POINT of VIEW

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Arrests

In traditional terminology, arrests are seizures of the person which eventuate in a trip to the station house and prosecution for crime.[1]

Television crime dramas frequently end with someone getting arrested. It's portrayed as a simple process that involves nothing more than an officer saying "You're under arrest" and the announcer saying "Stay tuned for previews of next week's show." In reality, of course, it's much more complicated than that. For one thing, an arrest requires probable cause, a subject we have covered in multiple editions over the years. It also requires compliance with more technical rules, some based on the Fourth Amendment, others on California statutes. These rules cover everything from giving certain notifications, searches incident to arrest, the use of force, the post-arrest procedure, entering a home to arrest an occupant, and arrest warrants. We will cover all of these subjects in this edition.

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, as noted, is defined as a seizure of a person for the purpose of making him available to answer pending or anticipated criminal charges.[2] A conventional arrest occurs when the suspect was told he was under arrest, although the arrest does not technically occur until the suspect complies with the officer's directions or is physically restrained.[3]

The other two are de facto arrests and traffic arrests. De facto arrests occur inadvertently when a detention becomes unduly prolonged or unreasonably intrusive. For example, a de facto arrest will ordinarily result if officers transported the detainee to another location without his consent.[4] A traffic arrest occurs when an officer stops a vehicle for a traffic violation. Although most stopped drivers do not consider themselves "arrested," it is technically an arrest when the officer has probable cause and the purpose of the stop is to enforce the law.[5] We will not cover traffic arrests because they are subject to the rules pertaining to investigative detentions, not conventional arrests.[6]

Notification Requirements

Under California law, officers who have made an arrest must notify the arrestee of certain things, although a failure to do so will not render the arrest illegal .[7] Note that the notification requirements are the same regardless of whether the suspect was arrested for a felony or misdemeanor, and regardless of whether the arrest was made with or without an arrest warrant.

Notification of arrest: Officers must notify the arrestee that he is under arrest.[8] This can be accomplished expressly ("You're under arrest") or by any other words or conduct that would indicate to a reasonable person that he was under arrest.[9]

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[1] *Terry v. Ohio* (1968) 392 U.S. 1, 16. Edited.
[2] See *Virginia v. Moore* (2008) 553 U.S. 164, 173; *People v. Harris* (1967) 256 Cal.App.2d 455, 459.
[3] See *California v. Hodari D.* (1991) 499 U.S. 621, 624.
[4] See *Florida v. Royer* (1983) 460 U.S. 491, 504-506.
[5] 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. $404,907* (8th Cir. 1999) 182 F.3d 643, 648 ["A traffic stop is not investigative; it is a form of arrest, based upon probable cause."].
[6] See *Berkemer v. McCarty* (1984) 468 U.S. 430, 439, fn.29.
[7] See *Devenpeck v. Alford* (2004) 543 U.S. 146, 155 ["we have never held [notification] to be constitutionally required"]; *U.S. v. Davis* (9th Cir. 1991) 932 F.3d 752, 758.
[8] See Pen. Code § 841.
[9] See *Lowry v. Standard Oil Co.* (1942) 54 Cal.App.2d 782, 791.

SPECIFY AUTHORITY: Officers must notify the arrestee of their authority.[10] This requirement is satisfied if the officer was in uniform or displayed a badge.[11] If it is impractical for officers in plain clothes to immediately identify themselves, they should do so when they can.[12]

SPECIFY CRIME: Informing the arrestee of the crime for which he was arrested is "good practice,"[13] but it is not required unless the arrestee asked.[14] If officers had probable cause to arrest the suspect for some crime, it is immaterial that they mistakenly arrested him for a crime that was not supported by probable cause.[15] As the Court of Appeal noted, "[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."[16]

Time of Arrest

If the crime was a felony or a "wobbler" (i.e., a crime that could be prosecuted as either a felony or a misdemeanor) officers may arrest the suspect at any time of the day or night.[17] If, however, the crime was a straight misdemeanor, the arrest must be made between the hours of 6 A.M. and 10 P.M.,[18] unless one of the following exceptions applies:

- Crime was committed in officer's presence.
- The arrest occurred in a public place; i.e., a place in which the suspect lacked a reasonable expectation of privacy.
- Arrest for domestic assault, and the arrest was made "as soon as probable cause arises."
- Arrest for violation of a domestic violence protective or restraining order and the officers had probable cause to believe the suspect had notice of the order.
- Arrest pursuant to a night service warrant.
- Citizens arrest.
- Arrestee was in custody on another matter.[19]

Use Of Force

Because it would be impractical to establish precise requirements for using particular degrees of force, the use of force is governed by a basic rule: the use of force must have been reasonably necessary under the circumstances. Like other police actions that are governed by the standard of "objective reasonableness," this means that a particular use of force is permissible if its necessity outweighed its intensity.[20] As the Supreme Court explained, "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 interest at stake."[21]

The problem is that these decisions must be made quickly and often under extreme pressure, which means there is not much time to conduct any kind

[10] Pen. Code § 841.

[11] Pen. Code § 841; *People v. Logue* (1973) 35 Cal.App.3d 1, 5 ["A police officer's uniform is sufficient indicia of authority to make the arrest."].

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

[13] See *Devenpeck v. Alford* (2004) 543 U.S. 146, 155.

[14] See Pen. Code § 841.

[15] See *In re Justin K.* (2002) 98 Cal.App.4th 695, 699 ["[The officer's] subjective understanding of the statutory scheme respecting stoplamps is not dispositive [s]o long as his conduct was objectively reasonable."]; *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1262 ["[E]ven if the trial court believed [the Bakersfield officer] only arrested defendant on the [Bakersfield] case, the arrest was still valid because [the officer] had probable cause to arrest defendant on the [Kern County] case."].

[16] *People v. White* (2003) 107 Cal.App.4th 636, 641.

[17] See Pen. Code §§ 17(b), 840; *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1144 ["[A] wobbler [is] an offense that confers discretion as to felony or misdemeanor punishment [and it] becomes a misdemeanor only after the judgment and hence retains its felony character for purposes of the limitations period."].

[18] See Pen. Code § 840.

[19] See Pen. Code §§ 836, 837, 840. Also see *United States v. Santana* (1976) 427 U.S. 38, 42.

[20] See *Scott v. Harris* (2007) 550 U.S. 372, 383; *Tekle v. U.S.* (9th Cir. 2006) 511 F.3d 839, 845.

[21] *Graham v. Connor* (1989) 490 U.S. 386, 396.

of cognitive test. With this in mind, the Supreme Court said, "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."[22] Or, as the Court of Appeal put it, "We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day."[23]

Necessity

In applying the balancing test, the courts will first identify the need for the force and the strength of that need.[24] Although they will consider the totality of circumstances in making these determinations, the "most important" is the extent to which the suspect "posed an immediate threat to the safety of the officers or others."[25] Thus, the most relevant circumstances are whether the suspect was actively resisting, the degree of resistance,[26] whether less intrusive force was utilized without success,[27] whether the suspect was armed, and the seriousness of the crime for which he was being arrested.[28]

It is important to note that a suspect who is not physically resisting may nevertheless be deemed to be "resisting" if the circumstances reasonably indicated that a physical attack was imminent.[29] As the First Circuit observed in *Parker v. Gerrish,* "In some circumstances defiance and insolence might reasonably be seen as a factor which suggests a threat to the officer."[30] For example, in ruling that officers did not use excessive force by 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."[31]

On the other hand, if the suspect was compliant, there would ordinarily be no need for any force other than the *de minimis* variety.[32] 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."[33]

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[22] *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.
[23] *Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 343.
[24] See *Drummond v. City of Anaheim* (9th Cir. 2003) 343 F.3d 1052, 1057 ["[I]t is the need for force which is at the heart of [the matter."].
[25] *Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 441. Also see *Scott v. Harris* (2007) 550 U.S. 372, 384; *Glenn v. Washington* County (9th Cir. 2011) 661 F.3d 460, 467 ["The most important factor is whether the individual posed an immediate threat to the safety of the officers or others."]; *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 164.
[26] See *Graham v. Connor* (1989) 490 U.S. 386, 396; *Tatum v. City and County of San Francisco* (9th Cir. 2006) 441 F.3d 1090, 1097; *Arpin v. Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 921.
[27] See *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 966.
[28] See *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 163; *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163.
[29] See *Gaddis v. Redford Township* (6th Cir. 2004) 364 F.3d 763, 775; *Lewis v. Downey* (7th Cir. 2009) 581 F.3d 467, 477 ["In cases upholding the use of taser guns, the victims [sic] have been violent, aggressive, confrontational, unruly, or presented an immediate risk of danger to themselves or others."]. Compare *Bryan v. McPherson* (9th Cir. 2010) 608 F.3d 614, 628 ["Bryan was neither a flight risk, a dangerous felon, nor an immediate threat"].
[30] (1st Cir. 2009) 547 F.3d 1, 10.
[31] (9th Cir. 2003) 340 F.3d 787, 793.
[32] See *Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 444; *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"]; *Parker v. Gerrish* (1st Cir. 2008) 547 F.3d 1, 10 ["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."]; *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."].
[33] (9th Cir. 2003) 343 F.3d 1052, 1058.

