared to discuss the matter with Patterson first in order to permit her to explain away the basis of the officers' suspicions."]; *In re Reginald B.* (1977) 71 Cal.App.3d 398, 403 [arrest lawful when made after officers confirmed the suspect's identity].
[172] See *People* v. *Superior Court (Logue)* (1973) 35 Cal.App.3d 1, 6.
[173] See Pen. Code § 7.21. ALSO SEE Pen. Code § 13100 *et seq.* [criminal offender record information].
[174] See 4 Witkin, *California Criminal Law* (3rd edition 2000), p. 258 ["[T]here is little statutory or case law coverage of the police practices of . . . booking arrested persons."].
[175] See *Doe* v. *Sheriff of DuPage County* (7th Cir. 1997) 128 F.3d 586, 588 [one purpose of booking is to confirm the arrestee's identity]; 3 LaFave *Search and Seizure* (Fourth Edition) at p. 46 ["law enforcement agencies view booking as primarily a process for their own internal administration"].
[176] See *Doe* v. *Sheriff of DuPage County* (7th Cir. 1997) 128 F.3d 586, 588.
[177] See Pen. Code § 851.5.
[178] See Pen. Code § 825(b) ["After the arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of the prisoner, visit the prisoner."].

Insert Perp Walks

PROBABLE CAUSE DETERMINATION: If the suspect was arrested without a warrant, and if he has not bailed out,[179] a judge must determine whether there was probable cause for the arrest. While such a determination must be made "promptly,"[180] there is a presumption of timeliness if the determination was made within 48 hours after arrest.[181] Note that in calculating the time limit, no allowance is made for weekends and holidays—it's a straight 48 hours.[182]

What must officers do to comply with this requirement? They will usually submit a Declaration of Probable Cause which contains a summary of the facts upon which probable cause was based.

Note that a suspect may not be released from custody based on a tardy probable cause determination,[183] nor may the charges be dismissed.[184] However, statements made by the arrestee after the 48 hours had expired might be suppressed if the court finds that probable cause to arrest did not exist.

ARRAIGNMENT: After an arrestee has been charged with a crime by prosecutors (and thus becomes a "defendant"), he must be arraigned. An arraignment is usually a defendant's first court appearance during which, among other things, a defense attorney is appointed or makes an appearance; the defendant is served with a copy of the complaint and is advised of the charges against him; the defendant pleads to the charge or requests a continuance for that purpose; and the judge sets bail, denies bail, or releases the defendant on his own recognizance.

A defendant must be arraigned within 48 hours of his arrest[185] unless, (1) he was released from custody,[186] or (2) he was being held on other charges or a parole hold.[187] Unlike the time limit for probable cause determinations, the 48-hour countdown does not include Sundays and holidays.[188] Furthermore, if time expires when court is in session, the defendant may be arraigned anytime that day.[189] If court is not in session, he may be arraigned anytime the next day.[190] If, however, the arrest occurred on Wednesday after the courts closed, the arraignment must take place on Friday, unless Wednesday or Friday were court holidays.[191]

Note that short delays are permitted if there was good cause; e.g., defendant was injured or sick.[192] A short delay may also be justified if, (1) the crime was serious; (2) officers were at all times diligently engaged in actions they reasonably believed were necessary to obtain necessary evidence or apprehend additional perpetrators; and (3) officers reasonably believed that these actions could not be postponed without risking the loss of necessary evidence, the identification or apprehension of additional suspects, or otherwise compromising the integrity of their investigation.[193] POV

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[179] See *In re Walters* (1975) 15 Cal.3d 738, 743.
[180] See *County of Riverside* v. *McLaughlin* (1991) 500 U.S. 44, 47.
[181] See *County of Riverside* v. *McLaughlin* (1991) 500 U.S. 44, 56; *Powell* v. *Nevada* (1994) 511 U.S. 79, 80 ["[*Riverside*] established that 'prompt' generally means within 48 hours of the warrantless arrest"].
[182] See *County of Riverside* v. *McLaughlin* (1991) 500 U.S. 44, 58; *Anderson* v. *Calderon* (9th Cir. 2000) 232 F.3d 1053, 1070 ["The *McLaughlin* Court made clear that intervening weekends or holidays would not qualify as extraordinary circumstances"].
[183] See *New York* v. *Harris* (1990) 495 U.S. 14, 18 ["Nothing in the reasoning of [*Payton* v. *New York*] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house."]; *People* v. *Watkins* (1994) 26 Cal.App.4th 19, 29 ["Where there is probable cause to arrest, the fact that police illegally enter a home to make a warrantless arrest neither invalidates the arrest itself nor requires suppression of any postarrest statements the defendant makes at the police station."]; Pen. Code § 836(a). **NOTE**: The United States Supreme Court indicated that even if a judge ordered the release of a suspect because of a post-arrest time limit violation, the suspect could be immediately rearrested if probable cause continued to exist. *New York* v. *Harris* (1990) 495 U.S. 14, 18.
[184] See *People* v. *Valenzuela* (1978) 86 Cal.App.3d 427, 431.
[185] Pen. Code § 825.
[186] See Pen. Code § 849(a); *Ng* v. *Superior Court* (1992) 4 Cal.4th 29, 38.
[187] *Ng* v. *Superior Court* (1992) 4 Cal.4th 29, 38; *People* v. *Gordon* (1978) 84 Cal.App.3d 913, 923; *O'Neal* v. *Superior Court* (1986) 185 Cal.App.3d 1086, 1090; *People* v. *Hughes* (2002) 27 Cal.4th 287, 326 [parole hold].
[188] See Pen. Code § 825(a)(2); *People* v. *Gordon* (1978) 84 Cal.App.3d 913, 922 ["Sunday was excludable"].
[189] See Pen. Code § 825(a)(2).
[190] See *People* v. *Gordon* (1978) 84 Cal.App.3d 913, 922.
[191] See Pen. Code § 825(a)(2).
[192] See *In re Walker* (1974) 10 Cal.3d 764, 778; *People* v. *Williams* (1977) 68 Cal.App.3d 36, 43.
[193] See *County of Riverside* v. *McLaughlin* (1991) 500 US 44, 54; *People* v. *Bonillas* (1989) 48 Cal.3d 757, 788.

Insert Disposition of Arrestees