

Citizen's Arrests

“There have been citizen arrests for as long as there have been public police—indeed much longer.”¹

Although citizens have been making arrests for centuries, the procedure can still be a little confusing, at least from the perspective of law enforcement officers. This is because citizens' arrests often place officers in a difficult situation.

Part of the difficulty is that officers are frequently required to assume the role of a neutral and detached judge under circumstances in which the parties may be quite agitated. Furthermore, officers must often make some quick legal and factual determinations that can have traumatic consequences on the parties and, strangely enough, even result in criminal charges against the officer.

The purpose of this article is to help make the situation a little less difficult by explaining the officer's legal responsibilities and reviewing the various decisions the officer may be required to make.² Among other things we will explain when a citizen may make an arrest, what the citizen must do to effect the arrest, and the officer's duties and responsibilities before and after the arrest has been made.

There are essentially two ways in which officers may be presented with a citizen's-arrest problem. First, there are situations in which the citizen made the arrest *before* officers arrived and is holding the suspect in custody. Second, there are situations in which an arrest has not yet been made, but at some point the citizen informs officers that he wants to arrest the suspect.

The procedure officers will follow will generally depend on which of these two situations they are confronting. As we will discuss later, officers are required by law to take custody of a person who has been arrested by a citizen. Consequently, if the arrest has already been made, the first thing officers must do is take the arrestee into custody. After that, they can sort out the facts and determine how best to proceed.

If, on the other hand, the arrest has not yet been made, officers can try to determine the facts before taking action. They may find that a citizen's arrest is justified and so advise the citizen. Or, they may determine there are no legal grounds to make a citizen's arrest and attempt to reason with the citizen. In either case, if the citizen makes an arrest, the officer must take the arrestee into custody although, as we will explain later, the officer will have some options after doing so.

WHEN PERMITTED

One of the first things an officer needs to determine is whether the citizen has a legal right to make an arrest. This will depend on whether the arrest is for a felony, misdemeanor or infraction.

Felonies

¹ *Spencer v. Lee* (7th Cir. 1989) 864 F.2d 1376, 1380.

² **NOTE:** The rules governing citizens' arrests also apply to arrests by officers who are acting outside their jurisdiction if they do not have statutory authority to perform peace-officer duties in that jurisdiction. See Penal Code §830.1 *et seq.*; *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1031; *People v. Monson* (1972) 28 Cal.App.3d 935, 940; *People v. Aldapa* (1971) 17 Cal.App.3d 184, 188; *People v. Lyons* (1971) 18 Cal.App.3d 760, 773; *People v. Martin* (1964) 225 Cal.App.2d 91, 94.

If the crime is a felony, the only requirement is that there be probable cause.³ In other words, the arrest will be lawful if the citizen was aware of facts that would cause a reasonable officer to believe there is a “fair probability” that the suspect committed the crime or attempted to do so.⁴

Two things should be noted. First, the felony need not be committed in the citizen’s presence.⁵ Second, for purposes of making a citizen’s arrest, a crime that can be prosecuted as either a felony or misdemeanor (commonly known as a “wobbler”) is considered a felony.⁶

Misdemeanors and infractions: The “in the presence” rule

A citizen’s arrest for a misdemeanor or infraction is a little more complicated than an arrest for a felony. There must, of course, be probable cause to arrest.⁷ But there must also be probable cause to believe the offense was committed in the citizen’s presence.⁸ As the court noted in *People v. Johnson*,⁹ “It is well established that the power to arrest for commission of a misdemeanor is dependent on the offense having been committed in the arresting person’s ‘presence.’”

In discussing this “in the presence” requirement, the Court of Appeal observed, “The requirement that the crime be committed in the [citizen’s] presence is construed liberally: it is sufficient if the acts became known to the [citizen] through his sensory perceptions.”¹⁰

³ See Penal Code §837.