Proportionate response by officers

Having established a need for some degree of force, the courts will look to see whether the amount of force that was used was commensurate with that need. "[T]he force used by a police officer," said the Eleventh Circuit, "must be reasonably proportionate to the need for the force."[34] Or, as the Ninth Circuit put it, "[W]e assess the gravity of the particular intrusion on Fourth Amendment interests by evaluating the type and amount of force inflicted."[35]

It should be noted that 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 unless the officer was negligent in failing to implement a less intrusive alternative.[36] As the court 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 used to effect a particular seizure was reasonable."[37]

Types of force

Although there is no simple test for determining whether a certain amount of force was proportionate to the threat, there are some guidelines. Specifically, the courts have established four degrees of force and have provided general standards for their use. They are as follows:

DE MINIMIS FORCE: *De minimis* force is force that is unlikely to cause injury and is permitted if there was probable cause.[38]

NON-DEADLY FORCE: Non-deadly force is essentially a degree of force that may cause injury but does not produce a substantial risk of causing *serious* injury. Examples include physical pressure,[39] hard pulling,[40] non-choking control hold,[41] and apprehension by police dog.[42] Note that a majority of the federal circuits have ruled that the use of pepper spray constitutes non-deadly force,[43] while the Ninth Circuit has ruled that it constitutes intermediate force.[43]

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[34] *Lee v. Ferraro* (11th Cir. 2002) 284 F.3d 1188, 1198. Also 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."].

[35] *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

[36] See *Bryan v. McPherson* (9th Cir. 2010) 608 F.3d 614, 627; *Glenn v. Washington County* (9th Cir. 2011) 661 F.3d 460, 474 ["it is well settled that officers need not employ the least intrusive means available so long as they act within a range of reasonable conduct"].

[37] (9th Cir. 1994) 25 F.3d 804, 807.

[38] See *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."]; *Myers v. Bowman* (11th Cir. 2013) 713 F.3d 1319, 1327 ["Because a police officer is entitled to use some force to arrest a suspect, the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment."]; *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."].

[39] 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."].

[40] See *Johnson v. County of Los Angeles* (9th Cir. 2003) 340 F.3d 787, 793 ["hard pulling and twisting applied to extract a moving armed robbery suspect from a getaway car under these circumstances is a minimal intrusion"]; *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"].

[41] 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"].

[42] 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."]; *Quintanilla v. City of Downey* (9th Cir. 1996) 84 F.3d 353, 358 ["the dog was trained to release on command, and it did in fact release"]; *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 963 ["[T]he risk of death from a police dog bite is remote."]; *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 703-4.

[43] See *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161; *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."].

INTERMEDIATE FORCE: Intermediate force is force that falls between non-deadly and deadly. Intermediate force is permitted if officers reasonably believed the suspect posed "an immediate threat" to them or others.[44] The Ninth Circuit has ruled that the use of tasers constitutes intermediate force if the device was used in "dart" mode,[45] but is undecided on whether a taser in "drive-stun" mode constitutes intermediate or non-deadly force.[46]

DEADLY FORCE: Deadly force is defined as force that "creates a substantial risk of causing death or serious bodily injury."[47] The United States Supreme Court has ruled that the use of deadly force can be justified only if all of the following circumstances existed:

(1) IMMINENT THREAT: Officers must have had probable cause to believe the arrestee posed a significant threat of death or serious injury to officers or others.[48] The most common type of threat is one that presently exists; e.g., the suspect is drawing a handgun on an officer.[49] Under limited circumstances, deadly force may used if officers reasonably believed that the threat was imminent or that his escape would pose "an inherent danger to society."[50]

(2) WARNING: Officers must, "where feasible," warn the arrestee that they are about to use deadly force.[51]

Searches Incident To Arrest

The Supreme Court has observed that "Every arrest must be presumed to present a risk of danger to the arresting officer."[52] For this reason, the Court ruled that officers who have made a custodial arrest may conduct a type of search known as a "search incident to arrest" if the following circumstances existed: (1) the arrest was "lawful"; (2) the arrest was "custodial" in nature; and (3) the arrestee had immediate access to the place or thing that was searched.

"LAWFUL" ARREST: In the context of searches incident to arrest, an arrest is deemed "lawful" if officers had probable cause.[53] Because the only requirement is probable cause, it is immaterial that officers conducted the search before they had notified him that he was under arrest. For example, a pat search of a detainee or his belongings may be upheld as a search incident to arrest if the officers had probable cause to arrest him.[54] "Once there is probable cause for an arrest," said the Court of Appeal, "it is immaterial that the search preceded the arrest."[55] Note that if a court rules that officers mistakenly arrested the suspect for a crime that was not supported by probable cause, the arrest will be deemed "lawful" if there was probable cause to arrest for some other crime. See "Notification Requirements (Specify crime), above.

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[44] See *Young v. Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161; *Bryan v. McPherson* (9th Cir. 2010) 608 F.3d 614, 628 ["the objective facts reveal a tense, but static, situation with [the officer] ready to respond to any developments while awaiting backup. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat"]. Also see *Glenn v. Washington County* (9th Cir. 2011) 661 F.3d 460, 467. **NOTE**: There are cases cited below that say or imply that an imminent threat is not required—that officers may use a taser if the suspect is actively resisting. Although the California courts have not yet addressed the issue, we think they will eventually join the Ninth Circuit in requiring active resistance.

[45] See *Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 449; *Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 809.

[46] See *Mattos v. Agarano* (9th Cir. 2011) 661 F.3d 433, 443.

[47] *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 705. Also see *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 165; *Quintanilla v. City of Downey* (9th Cir. 1996) 84 F3 353, 357. **NOTE**: In *Scott v. Harris* (2007) 550 U.S. 372, 384 the Court indicated that something more than a "high likelihood" of serious injury or death would be required.

[48] See *Tennessee v. Garner* (1985) 471 U.S. 1, 11; *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 164-65; *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1103; *Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 704.

[49] See *Hayes v. County of San Diego* (9th Cir. 2011) 638 F.3d 688, 698.

[50] See *Scott v. Harris* (2007) 550 U.S. 372, 382, fn.9. Also see *San Francisco v. Sheehan* (2015) __ U.S. __ [135 S.Ct. 1765, 1775.

[51] See *Tennessee v. Garner* (1985) 471 U.S. 1, 11-12; *Quintanilla v. City of Downey* (9th Cir. 1996) 84 F.3d 353, 357.

[52] *Washington v. Chrisman* (1982) 455 U.S. 1, 7.

[53] See: *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111; *People v. Fay* (1986) 184 Cal.App.3d 882, 892.

[54] See *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111; *People v. Limon* (1993) 17 Cal.App.4th 524, 538.

[55] *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 536.

"CUSTODIAL" ARREST: The arrest of an adult will be deemed "custodial" if the search occurred after officers had decided to transport him to jail, a police station, or other place of confinement or treatment.[56] The arrest of a minor will be deemed custodial if he will be taken to a police station, his home, juvenile hall, school, a curfew center, or if he will be taken into protective custody.[57] It follows that a search is not permitted if an adult or juvenile will be cited and released. (The subject of searches incident to arrest as they pertain to the new marijuana laws is discussed in the recent case of *In re D.W.*)

IMMEDIATE ACCESS: Unless an exception applies, a place or thing may not be searched incident to an arrest if the arrestee had been handcuffed, surrounded by officers, or was otherwise incapable of gaining immediate access to it when the search occurred.[58] Because officers who have arrested a suspect will ordinarily take steps to restrict his access to most things, searches incident to arrest are often limited to searches of the arrestee's person and, as discussed shortly, items that are "immediately associated" with his person.

