# Recent Case Report

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## People v. Leal

(2009) __ Cal.App.4th __ [2009 WL 3470629]

### Issue

If officers arrest a suspect in a residence, do they lose the right to search the area within his control if they wait until the scene had been secured?

### Facts

Salinas police officers went to Leal's home at about 5 P.M. to arrest him on two misdemeanor warrants. Based on information they had obtained from Leal's grandmother, they had reason to believe that he was using drugs, that he was a gang member, and that he might be armed with a gun. When the officers knocked on the door, Leal yelled, "Who's there?" One of the officers identified himself as a Salinas police officer and asked him to open the door but he refused. And he continued to refuse for the next 45 minutes. When he finally opened up, he was arrested as he stood at the threshold.

As one of the officers was walking Leal to a patrol car, the others conducted a protective sweep. Then, after determining that no one else was present, they searched the area that was within Leal's immediate control when he was arrested. On a chair next to the doorway they found a loaded semiautomatic handgun. After Leal's motion to suppress the weapon was denied, he pled no contest to possession of a firearm with an obliterated serial number.

### Discussion

Leal contended that the search was illegal, arguing that a search of a residence should not be deemed "incident" to the arrest of an occupant if it occurred after the arrestee had been taken outside. Although a substantial number of courts have ruled otherwise (see the comment, below), the court agreed and ruled that officers who have arrested a suspect inside a residence forfeit the right to conduct a search of the premises incident to the arrest if they wait until the scene has been secured. Consequently, the court ruled that Leal's handgun should have been suppressed.

### Comment

In 1969, the United States Supreme Court ruled in *Chimel* v. *California*[1] that officers who have arrested a person inside a residence may, as an incident to the arrest, search the area within the arrestee's immediate control, meaning the area within his grabbing or lunging distance. And for almost 40 years, courts throughout the country interpreted *Chimel* as permitting searches of the area within the arrestee's immediate control *at the time he was arrested*.

The reason they did not restrict the search to places and things in the arrestee's immediate control *at the time of the search*—as did the court in *Leal*—was that, given the officers' absolute right to search the area near the arrest site, it makes no sense to deprive them of this right if they waited until they could do it safely. As the court explained in *People* v. *Rege*:

[1] *Chimel* v. *California* (1969) 395 U.S. 752.

> [F]ollowing the lead of the Supreme Court, the federal circuits have recognized the folly of promulgating a rule designed to enable the police to protect themselves and interpreting it to require them to put themselves at risk in order to take advantage of it. Phrased less circuitously, it makes no sense to condition a search incident to arrest upon the willingness of police to remain in harms way while conducting it.[2]

For example, in rejecting the rule imposed by the court in *Leal*, the courts have noted the following:

- "Indeed, if the courts were to focus exclusively upon the moment of the search, we might create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer."[3]
- "[I]t is well-settled that officers may separate the suspect from the container to be searched, thereby alleviating their safety concerns, before they conduct the search."[4]
- "[I]t does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures."[5]

But the two justices who decided *Leal* concluded that the reasoning of the judges and justices who decided these cases was "flawed" because they had all mistakenly assumed that officers have a right or duty to conduct a search at some point when, in reality, they can adequately protect themselves by quickly leaving the premises after making the arrest. Said the court, "The fundamental flaw in the analysis contained in the cases we have criticized is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful."

Following this logic, however, officers could seldom search the area within the arrestee's immediate control because they can almost always alleviate any immediate threat by quickly removing the arrestee from the premises, walking swiftly to their cars, and making a quick departure. And, of course, if they did not do this—if they conducted the search while the arrestee still posed a threat—a court having the *Leal* court's mindset would rule that the search was illegal because it was pretextual.

In any event, the court ignored the fact that there are simply too many variables in in-home arrest situations to impose such a "one size fits all" rule. As the United States Supreme Court observed:

> The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter . . . [U]nlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.[6]

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[2] (2005) 130 Cal.App.4th 1584, 1590 [quoting *People* v. *Summers* (1999) 73 Cal.App.4th 288, 295 (conc. opn. of Bedsworth, J.).