⁴ See Penal Code §§837.2, 837.3; *Illinois v. Gates* (1983) 462 US 213, 238, 243, fn.13; *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1111 [“Probable cause to issue an arrest or search warrant [exists if] there is a fair probability that a person has committed a crime or a place contains contraband or evidence of a crime.”]; *People v. Rosales* (1987) 192 Cal.App.3d 759, 767-8 [“We see no reason why the full *Gates* rationale . . . should not be as fully applicable to the question of probable cause to support an arrest as it is to a search.”]; *People v. Superior Court (Thomas)* (1970) 9 Cal.App.3d 203, 208 [“Probable cause” for Fourth Amendment purposes means substantially the same as ‘probable cause’ for purposes of arrest without a warrant.”].

⁵ See Penal Code §§837.2, 837.3.

⁶ See Penal Code §17(b); *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1144 [a “wobbler” is a felony until court or prosecution reduces it to a misdemeanor].

⁷ NOTE: Although Penal Code §837.1 could be interpreted to mean that probable cause is not enough—that the circumstances must demonstrate the offense was *in fact* committed—such an interpretation has explicitly and implicitly been rejected by the courts. See *People v. Wilkins* (1972) 27 Cal.App.3d 763, 768-9; *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1031 [citizen’s arrest upheld when citizen “reasonably concluded [defendant] was in violation of Vehicle Code section 23152.”]; *Gomez v. Garcia* (1980) 112 Cal.App.3d 392, 397 [“While the statute [Penal Code §837] does not speak of ‘probable cause to believe’ an offense has been committed in the presence of the person making the arrest, the state of mind of such person of necessity comes into play in a hindsight analysis of whether the arrest was or was not lawful.”]; *Green v. DMV* (1977) 68 Cal.App.3d 536, 540 [“(A) warrantless arrest for an offense other than a felony must be based on *reasonable cause* to believe that the arrestee has committed the offense in the officer’s presence.” Emphasis added.]; *Johanson v. DMV* (1995) 36 Cal.App.4th 1209, 1216 *People v. Burgess* (1959) 170 Cal.App.2d 36, 40-1; *People v. Lee* (1984) 157 Cal.App.3d Supp. 9, 12. BUT ALSO SEE *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 587. A requirement of certainty also makes no sense because it would impose a standard of proof that is higher than that necessary to send a defendant to prison or to impose the death penalty.

⁸ See Penal Code §837.1; *Music v. DMV* (1990) 221 Cal.App.3d 841. NOTE: Re Infractions: Penal Code §837.1 authorizes a citizen’s arrest for a “*public offense* committed or attempted in [the citizen’s] presence.” Emphasis added. Both misdemeanors and infractions are “public offenses.” See Penal Code §§16 and 17; 80 Ops. Cal. Atty. Gen. 111; *People v. Wilkins* (1972) 27 Cal.App.3d 763, 768; *People v. Garcia* (1969) 274 Cal.App.2d 100; *People v. Sjosten* (1968) 262 Cal.App.2d 539,543; *People v. Campbell* (1972) 27 Cal.App.3d 849, 854.

⁹ (1981) 123 Cal.App.3d 495, 499.

¹⁰ *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1027. ALSO SEE *People v. Sjosten* (1968) 262 Cal.App.2d

For example, in *Padilla v. Meese*¹¹ a motorist informed an inspector at the Agricultural Inspection Station near South Lake Tahoe that a person driving a white Chevrolet pickup had been driving erratically. About two minutes later, a White Chevrolet pickup driven by Padilla stopped at the station. The inspector could smell “the odor of alcohol on [Padilla’s] breath and noted that his speech was slurred. He believed that [Padilla] had been drinking too much.” So he immediately notified the CHP. Padilla was still there when a CHP officer arrived a few minutes later. After determining that Padilla was under the influence, the officer took him into custody for DUI.

Although the court ruled the officer could not legally arrest Padilla because he had not actually seen him driving the truck, it ruled the inspector could have done so (and effectively did when he notified the CHP) because he had “observed [Padilla] drive his truck into the inspection station, and from his speech and the odor of alcohol about him [the inspector] reasonably concluded he was in violation of Vehicle Code section 23152.”