In many cases the courts have ruled that "immediate access" includes places and things that were within "grabbing distance,"[59] "wingspan,"[60] or "lunging" distance.[61] In determining whether a place or thing is within such an area, officers may consider that arrestees may act irrationally—that their fear of incarceration may motivate them to try to reach places and things some distance away.[62] Still, the place or thing "must be conceivably accessible to the arrestee—assuming that he was neither an acrobat nor a Houdini."[63]

For example, the Sixth Circuit ruled that an arrestee did not have immediate access to his car when, although not handcuffed, he was standing two or three feet from the rear bumper with three officers standing around him.[64] Similarly, the taking of a blood sample from a DUI arrestee cannot be justified as a search incident to arrest because the arrestee does not (as a practical matter) have immediate access to his blood.[65] What about cell phones? The Supreme Court resolved this issue, ruling that officers who have taken possession of an arrestee's cell phone may not conduct a search incident to arrest of its contents.[66] Instead, if they believe they have probable cause for a warrant, they should seize the phone and apply for one.[67]

EXCEPTIONS: There are two exceptions to the rule that a place or thing cannot be searched unless the suspect had immediate access to it. First, officers may search property that the arrestee was carrying if the nature of the property was such that it was "immediately associated" with his person.[68] Although the term "immediately associated" is ambiguous, it

[56] See *Knowles v. Iowa* (1998) 525 U.S. 113; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1212.
[57] See *In re Charles C.* (1999) 76 Cal.App.4th 420, 424 [transport home]; *People v. Humberto O.* (2000) 80 Cal.App.4th 237; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860; *People v. Breault* (1990) 223 Cal.App.3d 125, 132 [protective custody].
[58] See *Arizona v. Gant* (2009) 556 U.S. 332.
[59] See *Chimel v. California* (1969) 395 U.S. 752, 763; *U.S. v. Tejada* (7th Cir. 2008) 524 F.3d 809, 811 ["grabbing distance"].
[60] See *U.S. v. Ingram* (N.D.N.Y. 2001) 164 F.Supp.2d 310, 314 ["wingspan"].
[61] See *Thornton v. United States* (2004) 541 U.S. 615, 621 ["nor is an arrestee less likely to attempt to lunge for a weapon"].
[62] See *Washington v. Chrisman* (1982) 455 U.S. 1, 7 ["There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."]; *United States v. Chadwick* (1977) 433 U.S. 1, 15 [officers are not required "to calculate the probability that weapons or destructible evidence may be involved."].
[63] *U.S. v. Queen* (7th Cir. 1988) 847 F.2d 346, 353.
[64] *U.S. v. McCraney* (6th Cir. 2012) 674 F.3d 614, 619-20.
[65] See *Birchfield v. North Dakota* (2016) __ U.S. __ [136 S.Ct. 2160, 2185].
[66] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2495] ["Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."]; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1219.
[67] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2474, 2486] ["Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. That is a sensible concession."]; *U.S. v. Henry* (1st Cir. 2016) 827 F.3d 16, 28 ["the officers did exactly what the Supreme Court [in *Riley*] suggested they do: seize the phones to prevent destruction of evidence but obtain a warrant before searching the phones"].
[68] See *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2484].

seems to mean personal property that is likely to be transported along with the arrestee, such as a purse, wallet, backpack, package of cigarettes in arrestee's pocket.[69] Second, if officers have arrested an occupant of a vehicle for a crime in which there are fruits or instrumentalities (e.g., drug possession or trafficking), they may search the passenger compartment for such things as an incident to the arrest if they have *reasonable suspicion* that it is inside; i.e., neither probable cause nor immediate access is required.[70]

The "In The Presence" Rule

Officers may not ordinarily arrest someone for a misdemeanor unless they have probable cause to believe the crime was committed in their "presence."[71] Unfortunately, the question of what constitutes "presence" seems to be more of a philosophical or existential question than a practical one.[72] The only guidance the courts have provided so far is that the word "presence" will be "liberally construed,"[73] and it will not be satisfied unless the officer can testify, "based on his or her senses, to acts which constitute every material element of the misdemeanor."[74] Officers may, however, rely on circumstantial evidence and reasonable inferences based on their training and experience.[75]

For example, in *People v. Lee*[76] an officer in an apparel store saw Lee carry five items of clothing into a fitting room. But when she left the room, she was carrying only three, which she returned to the clothing rack. The officer then checked the fitting room and found one item there, which meant that one was unaccounted for. So, when Lee left the store, the officer arrested her for misdemeanor shoplifting and found the missing item in her purse. On appeal, Lee claimed the arrest was unlawful because her concealment of the item did not occur in the officer's presence. It didn't matter, said the court, because the term "presence" has "historically been liberally construed" and thus "[n]either physical proximity nor sight is essential."

The question has arisen whether a crime is committed in an officer's "presence" if he is watching it on a video monitor. Although the issue is unsettled, one court resolved the issue by ruling that the "presence" requirement will be met if the officer was watching a live feed, as opposed to a recording.[77]

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[69] *United States v. Chadwick* (1977) 433 U.S. 1, 15; *United States v. Edwards* (1974) 415 U.S. 800, 805; *United States v. Robinson* (1973) 414 U.S. 218, 223 [cigarette package]; *Gustafson v. Florida* (1973) 414 U.S. 260, 262 [cigarette package]; *People v. Limon* (1993) 17 Cal.App.4th 524, 538 ["hide-a-key" box]; *People v. Methey* (1991) 227 Cal.App.3d 349, 358-59 [wallet]; *People v. Ingham* (1992) 5 Cal.App.4th 326, 331 [purse]; *People v. Flores* (1979) 100 Cal.App.3d 221, 230 [shoulder bag]; *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243-44 [backpack]; *People v. Brown* (1989) 213 CA3 187, 192 [pill bottle].

[70] See *Arizona v. Gant* (2009) 556 U.S. 332, 335; *People v. Lopez* (2016) 4 Cal.App.5th 815, 82; *People v. Nottoli* (2011) 199 Cal.App.4th 532, 554.

[71] See Veh. Code § 40300.5; Pen. Code § 836(a)(1) [an officer may arrest a person without a warrant if the officer "has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence"]; *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].

[72] See *Pate v. Muni Court* (1970) 11 Cal.App.3d 721, 725 ["presence" is "not merely physical proximity but occurs when the crime is apparent to the officer's senses"].

[73] See *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1027 ["The requirement that the crime be committed in the officer's presence is construed liberally"]; *People v. Welsch* (1984) 151 Cal.App.3d 1038, 1042 ["interpreted liberally"]; *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 ["liberally construed"].

[74] *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 713. Also see *People v. Sjosten* (1968) 262 Cal.App.2d 539, 543-44. Compare *Arpin v. Santa Clara Valley Transportation Agency* (9th Cir. 2001) 261 F.3d 912, 920 ["[The officers] arrived after the alleged battery occurred. The officers could therefore not lawfully arrest Arpin for the battery."].

[75] See *People v. Steinberg* (1957) 148 Cal.App.2d 855.

[76] (1984) 157 Cal.App.3d Supp. 9.

[77] *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."].

This seems consistent with the Court of Appeal's ruling that a crime is committed in the "presence" of officers if they witnessed it by means of a telescope,[78] since there does not seem to be a significant difference between watching the commission of a crime live on a telescope or a computer screen.

Another question is whether a violation of the "in the presence" rule also constitutes a violation of the Fourth Amendment which may require the suppression of evidence obtained as the result of the violation. Unfortunately, the Supreme Court has never ruled on this issue and, therefore, its status is uncertain. While the Court has described "in the presence" as a "usual" requirement,[79] it is worth noting that the Court has never announced that a rule was based on the Constitution merely because it was "usual."

Even if the misdemeanor was not committed in an officer's presence, there are certain situations in which, per statutory law, "presence" is not required. They are as follows:

JUVENILES: The arrestee was a minor.[80]

DUI PLUS: The suspect was arrested for driving under the influence and there was reasonable suspicion to believe that one or more of the following circumstances existed:

- Arrestee was in or about a vehicle obstructing a roadway.
- Arrestee would not be apprehended unless immediately arrested.
- Arrestee might harm himself or damage property if not immediately arrested.
- Arrestee might destroy or conceal evidence unless immediately arrested.
- Arrestee's blood-alcohol level could not be accurately determined if he was not immediately arrested.
- Arrestee had been involved in auto accident.[81]

OTHERS: Other exceptions to the "in the presence" rule are as follows:

ASSAULT ON SCHOOL PROPERTY: Arrest for assault or battery on school property when school activities were occurring.

CARRYING LOADED FIREARM: Arrest for carrying a loaded firearm in a public place.

GUN IN AIRPORT: Arrest for carrying a concealed firearm in an airport.

DOMESTIC VIOLENCE: Arrest for assault on a spouse, cohabitant, or "a person with whom the suspect had parented a child."

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

ASSAULT ON ELDER: Arrest for 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: Arrest for assault on a firefighter, EMT, or paramedic engaged in performance of his duties.

PROBATION VIOLATIONS: Arrest for violating the terms or conditions of probation.[82]

Finally, it should be noted that if the crime was not committed in the officers' presence they may not release the suspect after he signs a promise to appear.[83] Instead, if they believe the crime should be charged, they will ordinarily obtain satisfactory identification, release him, and submit the case to prosecutors for review. POV

[78] See *Royton v. Battin* (1942) 55 Cal.App.2d 861, 866.

[79] *Carroll v. United States* (1925) 267 U.S. 132, 156-57 ["The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."]. Also see *Virginia v. Moore* (2008) 553 U.S. 164, 171 ["In a long line of cases, we have said that when an officer has probable causes to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt."].

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

[81] See Veh. Code § 40300.5; *People v. Schofield* (2001) 90 Cal.App.4th 968; *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029; *Music v. DM*V (1990) 221 Cal.App.3d 841.

[82] See Pen. Code §§ 243.5, 836, 836.1, 1203.2, 258.50(g). Veh. Code § 40300.5 [DUI].

[83] **NOTE**: The Penal Code does not authorize the issuance of a notice to appear in lieu of arrest when the misdemeanor is not committed in the officer's presence; i.e., Pen. Code § 853.6(h) authorizes the issuance of a notice to appear only if the suspect is "arrested."