[3] *U.S.* v. *Abdul-Saboor* (D.C. Cir 1996) 85 F.3d 664, 669. ALSO SEE *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1419.

[4] *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 542.

[5] *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607.

[6] *Maryland* v. *Buie* (1990) 494 U.S. 325, 333.

For example, in most cases officers will not have grounds to conduct a protective sweep, which necessarily increases the number of unknowns that exist when officers are on their "adversary's turf." And even though the officers in *Leal* had conducted a sweep, the totality of circumstances gave them good reason to worry. Specifically, they knew that Leal was a gang member, and that he might be armed with a gun, which meant there was reason to believe there was a firearm nearby. Moreover, he had just engaged the officers in a standoff for 45 minutes, and they had no way of knowing what he was doing during this time. Despite all this, the court cheerfully announced that there was "no threat to the officers."

A more fundamental error in *Leal* was the court's belief that a search is unconstitutional if it did not absolutely further the particular law enforcement need upon which it was based. In reality, many Fourth Amendment rules that are not based on the "totality of the circumstances" test—such as *Chimel*—represent a compromise between the interests of law enforcement and the interests of suspects. Most courts understand this and are not under the misapprehension that every search that is authorized by a "bright line" rule will be absolutely necessary. Instead, they realize that sometimes—especially in dangerous situations—it is necessary to provide officers with clear-cut rules so they can know ahead of time exactly what they can and cannot do.[7] For example, the courts routinely rule that officers who have detained a suspected drug seller may pat search him, even if there were several other circumstances indicating he did not pose a threat.

Finally, it should be noted that, even if the search in *Leal* had been illegal, the court erred by suppressing Leal's gun because suppression is appropriate only if an officer's conduct was "reckless or grossly negligent."[8] But, as noted earlier, the officers in *Leal*—far from being grossly negligent—complied fully with what has been described as "well settled" law.[9] Undeterred, the court ruled that the law is "muddled" and that the officers were guilty of misconduct by failing to unmuddle it. That's rich. The court admitted that all but one of the cases it cited would have upheld the officers' search,[10] but declared that

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[7] **NOTE**: It is true that the U.S. Supreme Court also neglected this principle when it ruled in *Arizona* v. *Gant* (2009) __ US __ [2009 WL 1045962] that officers may not conduct vehicle searches incident to the arrest of an occupant unless the arrestee had immediate access to the passenger compartment. But, as we discussed in our report on *Gant,* it was a horribly flawed decision.

[8] See *Herring* v. *United States* (2009) __ U.S. __ [the purpose of the exclusionary rule is "to deter deliberate, reckless, or grossly negligent conduct].

[9] *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 542.

[10] **NOTE**: The court claimed to have found one case that supported its decision: *People* v. *Summers* (1999) 73 Cal.App.4th 288. In *Summers*, the court upheld a search of a residence incident to an arrest when the search occurred while the arrestee was being escorted to a police car. But the court in *Leal* was mistaken in its belief that *Summers* supported its ruling. As Justice Bedsworth noted in his dissenting opinion in *Summers*, the court did not decide the issue upon which the *Leal* court based its ruling: "Does the removal of an arrestee from an area vitiate the right of law enforcement officers to search that area incident to his arrest? *By not facing this issue today*, we leave California police uncertain about the scope of their authority to search incident to arrest. That will force some officers to forego such searches and cause more reckless ones to contest their arrestees in a deadly jump ball for evidence and weapons, instead of removing them and returning for a safe search." Emphasis added.

these cases were decided incorrectly, then proclaimed that the law had become "muddled" but—and these are the court's words— "not sufficiently muddled" to generate the requisite level of confusion among officers to trigger the good faith rule. This sounds like a skit from Saturday Night Live. But no one is laughing, except Mr. Leal. POV

The court in *Leal* also ignored the United States Supreme Court's warning in *United States* v. *Knights* (2001) 534 U.S. 112 that courts should not decide cases by means of the "dubious logic" of citing a case (such as *Summers*) that upholds a certain search or seizure, and then ruling that the search at issue is unlawful because it was "not like it"; viz, it is "dubious logic . . . that an opinion *upholding* the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it . . . ." At p. 117.