It should be noted that if probable cause to arrest exists but it turns out the crime was not committed in the citizen’s presence, the arrest may be invalid under state law but it is valid as far as the Fourth Amendment is concerned. Thus, evidence obtained as the result of the arrest will not be suppressed.¹²

“STALE MISDEMEANORS”: In some rather old California cases, the courts have interpreted the “in the presence” rule as prohibiting warrantless arrests for so-called “stale misdemeanors.” This term was used to describe a misdemeanor committed in the presence of the citizen who delayed making the arrest for an unreasonable period of time.¹³ Of course, a delay for the purpose of locating an officer would not be unreasonable if the citizen was diligent. But an unnecessary delay would probably render the misdemeanor “stale.” If this happens, an arrest would be permitted only if authorized by an arrest warrant.

Two things should be noted about the “stale misdemeanor” rule. First, a violation of the rule does not constitute a violation of the Fourth Amendment. Therefore, evidence obtained as the result of a stale misdemeanor arrest cannot be suppressed so long as there was probable cause. Second, the “stale misdemeanor” rule, if it exists at all, is sitting on very shaky legal ground. As far as we could determine, the only real authority for the rule is a brief observation in a California Supreme Court opinion filed in 1907.¹⁴

539, 543.

¹¹ (1986) 184 Cal.App.3d 1022.

¹² See *Barry v. Fowler* (9th Cir. 1990) 902 F.2d 770, 772. And as the result of California’s Proposition 8, evidence may be suppressed only if it was obtained in violation of the United States Constitution. See *People v. Hull* (1995) 34 Cal.App.4th 1448, 1455; *People v. Dyke* (1990) 224 Cal.App.3d 648, 657; *In re Lance W.* (1985) 37 Cal.3d 873; *People v. May* (1988) 44 Cal.3d 309; *People v. Plyler* (1993) 18 Cal.App.4th 535, 544; *People v. Arangure* (1991) 230 Cal.App.3d 1302, 1305; *People v. Deltoro* (1989) 214 Cal.App.3d 1417, 1423-4; *People v. Banks* (1990) 217 Cal.App.3d 1358, 1362-3; *In re Charles C.* (1999) 76 Cal.App.4th 420, 426-7.

¹³ See *People v. Craig* (1907) 152 Cal. 42, 47; *Hill v. Levy* (1953) 117 Cal.App.2d 667, 670 [“(A)n arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the person making the arrest.”]; *Jackson v. Superior Court* (1950) 98 Cal.App.2d 189, 188 [“(I)n order to justify an arrest without warrant the arrestor must proceed as soon as may be to make the arrest. And if instead of doing that he goes about other matters unconnected with the arrest, the right to make the arrest without a warrant ceases, and in order to make a valid arrest he must then obtain a warrant.”]; *People v. Hampton* (1985) 164 Cal.App.3d 27, 30-1.

¹⁴ See *People v. Craig* (1907) 152 Cal. 42, 47 [“It seems to be generally held that an arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the arresting officer. . . .”].

EXCEPTIONS TO THE “IN THE PRESENCE” RULE: If an officer determines that a misdemeanor was not committed in the citizen’s presence and, therefore, a citizen’s arrest would be unlawful, the *officer* may make the arrest if there is probable cause to arrest and one of the following circumstances exists:

- MINORS: The suspect is a minor¹⁵
- DUI PLUS: The arrestee was driving under the influence of alcohol or drugs, *plus*: (1) the arrestee was involved in auto accident; (2) the arrestee was in or about a vehicle obstructing a roadway; (3) the arrestee would not be caught unless immediately arrested; (4) the arrestee may injure himself or damage property unless he was immediately arrested; or (5) the arrestee may destroy or conceal evidence unless immediately arrested.¹⁶
- ASSAULT ON SCHOOL PROPERTY: Arrest for assault or battery on school property during hours when school activities were being conducted.¹⁷
- CARRYING LOADED FIREARM: Arrest for carrying a loaded firearm in violation of Penal Code §12031.¹⁸
- CONCEALED FIREARM IN AIRPORT: Arrest for carrying a concealed firearm in an airport.¹⁹
- VIOLATION OF DOMESTIC VIOLENCE PROTECTIVE ORDER: Arrest for violating a domestic violence protective order or restraining order if there is probable cause to believe the arrestee had notice of the order.²⁰
- DOMESTIC VIOLENCE: Arrest for assault on the arrestee’s spouse, a cohabitant, or the other parent of the arrestee’s child.²¹
- ASSAULT ON FIREFIGHTER, EMT: Arrest for assault on firefighter, EMT, or paramedic engaged in performance of duties.²²