Arrest Warrants

The Supreme Court has routinely encouraged officers to seek arrest warrants whenever possible because the warrant procedure enables "a neutral judicial officer [to] assess whether the police have probable cause."[1] Still, the Court has acknowledged that it has "never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant."[2] So, why should they seek one?

There are five reasons: (1) a warrant also constitutes authorization for officers to enter the arrestee's home to take him into custody, (2) a warrant allows officers to enter the data contained in the warrant into various warrant databases, (3) it stops the statute of limitations from running[3] (4) it authorizes officers to arrest a suspect for a misdemeanor that was not committed in their presence, and (5) it makes it likely that the arrest will be upheld under the good faith rule if a court later determines that probable cause did not exist.[4]

General Rules

Defined: An arrest warrant is a court order in which a judge directs officers to arrest a certain person if and when they locate him. In the words of the Supreme Court, "An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense."[5]

Types of arrest warrants: The main types of arrests warrants are conventional warrants, *Ramey* warrants, and *Steagald* warrants. Less common, but still important, are probation violation warrants,[6] parole violation warrants (a.k.a. parolee-at-large warrants),[7] grand jury indictment warrants,[8] and bench warrants for failing to appear in court.[9]

When an arrest warrant terminates: An arrest warrant remains in effect until it is executed or recalled by the court; i.e., it does not become "stale."[10]

Postponing an arrest: Although arrest warrants are court orders, officers are not *required* to execute them immediately upon locating the suspect as there are several legitimate reasons for delaying an arrest or seeking its recall.[11]

Investigating the warrant's validity: Officers are not required to investigate the validity of an arrest warrant that appears valid on its face.[12] They may not, however, ignore information that reasonably indicates the warrant had been executed or recalled, or that probable cause no longer exists.[13]

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 remains outstanding.[14]

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[1] *Steagald v. United States* (1981) 451 U.S. 204, 212.
[2] *Gerstein v. Pugh* (1975) 420 U.S. 103, 113.
[3] See *People v. Robinson* (2010) 47 Cal.4th 1104, 1111.
[4] See *Steagald v. United States* (1981) 451 U.S. 204, 212.
[5] *Steagald v. United States* (1981) 451 U.S. 204, 213. Also see Pen. Code § 813 *et seq*.
[6] See Pen. Code § 1203.2.
[7] See Pen. Code §§ 3060, 3062, 3081; *People v. Hunter* (2006) 140 Cal.App.4th 1147, 1153-54.
[8] See Pen. Code § 945.
[9] See Pen. Code § 978.5. Also see Pen. Code §§ 813(c), 853.8, 983.
[10] See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1071; *People v. Case* (1980) 105 Cal.App.3d 826, 834.
[11] See *U.S. v. Pelletier* (8th Cir. 2012) 700 F.3d 1109, 1117; *U.S. v. Wagner* (7th Cir. 2006) 467 F.3d 1085, 1090.
[12] See *Herndon v. County of Marin* (1972) 25 Cal.App.3d 933, 937.
[13] See *Milliken v. City of South Pasadena* (1979) 96 Cal.App.3d 834, 842.
[14] See *U.S. v. Martin* (7th Cir. 2005) 399 F.3d 879, 881.

WARRANTS SENT BY EMAIL OR FAX: A warrant or an abstract sent from one agency to another via email or fax has the same legal force as the original warrant.[15]

WHEN WARRANTS MAY BE SERVED: Felony arrest warrants may be served at any time.[16] Misdemeanor warrants may not be served between the hours of 10 P.M. and 6 A.M. unless (1) the arrest was made in a public place, (2) the arrestee was already in custody for another offense, or (3) the warrant authorized night service.[17]

The question sometimes arises: If officers are lawfully inside the home after 10 P.M. because, for example, they have made a consensual entry to take a police report, can they arrest an occupant if they learn he is wanted on a warrant that is not endorsed for night service? Although there is no case law directly on point, the Court of Appeal has noted that the purpose of the temporal limitations "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."[18] It seems likely that none of these concerns would be implicated if officers had already been invited in.

Conventional Arrest Warrants

A conventional arrest warrant (also known as a "complaint warrant") is issued by a judge after prosecutors have filed a complaint against the suspect for a felony or misdemeanor.[19] A warrant will not, however, be issued automatically simply because a complaint had been filed. Instead, as with search warrants, officers must provide the judge with an affidavit containing the facts upon which probable cause was based. Such a declaration or affidavit may include police reports or written statements by witnesses so long as there was reason to believe the source of the information was reliable.[20]

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, the amount of bail (if any), and the judge's signature.[21] Furthermore, the warrant must contain sufficient information about the suspect to make it reasonably likely that officers will arrest the right person. This information typically includes such things as his address, occupation, places he frequents, his known associates and the places they frequent, and a description of the vehicles he has been known to drive.[22]

The amount of information that will be required will ordinarily depend on what information the officers possess about the arrestee or information they could have obtained with reasonable effort.[23] Before arresting someone on a warrant, officers may not, of course, ignore objective circumstances that reasonably indicate the arrestee was not the subject of the warrant.[24]

"DOE" WARRANTS: If officers do not know the suspect's name they may be able to obtain a John Doe warrant.[25] With Doe warrants it is especially important to include enough information about the

[15] See Pen. Code § 850; *People v. McCraw* (1990) 226 Cal.App.3d 346, 349.
[16] See Pen. Code § 840.
[17] See Pen. Code § 840.
[18] *People v. Whitted* (1976) 60 Cal.App.3d 569, 572.
[19] See *Lohman v. Superior Court* (1977) 69 Cal.App.3d 894, 903; Pen. Code §§ 813, 1427; *In re Walters* (1975) 15 Cal.3d 738, 747 ["[A] person charged with the commission of a misdemeanor may also be arrested pursuant to a warrant."]; *U.S. v. Clayton* (8th Cir. 2000) 210 F.3d 841, 843 ["We agree with those courts that have held that this principle applies with equal force to misdemeanor warrant." Citations omitted.].
[20] See *In re Walters* (1975) 15 Cal.3d 738, 748.
[21] See Pen. Code §§ 815, 815a.
[22] See *People* v. *Robinson* (2010) 47 Cal.4th 1104, 1138; Pen. Code § 815.
[23] See *People v. Robinson* (2010) 47 Cal.4th 1104, 1132; *People v. Tockgo* (1983) 145 Cal.App.3d 635, 640.
[24] See *Robinson v. City and County of San Francisco* (1974) 41 Cal.App.3d 334, 337.
[25] See *People v. Robinson* (2010) 47 Cal.App.4th 1104, 1138.

suspect (including a photo if available) to sufficiently reduce the possibility that someone else might be arrested by mistake.[26] Note that for purposes of tolling the statute of limitations, an arrestee is sufficiently described in a Doe warrant if the warrant lists his DNA profile.[27]

Ramey Warrants

A *Ramey* arrest warrant—also known as a "Warrant of Probable Cause for Arrest"[28]—may be issued when officers have probable cause to arrest the suspect for a felony or misdemeanor, but prosecutors have not yet filed a criminal complaint against him.[29] *Ramey* warrants are commonly used when officers lack proof of guilt beyond a reasonable doubt, which is the standard required for filing a complaint. In such cases, officers may seek a *Ramey* warrant in order to obtain enough evidence for charging if, after arresting the suspect, they are able to question him, place him in a lineup, obtain consent to search, or obtain his fingerprints or DNA.

REQUIRED INFORMATION: As with conventional arrest warrants, *Ramey* warrants must contain sufficient information to effectively reduce the chances of arresting the wrong person. In addition, *Ramey* warrants must contain the name of arrestee, 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, signature and title of issuing judge, time the warrant was issued, and the amount of bail (if any).[30] We have included a sample *Ramey* warrant on page 12.

IF ADDRESS IS INCLUDED: Although *Ramey* arrest warrants may contain the arrestee's last known address, this does not constitute authorization to search that address for the suspect. Instead, it is merely an aid in locating him.[31] As discussed in the accompanying article "Entry to Arrest," officers are permitted to enter a home to execute an arrest warrant only if they reasonably believed the arrestee "lives" there and is presently inside.

Steagald Warrants

A *Steagald* warrant is a combination search and arrest warrant that authorizes officers to enter a home or other structure for the purpose of searching for and arresting a wanted suspect who does not live on the premises; i.e., the home belongs to the suspect's friend, relative, or other third party.[32] Like any arrest warrant, a *Steagald* warrant can only be issued if an officer submits an affidavit that establishes probable cause to arrest the suspect.