ARREST PROCEDURE

If a citizen has a legal right to arrest the suspect and elects to do so, there is a procedure that should be followed. This procedure can be divided into three parts: (1) taking the suspect into custody, (2) formalizing the arrest, and (3) transferring custody to an officer.

Taking the suspect into custody

A citizen who has a legal right to arrest the suspect may take the suspect into custody.²³ This can, of course, be dangerous and foolish.²⁴ Consequently, the law permits the citizen to delegate

¹⁵ See W&I Code §625; *In re Samuel V.* (1990) 225 Cal.App.3d 511.

¹⁶ See Vehicle Code §40300.5; *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029; *Music v. DMV* (1990) 221 Cal.App.3d 841.

¹⁷ See Penal Code §243.5.

¹⁸ See Penal Code §12031(a)(3).

¹⁹ See Penal Code §836(e).

²⁰ See Penal Code §836(c)(1).

²¹ See Penal Code §836(d).

²² See Penal Code §836.1.

²³ See Penal Code §835; *People v. Johnson* (1981) 123 Cal.App.3d 495, 499. NOTES: Use of force: If the suspect resists, the citizen may use reasonable force. See *People v. Garcia* (1969) 274 Cal.App.2d 100, 105. Time of arrest: Although an arrest for a misdemeanor may not ordinarily be made between 10 P.M. and 6 A.M., this rule does not apply to citizen’s arrests. See Penal Code §840(1).

²⁴ See *Green v. DMV* (1977) 68 Cal.App.3d 536, 541 [“Very wisely, [the citizen] chose to enlist the aid of the police in effectuating the arrest rather than risking his own safety.”]; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 544 [“Frequently, it is most prudent for a private citizen to summon a police officer to assist in making the arrest.”].

to officers the duty of physically arresting the suspect.²⁵ As the Court of Appeal noted in a misdemeanor case, “It is well established that a citizen in whose presence a misdemeanor has been attempted or committed may effect a citizen’s arrest and in so doing may both summon the police to his aid and delegate to police the physical act of taking the offender into custody.”²⁶

IMPLIED DELEGATION OF AUTHORITY: In most cases, the citizen’s delegation of authority to officers is implied from the surrounding circumstances. Although no specific words or actions are required, it must reasonably appear the citizen *intended* to arrest the suspect. Such an intent is typically found if the citizen:

- (1) Requested police assistance or otherwise notified police of the crime; and
- (2) Took steps to keep the suspect on the scene or learn the suspect’s whereabouts, either of which could reasonably indicate an intent that the suspect be taken into custody when officers arrived.

As the court stated in *Padilla v. Meese*,²⁷ “[T]he delegation of the physical act of arrest need not be express, but may be implied from the citizen’s act of summoning an officer, reporting the offense, and pointing out the suspect.”

For example, in *Green v. DMV*²⁸ a man named Baughn saw Green driving erratically. Suspecting Green was drunk, Baughn followed her until she pulled into the driveway of her home and stopped. At that point, Baughn decided to arrest her but “was afraid to drag [Green] out of her car and arrest her unassisted.” So he went looking for an officer and, when he found one, notified him of what he had seen. Other officers were dispatched to Green’s home. They found her asleep in her car, ordered her out, observed that she appeared to be quite drunk and, apparently in the view of the trial judge, “arrested” her.

The court ruled that if the officers had, in fact, arrested Green it was a lawful arrest. Although it was true the officers had not actually observed Green driving the car, and it was also true that Baughn had not expressly delegated to them his right to make an arrest, the court ruled “the police were acting as agents assisting in effectuating Baughn’s citizen’s arrest.

Similarly, in *People v. Johnson*²⁹ a man named Weatherford observed Johnson carrying a club and prowling around some homes in San Jose. While Weatherford’s wife phoned police and furnished them with a physical description of the prowler, Weatherford followed Johnson for a while, then returned home. When officers arrived, Weatherford pointed out where he had last seen the prowler. A few minutes later, officers arrested Johnson after spotting him in the area and noticing he matched the description provided by Weatherford. They then transported him to Weatherford who made a formal citizen’s arrest.

In discussing the legality of the initial arrest by the officers, the court determined that, although the officers could not have lawfully arrested Johnson on their own authority, they were acting as Weatherford’s delegates or agents. Although it was true Weatherford did not expressly delegate his authority to make the arrest, the court ruled he had impliedly done so, and this was sufficient. Said the court, “Weatherford’s actions in summoning police, following the suspect,

²⁵ See Penal Code §839; *People v. Campbell* (1972) 27 Cal.App.3d 849, 854 [“[The citizen] had the right to delegate the physical act of taking an offender into custody to [police officers].”]; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 544 [“(Penal Code §839) impliedly authorizes the delegation of the physical act of taking an offender into custody.”]; *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1030 [“A citizen may make an arrest for a misdemeanor committed in his presence. In doing so he may delegate the act of taking the suspect into physical custody.”], 1032.

²⁶ *People v. Johnson* (1981) 123 Cal.App.3d 495, 499.

²⁷ (1986) 184 Cal.App.3d 1022, 1030 [citing *People v. Johnson* (1981) 123 Cal.App.3d 495, 499].

²⁸ (1977) 68 Cal.App.3d 536. ALSO SEE *People v. Harris* (1967) 256 Cal.App.2d 455, 458-9; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 544-5.

²⁹ (1981) 123 Cal.App.3d 495.

pointing the suspect's whereabouts to police, and thereafter effecting a citizen's arrest, reasonably support the inference that it was his intention that the prowler be arrested and that had he known at the outset that it was necessary for him to effect the arrest, he would have delegated that authority to the police, as the law allows him to do."

Arrest formalities

Either before or after the suspect is taken into custody, he must be formally arrested.³⁰ There are no "magic words" the citizen must recite to the suspect in order to effect the arrest.³¹ In fact, the arrest may be effected without any words at all when, for example, the citizen "took defendant by the arm and told him he was going to call the police"³²; or when the citizen "told the officers that he wanted defendant arrested"³³; or when a citizen who witnessed a misdemeanor hit and run detained the driver, notified police, and told them what he had seen.³⁴

There are, however, certain formalities that should ordinarily be observed, especially if officers are present when the arrest occurs and are able to advise the citizen of the correct procedure. The basic formality is to notify the suspect he is under arrest and that it is a citizen's arrest.³⁵ In addition, if there has been a significant time lapse between the commission of the offense and the arrest, the citizen should also briefly explain the facts justifying the arrest.³⁶

Finally, if the suspect says he wants to know the specific offense for which he is being arrested, the citizen or the officer must inform him.³⁷ It should be noted that if it turns out the citizen or officer were mistaken as to the offense that was committed, the arrest will not be invalidated so long as there was probable cause to arrest for any felony or a misdemeanor that was committed in the citizen's presence or was exempt from this requirement.³⁸

Although the arrest should be made by the citizen who is effecting it, for various reasons the citizen may be unable or unwilling to confront the suspect and inform him he is under arrest. Again, this duty may be delegated to officers so long as the citizen clearly understands that, as far as the law is concerned, *he* is the person making the arrest and that he is simply delegating to

³⁰ See Penal Code §841.

³¹ See *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1032 ["In considering whether a citizen's arrest was made, and the legality thereof, it is the substance and not any 'magic words' which we must consider."]; *Johanson v. DMV* (1995) 36 Cal.App.4th 1209, 1217.

³² See *People v. Garcia* (1969) 274 Cal.App.2d 100, 105.

³³ See *People v. Johnson* (1969) 271 Cal.App.2d 51, 52-3.

³⁴ See *People v. Harris* (1967) 256 Cal.App.2d 455, 459.