Steagald warrants are different, however, because they cannot be issued unless the affidavit also establishes probable cause to believe that (1) the arrestee was inside the residence when the warrant was issued, and (2) he would still be there when the warrant is executed.[33] And this can be difficult to do because it is often hard to prove the arrestee will still be inside the residence when officers arrive. As the Justice Department noted in its argument in *Steagald*, "[P]ersons, as opposed to objects, are inherently mobile, and thus officers seeking to effect an arrest may be forced to return to the magistrate several times as the subject of the arrest warrant moves from place to place." For this reason, the Court noted that officers can avoid the need for a *Steagald* warrant if they obtain a standard arrest warrant then wait until he is inside his home or a public place before arresting him. POV

[26] See *People v. Montoya* (1967) 255 Cal.App.2d 137, 142; *Powe v. City of Chicago* (7th Cir. 1981) 664 F.2d 639, 647.
[27] See *People v. Robinson* (2010) 47 Cal.4th 1104, 1136.
[28] See Pen. Code § 817.
[29] See *Payton v. New York* (1980) 445 U.S. 573; Pen. Code §§ 840, 1427; *People v. Ramey* (1976) 16 Cal.3d 263, 275.
[30] See Pen. Code §§ 815, 815a, 816; *People v. McCraw* (1990) 226 Cal.App.3d 346, 349.
[31] See *U.S. v. Bervaldi* (11th Cir. 2000) 226 F.3d 1256, 1263; *U.S. v. Lauter* (2nd Cir. 1995) 57 F.3d 212, 215.
[32] See *Steagald v. United States* (1981) 451 U.S. 204; Pen. Code § 1524(a)(6); *People v. Dyke* (1990) 224 Cal.App.3d 648, 658; *Watts v. County of Sacramento* (9th Cir. 2001) 256 F.3d 886, 889; *U.S. v. Litteral* (9th Cir. 1990) 910 F.2d 547, 553; *U.S. v. Lovelock* (2nd Cir. 1999) 170 F.3d 339, 344 ["[*Payton*] does not authorize entry into a residence in which the officers do not believe the suspect is residing but believe he is merely visiting."].
[33] See *Steagald v. United States* (1981) 451 U.S. 204, 221-22.

SUPERIOR COURT OF CALIFORNIA

County of _____

ARREST WARRANT

Probable Cause Arrest Warrant
Ramey Warrant

The People of the State of California
To Any California Peace Officer **Warrant No. _____**

Arrestee's name: *[Insert name]*, hereinafter "Arrestee."

Declarant's name and agency: *[Insert name and agency]*, hereinafter "Declarant."

Order: Proof by Declaration of Probable Cause having been presented to me on this date by Declarant pursuant to Penal Code § 817, I find there is probable cause to believe that Arrestee committed the crime(s) listed below. You are therefore ordered to execute this warrant and bring Arrestee before any judge in this county pursuant to Penal Code §§ 821, 825, 826, and 848.

Crime(s): *[List crime(s)]*

Bail: ☐ No bail ☐ Bail is set at $_____.

☐ **Night service authorization** [*Required for misdemeanors only*]: Good cause for night service having been established in the supporting declaration, this misdemeanor warrant may be executed at any hour of the day or night.

_____ _____
Date and time warrant issued Judge of the Superior Court

◆ Arrestee Information ◆

For identification purposes only

Name:

AKAs:

Last known address(es):

Sex: M F Race: Height: Weight: Color of hair: Color of eyes:

Scars, marks, tattoos:

Vehicle(s) linked to Arrestee:

Other identifying information:

Entry To Arrest

An intrusion by the state into the privacy of the home for any purpose is one of the most awesome incursions of police power into the life of the individual.[1]

There was a time when officers who had developed probable cause to arrest someone would simply drive over to his house and arrest him. If they needed to break in, no problem. In fact, this was standard police practice in most states for around two hundred years. Although it had its detractors, everyone agreed that it was efficient. In addition, it was good for the environment because there was no paperwork.

Nevertheless, the U.S. Supreme Court and the California Supreme Court ruled in *Payton v. New York* and *People v. Ramey* that these types of warrantless entries were illegal.[2] Instead, the courts established specific requirements that must be met whenever officers make a forcible entry into a home to arrest an occupant. Later, the Supreme Court announced even more stringent requirements—known as *Steagald* requirements—when officers want to look for the arrestee in the home of a third person, such as a friend or family member.

In this article we will cover all of these requirements, plus others that pertain to the manner in which officers enter and search for the arrestee.

Entering the Arrestee's Home

Pursuant to *Payton* and *Ramey*, officers may enter the suspect's home for the purpose of arresting him if (1) they have court authorization to enter, (2) they have sufficient reason to believe that the arrestee lived in the house, and (3) they reasonably believed that the arrestee was currently inside. Before we discuss these requirements, however, it should be noted that they do not apply unless officers physically entered the residence (i.e., crossed the threshold) and unless they did so for the purpose of arresting a resident. For example, compliance is not required if officers entered the premises to conduct a probation search, make a controlled buy, or if they encountered the arrestee on his front porch or front yard.[3] Furthermore, officers may ask or order the arrestee to exit, then arrest him as he steps outside.[4] Thus, in *People v. Tillery* the court ruled that an arrest without court authorization was lawful when the officer arrested the suspect in the hallway of his apartment building after asking him to step out. Said the court, "Once he stepped outside, it was lawful for the officer to arrest him."[5] For the same reason, compliance is not required if officers made the arrest while the arrestee was standing in his doorway. This is because a person who is standing in the doorway of a home is in a "public" place.[6]

Court authorization to enter

Legal grounds for entering the arrestee's home include the issuance of a probation or parole violation warrant,[7] a grand jury indictment warrant,[8] or a bench warrant for the arrestee's failure to appear.[9] But the most common legal justifications are entries by means of conventional arrest warrant, a *Ramey* arrest warrant, and search warrants.

Conventional arrest warrants: A conventional arrest warrant (also known as a "complaint warrant") is issued by a judge after prosecutors filed a complaint against the suspect for a felony or misde-

[1] *People v. Ramey* (1976) 16 Cal.3d 263, 275.
[2] See *Payton v. New York* (1980) (1980) 445 U.S. 573; *People v. Ramey* (1976) 16 Cal.3d 263.
[3] See *Steagald v. United States* (1981) 451 U.S. 204, 221; *People v. Green* (1983) 146 Cal.App.3d 369, 377.
[4] See *People v. Jackson* (1986) 187 Cal.App.3d 499, 505; *People v. Lujano* (2014) 229 Cal.App.4th 175, 183-84.
[5] (1979) 99 Cal.App.3d 975, 979-80.
[6] *United States v. Santana* (1976) 427 U.S. 38.
[7] See Pen. Code §§ 1203.2(a) [probation], 3060(a) [parole]; *People v. Hunter* (2006) 140 Cal.App.4th 1147, 1153-54.
[8] See Pen. Code § 945.
[9] See Pen. Code §§ 853.8, 978.5, 983; *Allison v. County of Ventura* (1977) 68 Cal.App.3d 689, 701-702.

meanor.[10] The subject of conventional arrest warrants is covered in the accompanying article, "Arrest Warrants" (Conventional Arrest Warrants).

RAMEY WARRANTS: A *"Ramey"* warrant is an arrest warrant that is issued by a judge *before* prosecutors filed a complaint. The subject of *Ramey* warrants is also covered in the accompanying article, "Arrest Warrants" (*Ramey* Warrants).

SEARCH WARRANTS: Because search warrants authorizes officers to enter the listed premises, no further authorization is required to enter the premises and arrest an occupant. As the court observed in *People v. McCarter*, "[N]o *Ramey* violation as to [the arrestee] could have occurred under the present facts since the police had judicial authorization to enter her home via a validly issued and executed search warrant."[11]

Proving where the arrestee "lives"

In many cases it is difficult to determine exactly where an arrestee is currently "living" because, among other things, arrestees may be actively attempting to conceal their whereabouts,[12] and it is not uncommon for the arrestee's friends and relatives to lie to officers about the location of his home. For these reasons, California courts require only that officers have "reasonable suspicion"—not probable cause—as to where the arrestee is living.[13] Although the federal courts are currently split between requiring reasonable suspicion and probable cause,[14] officers will ordinarily have enough information about where the arrestee lives to satisfy both of these standards because they both may be based on direct and circumstantial evidence, and the information will be evaluated by applying common sense, not hypertechnical analysis.[15]

DIRECT EVIDENCE: Direct evidence as to where the arrestee is currently living is often based on information from officers who have staked out the residence. It may also be based on information from informants, neighbors, and property managers.[16]

CIRCUMSTANTIAL EVIDENCE: Officers will often be able to prove that the arrestee lives in a certain home by obtaining records that he listed it as his address on a rental agreement,[17] motel registration card,[18] utility billing records,[19] telephone or internet records,[20] credit card application,[21] employment application,[22] post office records,[23] DMV records,[24] vehicle repair work order,[25] jail booking records,[26] bail bond application,[27] police or arrest report,[28] parole or probation records.[29]