³⁵ See Penal Code §841. ALSO SEE *People v. Harris* (1967) 256 Cal.App.2d 455, 459 [informing the suspect he is under arrest is not required "where the accused is pursued immediately after the offense."]; *People v. Garcia* (1969) 274 Cal.App.2d 100, 105 [citizen's arrest occurred when the citizen "took defendant by the arm and told him he was going to call the police."]. NOTE: Notifying suspect he is under arrest was not required when the suspect was taken into custody during the commission of the offense or in fresh pursuit afterwards. See *People v. Campbell* (1972) 27 Cal.App.3d 849, 854; *People v. Sjosten* (1968) 262 Cal.App.2d 539, 545.

³⁶ See Penal Code §841; *Johanson v. DMV* (1995) 36 Cal.App.4th 1209, 1218 ["When there is an appreciable lapse in time such that the person arrested would not necessarily be familiar with the circumstances justifying the arrest, Penal Code section 841 requires a formal advisement. That is not the case here, where the circumstances justifying Johnson's arrest and his arrest constituted one brief and continuous course of events."].

³⁷ See Penal Code §841.

³⁸ See *People v. Kelley* (1969) 3 Cal.App.3d 146, 151 ["The officer's announcement of the wrong offense did not make the arrest unlawful."]; *People v. Harris* (1967) 256 Cal.App.2d 455, 459; *Gomez v. Garcia* (1980) 112 Cal.App.3d 392, 397. ALSO SEE *Johanson v. DMV* (1995) 36 Cal.App.4th 1209, 1217.

the officers this authority to do so.³⁹

For example, in *People v. Sjosten*⁴⁰ a woman saw a prowler outside her home at about midnight and notified police. Shortly thereafter, officers detained a suspect and asked the woman to look out her window to see if he was the prowler. She positively identified the man, said she wanted to make a citizen's arrest, and signed a citizen's arrest form. But "because she was in her robe and nightgown," she asked an officer to formally place the suspect under arrest. In ruling this procedure was proper under the circumstances, the court said, "The fact that she did not physically confront appellant is not significant. It is sufficient that she directed the officer to make the arrest and observed him doing so from her window."

TRANSPORTING SUSPECT TO CITIZEN: If a citizen informs officers that he or she wants to arrest a certain suspect who is detained elsewhere by officers, the officers may want to transport the suspect to the citizen for purposes of having the citizen formally arrest the suspect. The legal issue here is as follows:

The officers' act of transporting the suspect ordinarily constitutes a *de facto* arrest. But if the crime under investigation is a misdemeanor, the officers cannot lawfully arrest the suspect because the crime did not occur in their presence. Thus, it could be argued that any subsequent ID of the suspect or other evidence obtained during or after transport was the "fruit" of an illegal arrest and must be suppressed.

The Court of Appeal, however, has rejected such reasoning, ruling instead that officers may transport the detained suspect to the citizen to have him formally arrested if they have "probable cause to believe that the suspect committed an offense, but are prevented by statute from themselves making the arrest."⁴¹

Officer takes custody

If the suspect is in the physical custody of the citizen when officers arrive, officers must—"without unnecessary delay"—take custody of the suspect.⁴² This is an absolute requirement. Pursuant to California law, if officers refuse to do so, they may be charged with a felony.⁴³

It appears the reason for this requirement, and the rather severe penalty for violating it, was "to minimize the potential for violence when a private person restrains another by a citizen's arrest by requiring that a peace officer (who is better equipped by training and experience) accept custody of the person arrested from the person who made the arrest."⁴⁴

Two things should be noted. First, the officer's act of taking custody of the suspect does not constitute an arrest by the officer.⁴⁵ The arrest was made by the citizen; the officer is simply accepting a transfer of custody from the citizen as required by California law. Consequently, the officer cannot be sued for false arrest or false imprisonment for accepting custody.⁴⁶

³⁹ See *Johanson v. DMV* (1995) 36 Cal.App.4th 1209, 1217.

⁴⁰ (1968) 262 Cal.App.2d 539.

⁴¹ *People v. Johnson* (1981) 123 Cal.App.3d 495, 500.

⁴² See Penal Code §§142, 847, 849; *People v. Pringle* (1984) 151 Cal.App.3d 854, 857; *Kinney v. County of Contra Costa* (1970) 8 Cal.App.3d 761, 767; *People v. Harris* (1967) 256 Cal.App.2d 455, 459. NOTES: This requirement is stated somewhat differently in Penal Code §847 which requires the citizen to "deliver" the suspect to a peace officer or take the suspect to a magistrate. The citizen may also deliver the suspect to "the nearest or most accessible magistrate in the county in which the offense is triable." See Penal Code §849(a).

⁴³ See Penal Code §142.

⁴⁴ See 73 Ops. Cal. Atty. Gen. 291, 295.

⁴⁵ See *People v. Harris* (1967) 256 Cal.App.2d 455, 459-60; *In re Roland K.* (1978) 82 Cal.App.3d 295, 298.

⁴⁶ See Penal Code §847(c); *Kinney v. County of Contra Costa* (1970) 8 Cal.App.3d 761, 768-9 ["But we are

Second, if the suspect is inside his home or the home of someone else when officers arrive, they are not required to enter the home without a warrant for the purpose of arresting the suspect. This is because the requirement that officers take custody of the suspect applies only if the officer “has the authority to receive or arrest” the suspect.⁴⁷ Under California and federal law, officers do not have authority to enter a home to arrest an occupant unless they have a warrant or there were exigent circumstances that justified an immediate warrantless entry.⁴⁸

Options after officer takes custody

Although officers are required to accept custody from the citizen, they are not required to transport the suspect to jail. Instead, depending on the circumstances, they have the following options: (1) book the suspect into jail, (2) issue a notice to appear and release the suspect after he signs it,⁴⁹ or (3) release the suspect without issuing a notice to appear.

This third option—an unconditional release—is permitted if officers are satisfied “there are insufficient grounds for making a criminal complaint against the person arrested.”⁵⁰ As the Court of Appeal observed, California law “permits a peace officer, when a person has been arrested by a private citizen and delivered to him to release the arrested person from custody if he, the peace officer, is satisfied that there is no ground for making a criminal complaint against the person arrested.”⁵¹

SEARCHING THE ARRESTEE

A citizen who makes a citizen’s arrest may seize any weapons in the arrestee’s possession⁵² and any evidence in plain view.⁵³ The citizen may not, however, search the arrestee for evidence⁵⁴ unless the citizen is a merchant who is authorized to do so under California’s “merchant privilege.”⁵⁵ Nevertheless, if a citizen conducts an illegal search, any evidence discovered as the result will not be suppressed unless the citizen was acting a “police agent.”⁵⁶

presented with no authority, and we find none, holding that a peace officer, required to take custody of a person arrested by a private citizen, must at his peril *correctly* adjudge whether the citizen had probable cause. The means of information would ordinarily be scant and any error on the officer’s part would be costly; should he incorrectly find no probable cause and refuse custody he would face criminal sanctions, while a faulty contrary decision would subject him to civil liability to the person arrested. Such an application of the Fourth Amendment would be unreasonable.”]; *Shakespeare v. City of Pasadena* (1964) 230 Cal.App.2d 375, 382; *People v. Pringle* (1984) 151 Cal.App.3d 854.

⁴⁷ See Penal Code §142.

⁴⁸ See *Payton v. New York* (1980) 445 US 573; *People v. Ramey* (1976) 16 Cal.3d 263.

⁴⁹ NOTE: Only the officer—not the arresting citizen—may issue a citation or notice to appear. See 74 Ops. Cal. Atty. Gen. 37, 39.

⁵⁰ See Penal Code §849(b)(1); 73 Ops. Cal. Atty. Gen. 291, 295-6.

⁵¹ *Kinney v. County of Contra Costa* (1970) 8 Cal.App.3d 761, 767.

⁵² See Penal Code §846.