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[10] See *Payton v. New York* (1980) 445 U.S. 573, 602-603; Pen. Code § 1427, *In re Walters* (1975) 15 Cal.3d 738, 747; *U.S. v. Clayton* (8th Cir. 2000) 210 F.3d 841, 843 ["We agree with those courts that have held that this principle applies with equal force to misdemeanor warrant." Citations omitted.].
[11] (1981) 117 Cal.App.3d 894, 908.
[12] See *U.S. v. Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.
[13] See *People v. Downey* (2011) 198 Cal.App.4th 652. 662. Also see *Valdez v. McPheters* (10th Cir. 1999) 172 F.3d 1220.
[14] See *U.S. v. Grandberry* (9th Cir. 2013) 730 F.3d 968, 970; *U.S. v. Bohannon* (2nd Cir. 2016) 824 F.3d 242, 253.
[15] See *U.S. v. Graham* (1st Cir. 2009) 553 F.3d 6, 14; *U.S. v. Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.
[16] See, for example, *People v. Gibson* (2001) 90 Cal.App.4th 371, 381; *U.S. v. Bervaldi* (11th Cir. 2000) 226 F.3d 1256.
[17] See *U.S. v. Edmonds* (3rd Cir. 1995) 52 F.3d 1236, 1247-48; *U.S. v. Bennett* (11th Cir. 2009) 555 F.3d 962, 965.
[18] See *People v. Fuller* (1983) 148 Cal.App.3d 257, 263; *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 657.
[19] See *People v. Downey* (2011) 198 Cal.App.4th 652, 659; *U.S. v. Denson* (10th Cir. 2014) 775 F.3d 1214, 1217-18.
[20] See *People v. Icenogle* (1977) 71 Cal.App.3d 576, 581; *U.S. v. Terry* (2nd Cir. 1983) 702 F.2d 299, 319.
[21] See *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 62, fn.1.
[22] See *People v. Jacobs* (1987) 43 Cal.3d 472, 478.
[23] See *U.S. v. Route* (5th Cir. 1997) 104 F.3d 59, 61, fn.1; *U.S. v. Stinson* (D. Conn. 1994) 857 F.Supp. 1026, 1031.
[24] See *People v. Boyd* (1990) 224 Cal.App.3d 736, 740; *U.S. v. Ayers* (9th Cir. 1991) 924 F.2d 1468, 1480.
[25] See *U.S. v. Manley* (2nd Cir. 1980) 632 F.2d 978, 983.
[26] See *Washington v. Simpson* (8th Cir. 1986) 806 F.2d 192, 196; *U.S. v. Clayton* (8th Cir. 2000) 210 F.3d 841, 842-43.
[27] See *U.S. v. Barrera* (5th Cir. 2006) 464 F.3d 496, 504.
[28] See *People v. Ott* (1978) 84 Cal.App.3d 118, 126; *U.S. v. Ayers* (9th Cir. 1991) 924 F.2d 1468, 1479.
[29] See *People v. Kanos* (1971) 14 Cal.App.3d 642, 645, 648; *U.S. v. Mayer* (9th Cir. 2008) 530 F.3d 1099, 1104.

It should also be noted that an arrestee may be deemed to be living in two or more residences at the same time, or in residences owned by friends or relatives.[30] Nevertheless, an arrestee will not be deemed to be "living" in a home unless he regularly spent the night there—even if not every night. To put it another way, staying occasionally in a certain home does not constitute "living" in it.[31]

One other thing. Although conventional arrest warrants and *Ramey* warrants sometimes contain the arrestee's last known address or the location of a place in which he might be staying, this does not constitute court authorization to enter that place. This is because, unlike an address that appears on a search warrant, an address listed on an arrest warrant is merely an aid to locating the arrestee and it is often based on hearsay and other information that may or may not be reliable.[32]

ARRESTEE IS NOW INSIDE: Even if officers had reason to believe that the arrestee currently lived in a certain residence, they may not enter unless they also had "reason to believe" he was presently inside. As the Supreme Court explained, "[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within.*"[33] What does "reason to believe" mean? In California, it means that officers had reasonable suspicion, which is a fairly low standard of proof.[34] The federal courts are, however, split between requiring reasonable suspicion and probable cause.[35] Still, in most cases officers will have sufficient information about where the arrestee lives to satisfy the probable cause standard.[36]

An officer's determination that the arrestee is currently inside his home may be based on direct or circumstantial evidence, and a commonsense interpretation of the evidence. Consequently, the following circumstances are relevant:

ARRESTEE ANSWERED THE PHONE: The arrestee answered the phone shortly before officers entered.[37]

ARRESTEE'S CELL PHONE WAS INSIDE: Officers obtained cell site data for the arrestee's phone that showed that a call to or from that phone had recently been made to or from the residence.[38]

ARRESTEE'S CAR WAS PARKED OUTSIDE: The arrestee's car (or a car he had been using) was currently parked at or near the residence.[39] It is relevant that the hood over the engine compartment was relatively warm.[40]

ARRESTEE LIVED ALONE, PLUS SIGNS OF ACTIVITY: Officers reasonably believed that the arrestee lived alone and there were indications that someone was inside; e.g., noises or sounds of TV or radio, lights on at night.[41]

SUSPICIOUS RESPONSE BY PERSON AT THE DOOR: The person who answered the door was evasive when asked if the suspect was inside.[42]

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[30] See *Case v. Kitsap County Sheriff's Department* (9th Cir. 2001) 249 F.3d 921, 931 [arrestee lived at the house "at least part of the time"]; *U.S. v. Litteral* (9th Cir. 1990) 910 F.2d 547, 553 [suspect was a "co-resident"]; *U.S. v. Risse* (8th Cir. 1996) 83 F.3d 212, 217 [arrestee may "concurrently maintain a residence elsewhere as well"]; *U.S. v. Bennett* (11th Cir. 2009) 555 F.3d 962, 965 ["The fact that a suspect may live somewhere else from time to time does not categorically prevent a dwelling from being the suspect's residence."]; *Washington v. Simpson* (8th Cir. 1986) 806 F.2d 192, 196 [arrestee stayed in the residence two to four nights a week, she kept clothing and other personal belongings there].

[31] See *U.S. v. Franklin* (9th Cir. 2010) 603 F.3d 652, 656; *Perez v. Simpson* (9th Cir. 1989) 884 F.2d 1136, 1141.

[32] See *Wanger v. Bonner* (5th Cir. 1980) 621 F.2d 675, 682; *U.S. v. Lauter* (2nd Cir. 1995) 57 F.3d 212, 215.

[33] *Payton v. New York* (1980) 445 U.S. 573, 603. Emphasis added. Also see *People v. Alcorn* (1993) 15 Cal.App.4th 652.

[34] See *People v. Downey* (2011) 198 Cal.App.4th 652. 662.

[35] See *U.S. v. Grandberry* (9th Cir. 2013) 730 F.3d 968, 970; *U.S. v. Bohannon* (2nd Cir. 2016) 824 F.3d 242, 253.

[36] See *People v. Benton* (1978) 77 Cal.App.3d 322, 327 [officers lost sight of two fleeing armed robbers, then saw that the screen door of an apartment "had been ripped off its mount"]; *U.S. v. Barrera* (5th Cir. 2006) 464 F.3d 496, 501, fn.5.

[37] See *Maryland v. Buie* (1990) 494 U.S. 325, 328; *Case v. Kitsap County Sheriff's Dept.* (9th Cir. 2001) 249 F.3d 921.

[38] See *U.S. v. Bohannon* (2nd Cir. 2016) 824 F.3d 242, 256.

[39] See *People v. Williams* (1989) 48 Cal.3d 1112, 1139; *People v. Icenogle* (1977) 71 Cal.App.3d 576, 581.

[40] See *U.S. v. Boyd* (8th Cir. 1999) 180 F.3d 967, 978.

[41] See *U.S. v. Morehead* (10th Cir. 1992) 959 F.2d 1489, 1496-97; *U.S. v. Gay* (10th Cir. 2001) 240 F.3d 1222, 1227.

[42] See *People v. Dyke* (1990) 224 Cal.App.3d 648, 659. Compare *People v. Jacobs* (1987) 43 Cal.3d 472, 479.

SUSPICIOUS RESPONSE TO KNOCKING: When officers knocked and announced, they heard sounds or saw activity inside that reasonably indicated an occupant was trying to hide, delay, or avoid them.[43]

WORK SCHEDULE, HABITS: Officers entered at a time when the arrestee was usually at home based, for example, on his work schedule.[44]

Two other things should be noted. First, although the failure of anyone to respond to the officers' knocking and announcement is an indication that no one is home, it is not conclusive proof.[45] Second, officers are not required to take an occupant's word that the arrestee is not at home. As the Ninth Circuit observed, "It is not an unheard-of phenomenon that one resident will tell police that another resident is not at home, when the other resident actually is hiding under a bed."[46]

Exigent circumstances

As noted, the requirements for entering a home to arrest an occupant are excused if there were exigent circumstances. While there are many types of exigent circumstances, there are only four that are relevant to situations in which officers enter with the intent to arrest an occupant: hot pursuits, fresh pursuits, armed standoffs, and imminent destruction of evidence.[47]

HOT PURSUITS: In the context of exigent circumstances, a so-called "hot" pursuit occurs when (1) officers had probable cause to arrest the suspect, (2) the arrest was "set in motion" in a public place, and (3) the suspect responded by running into his home or other private place. When this happens, officers may pursue him inside.[48] The crime for which the suspect was wanted may be either a felony or misdemeanor.[49]

FRESH PURSUITS: Unlike "hot" pursuits, "fresh" pursuits are not physical chases but, instead, are situations in which (1) officers are quickly responding to investigative leads as to the identity or location of a suspect; (2) the leads suddenly develop into probable cause to arrest, at which point; (3) the officers make a warrantless entry into the suspect's home or other structure for the purpose of making the arrest.[50]

Although there are no formal requirements for determining what constitutes a "fresh" pursuit, the cases indicate that such an entry is permitted if the following four circumstances existed:

(1) SERIOUS FELONY: The crime under investigation was a serious felony.