⁵³ See *Payton v. New York* (1980) 445 US 573, 587; *Horton v. California* (1990) 496 US 128, 136; *Minnesota v. Dickerson* (1993) 508 US 366, 375; *People v. Bush* (1974) 37 Cal.App.3d 952, 957.

⁵⁴ See *People v. Martin* (1964) 225 Cal.App.2d 91, 95.

⁵⁵ See Penal Code §490.5(f)(4).

⁵⁶ See *People v. Wharton* (1991) 53 Cal.3d 522, 579; *People v. De Juan* (1985) 171 Cal.App.3d 1110, 1120; *United States v. Jacobsen* (1984) 466 US 109, 113; *People v. Baker* (1970) 12 Cal.App.3d 826, 834; *People v. Taylor* (1990) 222 Cal.App.3d 612, 619; *People v. Cheatham* (1968) 263 Cal.App.2d 458, 462. NOTE: As a practical matter, a citizen will be deemed a police agent only if officers requested, planned or facilitated the search (See *California v. Greenwood* (1988) 486 US 35, 39; *Lugar v. Edmondson Oil Co.* (1982) 457 US 922, 937; *United States v. Jacobsen* (1984) 466 US 109, 113; *People v. Bennett* (1998) 17 Cal.4th 373, 383, fn.2; *Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 333; *People v. Leighton* (1981) 124 Cal.App.3d 497,

An officer who takes custody of the arrestee from the citizen may, depending on the circumstances, be permitted to conduct the following types of searches:

PAT SEARCH: A pat search is permitted if officers reasonably believe, (1) the arrestee is in possession of a weapon, or (2) he constitutes a danger to officers or others.⁵⁷

SEARCH INCIDENT TO ARREST: A search incident to arrest is permitted if, (1) there is probable cause to arrest the suspect; (2) the suspect will be transported to jail, the police station, or, in the case of a minor, to his home; and (3) the search occurred at or near the time of the arrest. Officers who are conducting a search incident to arrest may search the arrestee, the area within the arrestee's "immediate control," and all personal property and containers in the arrestee's possession at the time of arrest.⁵⁸

SEARCH FOR PROPERTY STOLEN FROM MERCHANT: Regardless of whether the suspect will be transported to jail or some other location, an officer who accepts custody of a person arrested by a merchant having probable cause to believe the arrestee has stolen retail merchandise may search the arrestee and his immediate possessions for such merchandise.⁵⁹ END

501; *People v. Tarantino* (1955) 45 Cal.2d 590; *Raymond v. Superior Court* (1971) 19 Cal.App.3d 321; *People v. Fierro* (1965) 236 Cal.App.2d 344; *People v. North* (1981) 29 Cal.3d 509, 515) or if officers were aware the citizen would conduct or was conducting an illegal search but failed to intervene. (See *People v. Mangiefico* (1972) 25 Cal.App.3d 1041, 1047; *Stapleton v. Superior Court* (1968) 70 Cal.2d 97, 103).

⁵⁷ See *Terry v. Ohio* (1968) 392 US 1, 27-8; *Ybarra v. Illinois* (1979) 444 US 85, 93-4; *Adams v. Williams* (1972) 407 US 143; *People v. Suennen* (1980) 114 Cal.App.3d 192, 199; *People v. Williams* (1992) 3 Cal.App.4th 1100, 1104; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1240; *People v. Dickey* (1994) 21 Cal.App.4th 952, 956.

⁵⁸ See *Chimel v. California* (1969) 395 US 752; *United States v. Chadwick* (1977) 433 US 1, 14-5; *Preston v. United States* (1964) 376 US 364, 367; *Gustafson v. Florida* (1973) 414 US 260, 266; *People v. Limon* (1993) 17 Cal.App.4th 524, 538; *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243-4; *People v. Methey* (1991) 227 Cal.App.3d 349, 358-9; *People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1005-6; *People v. Ingham* (1992) 5 Cal.App.4th 326, 331. **NOTE:** The citizen making the arrest does not have a legal right to conduct a search incident to the arrest. See *People v. Martin* (1964) 225 Cal.App.2d 91, 95.

⁵⁹ See Penal Code §490.5(f)(6).