(2) DILIGENCE: The officers were diligent in their attempt to apprehend the perpetrator.

(3) SUSPECT IS INSIDE: The officers had "reason to believe" the perpetrator was presently inside the structure. (See "Arrestee is now inside," above.

(4) CIRCUMSTANTIAL EVIDENCE OF FLIGHT: Officers reasonably believed the perpetrator was in active flight or soon would be.[51]

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[43] See *People v. Dyke* (1990) 224 Cal.App.3d 648, 659 [officers saw someone open the curtains then immediately close them, then they heard someone inside say "It's the fucking pigs."]; *U.S. v. Junkman* (8th Cir. 1998) 160 F.3d 1191, 1193 [after officers knocked and announced someone yelled "cops," then there was a "commotion in the room."].

[44] See *U.S. v. Diaz* (9th Cir. 2007) 491 F.3d 1074, 1078; *U.S. v. Magluta* (11th Cir. 1995) 44 F.3d 1530, 1535 ["officers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule"].

[45] See *Case v. Kitsap Sheriff's Dept.* (9th Cir. 2001) 249 F.3d 921, 931; *U.S. v. Beck* (11th Cir. 1984) 729 F.2d 1329, 1332.

[46] *Motley v. Parks* (9th Cir. *en banc* 2005) 432 F.3d 1072, 1082.

[47] See *Steagald v. United States* (1981) 451 U.S. 204, 221-22; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 122 ["The [arrest] warrant requirement is excused when exigent circumstances require prompt action by the police to prevent imminent danger to life or to forestall the imminent escape of a suspect or destruction of evidence."].

[48] See *Steagald v. United States* (1981) 451 U.S. 204, 221-22; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 122. *Stanton v. Sims* (2013) __ US __ [134 S.Ct. 3, 4]; *United States v. Santana* (1976) 427 U.S. 38, 43.

[49] See *People v. Lloyd* (1989) 216 Cal.App.3d 1425, 1430; *In re Lavoyne M.* (1990) 221 Cal.App.3d 154, 159.

[50] See *People v. Escudero* (1979) 23 Cal.3d 800, 808.

[51] See *Minnesota v. Olson* (1990) 495 U.S. 91, 100; *People v. Escudero* (1979) 23 Cal.3d 800, 811; *People v. Manderscheid* (2002) 99 Cal.App.4th 355, 363-64.

For example, in *People v. Smith*, the defendant shot and killed two LAPD officers and a manhunt began immediately. After identifying Smith, officers made a warrantless entry into his home which, said the court, was lawful because it "was reasonable for the police to believe he might stop at his house before continuing his flight, to obtain clothes, money, or ammunition."[52]

ARMED STANDOFFS: An armed standoff is essentially a situation in which (1) officers have developed probable cause to arrest a suspect who is reasonably believed to be armed and dangerous; (2) the suspect is inside his home or other structure; (3) the suspect injured or threatened to injure himself or others; and (4) the suspect refused to surrender. If these circumstances existed, and so long as the officers were actively engaged in ending the standoff, a warrant is not required to enter the structure for the purpose of arresting him, even if there was time to obtain a warrant.[53]

DESTRUCTION OF EVIDENCE: A common situation in which a warrantless entry to arrest is based on exigent circumstances are those in which there is a plausible threat that incriminating evidence on the premises would be destroyed if officers waited until they could obtain a search or arrest warrant.[54] This exception to the warrant requirement applies if the following circumstances existed:

(1) EVIDENCE ON PREMISES: Officers must have had probable cause to believe there was destructible evidence on the premises.[55]

(2) JAILABLE CRIME: While the crime under investigation need not be a felony or even "serious,"[56] it must carry a potential jail sentence.[57]

(3) IMPENDING DESTRUCTION: The officers must have had reason to believe that the suspect or someone else on the premises was about to destroy the evidence or undermine its value in court.[58] For example, it is usually reasonable for officers to believe that a suspect inside a residence containing destructible evidence will attempt to destroy the evidence if he thinks he is about to be arrested or that a search of the residence is imminent.[59]

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[52] (1966) 63 Cal.2d 779, 797.

[53] *People v. Williams* (1989) 48 Cal.3d 1112, 1139.

[53] See *Fisher v. City of San Jose* (9th Cir. 2009) 558 F.3d 1069, 1071.

[54] See *Kentucky v. King* (2011) 563 U.S. 452, 460; *Missouri v. McNeely* (2013) __ US __ [133 S.Ct. 1552, 1559].

[55] See *People v. Thompson* (2006) 38 Cal.4th 811, 820-22; *People v. Torres* (2012) 205 Cal.App.4th 989, 994.

[56] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.

[57] See *People v. Torres* (2012) 205 Cal.App.4th 989, 995; *People v. Hua* (2008) 158 Cal.App.4th 1027, 1035-36.

[58] See *Illinois v. McArthur* (2001) 531 U.S. 326, 332; *People v. Bennett* (1998) 17 Cal.4th 373, 384; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1209 ["Where the emergency is the imminent destruction of evidence, the government agents must have an objectively reasonable basis for believing there is someone inside the residence who has reason to destroy the evidence."]. **NOTE**: The courts have sometimes indicated the following circumstances are relevant in determining the lawfulness of a warrantless entry to secure the premises: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and, in the case of drugs, the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic. *People v. Bennett* (1998) 17 Cal.4th 373, 385; *People v. Gentry* (1992) 7 Cal.App.4th 1255, 1261.

[59] See *Illinois v. McArthur* (2001) 531 U.S. 326, 332 ["[T]he police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant."]; *Richards v. Wisconsin* (1997) 520 U.S. 385, 396 ["petitioner's apparent recognition of the officers combined with the easily disposable nature of the drugs-justified the officers' ultimate decision to enter with-out first announcing their presence and authority"]; *People v. Williams* (1989) 48 Cal.3d 1112; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1209; *People v. Zepeda* (1980) 102 Cal.App.3d 1, 7 ["Once the Fuentes' residence was searched and Fuentes and defendant were confronted at their place of work, police prudence dictated that the defendant's residence be searched as immediately after as possible. If it were not done that night, defendant could easily have frustrated any later search."]; *U.S. v. Franklin* (11th Cir. 2012) 694 F.3d 1, 8] ["There were at least two cars in the driveway and at least one other person in the residence who had already shown the willingness to help Franklin avoid arrest by not answering the door."].

Consensual entry

Officers may, of course, enter a home without a warrant if they were invited to enter by the arrestee or another resident. In such cases, however, there are two additional requirements that must be met for the consent to be deemed effective:

(1) VOLUNTARY: Consent must have been given voluntarily,[60] meaning it must have been given freely and not by means of an officer's threats, promises, pressure, or other form of coercion.[61]

(2) AUTHORITY TO CONSENT: The officers must have reasonably believed that the consenting person had the authority to admit them.

But even if these two requirements are met, the entry will not be deemed consensual if officers intended to—and did—immediately arrest the suspect as they entered but did not reveal their intensions to the consenting person.[62] This is because such consent would not have been "knowing and intelligent" and also because an immediate arrest would have been beyond the scope and intensity of the consent.[63]

DETERMINING THE OFFICERS' INTENT: An intent to arrest will ordinarily be found if the officers had probable cause to arrest when they obtained consent, and they made the arrest immediately or very quickly after entering. An intent to arrest is especially likely to be found if the officers had claimed they just wanted to come inside and "talk" with the arrestee. As the Court of Appeal explained, "A right to enter for the purpose of talking with a suspect is not consent to enter and effect an arrest."[64] In other words, "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 to explanation or justification."[65]

Accordingly, consent may be deemed knowing and intelligent if the court determined that, even though the officers intended to make the arrest, they had decided to do so only after they had talked to the arrestee and, after having given him the opportunity to confirm or dispel their suspicions, they concluded that probable cause continued to exist. This is an especially likely result if probable cause was not so indisputable that the officers would have disregarded the suspect's story.

CONSENT GIVEN TO UNDERCOVER OFFICERS: Suspects will frequently consent to an entry by undercover officers for the purpose of engaging in some sort of illegal activity, such as selling drugs. Although the officers will necessarily have misrepresented their identities and purpose, the suspect's consent to enter will be deemed valid because, as the courts see it, criminals who admit people into their homes for the purpose of committing or planning a crime are knowingly taking a chance that the people are undercover officers.[66]

Furthermore, because it would be extremely dangerous for an undercover officer to arrest a suspect after developing probable cause (and it would be unthinkable that a police informant would make a

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[60] See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548; *Florida v. Royer* (1983) 460 U..S 491, 497.

[61] See *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 228; *Florida v. Bostick* (1991) 501 U.S. 429, 438.

[62] Compare *People v. Villa* (1981) 125 Cal.App.3d 872, 878 ["the evidence disclosed the entry was for the purpose of investigating the earlier incident. There was no evidence of subterfuge at the time consent to enter was given."].

[63] See *U.S. v. Strickland* (11th Cir. 1990) 902 F.2d 937, 941 ["[T]he scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass."].

[64] *In re Johnny V.* (1978) 85 Cal.App.2nd 120, 130. Also see *U.S. v. Johnson* (9th Cir. 1980) 626 F.2d 753 [agents immediately arrested the suspect after obtaining consent to "talk" with him].

[65] *People v. Superior Court (Kenner)* (1977) 73 Cal.App.3d 65, 69.

[66] See *U.S. v. Bramble* (9th Cir. 1997) 103 F.3d 1475. 1478 ["It is well-settled that undercover agents may misrepresent their identity to obtain consent to entry."]; *Toubus v. Superior Court* (1981) 114 Cal.App.3d 378, 383 ["*Payton* and *Ramey* are inapplicable where an agent is invited by a suspect to enter."].

citizens arrest), the courts developed a rule—commonly known as "consent once removed"—by which backup officers may, under certain circumstances, forcibly enter the premises to make the arrest.[67] While the term "consent once removed" might suggest that the suspect's act of consenting to an entry by an undercover officer is somehow conferred on the arresting officers,[68] in reality it is based on the theory of exigent circumstances; specifically, the likelihood of harm to the undercover officer if his cover was blown while he was inside, or maybe even if suspect became suspicious.[69] It is also sometimes based on the theory that a suspect who invites someone into his home for the purpose of committing a crime has assumed the "incremental risk" that the person is an undercover officer, and that other officers would immediately enter to arrest him if and when probable cause had developed.[70]

Entering a Third Person's Home

Until now, we have been discussing the requirements for entering the arrestee's home. Oftentimes, however, officers will have reason to believe that the arrestee is temporarily staying elsewhere, such as in the home of a friend or relative. Although officers may enter a third party's home to arrest a guest or visitor if they obtained consent from the third party or if there were exigent circumstances, they may not enter merely because they had a conventional arrest warrant or *Ramey* warrant. Instead, they must have had a hybrid warrant that is both a warrant to search the premises for the arrestee and a warrant to arrest him. These hybrid warrants are known as *Steagald* warrants.[71]

STEAGALD WARRANT REQUIREMENTS: To obtain a *Steagald* warrant, officers must establish, by means of an affidavit, that (1) there is probable cause to arrest the subject of the warrant, (2) there is probable cause to believe he was inside the residence when the warrant was issued, and (3) there is probable cause to believe he would still be inside when the warrant was executed.

ALTERNATIVES TO STEAGALD WARRANTS: *Steagald* warrants are often impractical because it can be difficult to prove that the arrestee will remain in the residence until the warrant was issued and executed. For this reason, the U.S. Supreme Court advised officers that they may have other options; specifically, (1) delay the arrest until the arrestee is inside his own residence, in which case only a conventional or *Ramey* arrest warrant is required; or (2) 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.[72]

Post-Entry Procedure

The post-entry procedure will naturally vary depending on the circumstances of each case. For example, if the entry was consensual, officers may

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[67] See *Pearson v. Callahan* (2009) 555 U.S. 223, 244 ["consent once removed" doctrine "had been considered by three Federal Courts of Appeals and two State Supreme Courts," and that it "had been accepted by every one of those courts"].
[68] See *U.S. v. Rivera* (7th Cir. 2016) 817 F.3d 339, 341.
[69] See *U.S. v. Rivera* (7th Cir. 2016) 817 F.3d 339, 342.
[70] *U.S. v. Paul* (7th Cir. 1986) 808 F.2d 645, 648. Also see *Toubus v. Superior Court* (1981) 114 Cal.App.3d 378, 384 ["The officers who came in to make the arrest acted to assist their fellow officers who were lawfully inside the apartment and who had probable cause to make an arrest for a felony then being committed in their presence; that the officers chose to seek the help of their colleagues in accomplishing the arrest in their presence is not improper."]; *U.S. v. Bramble* (9th Cir. 1997) 103 F.3d 1475, 1478 ["We seriously doubt that the entry of additional officers would further diminish the consenter's expectation of privacy, and, in the instant case, any remaining expectation of privacy was outweighed by the legitimate concern for the safety of the officers inside."]; *U.S. v. Yoon* (6th Cir. 2005) 398 F.3d 802, 809-10 (conc. opn. of Kennedy, J.) ["[Consent once removed] is based upon the theory that, because an undercover agent or informant who establishes probable cause to arrest the suspect may in fact arrest him then and there, he should be entitled to call in the agents with whom he is working to assist in the arrest"].
[71] See *Steagald v. United States* (1981) 451 U.S. 204.
[72] 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"].

do only those things that they reasonably believed the consenting person authorized them to do. On the other hand, if the entry was based on the issuance of a conventional, *Ramey*, or *Steagald* warrant, or if it was based on exigent circumstances, officers have much more freedom so long as they confine their activities to those things that were reasonably necessary to take the arrestee into custody and protect their safety.

SEARCH FOR ARRESTEE: If it is necessary to search the premises for the arrestee, officers must restrict their search to places in which a person might be hiding.[73] This is because a more intensive search is unnecessary when the officers' only objective is to locate people, as opposed to evidence.

PROTECTIVE SWEEPS: A protective sweep or "walk through" consists of a quick and cursory tour of a home or other structure for the purpose of locating anyone on the premises who is reasonably believed to pose a threat to the officers or others.[74] For this reason, protective sweeps are permitted only if officers were aware of facts that reasonably indicated (1) there was a person on the premises (other than the arrestee) who had not made his presence known, and (2) that person presented an imminent threat.

Accordingly, protective sweeps may not be conducted as a matter of routine or departmental policy. Nor may they be conducted on grounds that the officers did not know whether a threat existed and, therefore, they could not rule out that possibility.[75]

SEARCH INCIDENT TO ARREST: If the suspect was arrested, officers may search him and the area that was within his immediate control *at the time of search*.[76] Even if the arrestee lacked immediate access, officers may inspect areas and things that were (1) "immediately adjoining the place of arrest," and (2) large enough to conceal a hiding person.[77] The subject of searches incident to arrest is covered in the accompanying article "Arrests" (Searches Incident to Arrest).

ACCOMPANY ARRESTEE: If officers permit the arrestee to go into any other rooms (e.g., to obtain a jacket) they may accompany him.[78]

SEIZE EVIDENCE IN PLAIN VIEW: While inside the residence, officers may seize an item if they had probable cause to believe it was, in fact, evidence of a crime.[79]

REMAIN PENDING SEARCH WARRANT: If officers decided to seek a search warrant after having entered the premises, they may secure the location for a reasonable amount of time pending issuance of the warrant.[80] They may not, however, conduct a search or otherwise "exploit their presence" inside.[81] POV

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[73] See *Maryland v. Buie* (1990) 494 U.S. 325, 330 ["[U]ntil the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found"]; *U.S. v. Richards* (7th Cir. 1991) 937 F.2d 1287, 1292 [the officer "moved briefly through two bedrooms, the bathroom and kitchen"].

[74] See *Maryland v. Buie* (1990) 494 U.S. 325, 327 ["A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding."]; *U.S. v. Arch* (7th Cir. 1993) 7 F.3d 1300, 1304 ["the officers did not dawdle in each room looking for clues, but proceeded quickly"].

[75] See *Dillon v. Superior Court* (1972) 7 Cal.3d 305, 314 [while there is always "the possibility" that someone else is on the premises, a mere possibility is insufficient].

[76] See *Arizona v. Gant* (2009) 556 U.S. 332.

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

[78] See *Washington v. Chrisman* (1982) 455 U.S. 1, 7; *U.S. v. Roberts* (5th Cir. 2010) 612 F.3d 306, 310-11.

[79] See *Minnesota v. Dickerson* (1993) 508 U.S. 366, 375; *People v. Clark* (1989) 212 Cal.App.3d 1233, 1238; *Arizona v. Hicks* (1987) 480 U.S. 321, 326-28; *People v. Stokes* (1990) 224 Cal.App.3d 715; *People v. Holt* (1989) 212 Cal.App.3d 1200, 1204; *U.S. v. Banks* (8th Cir. 2008) 514 F.3d 769, 773] ["The third requirement, that the incriminating character of an item be immediately apparent is satisfied when police have probable cause to associate the property with criminal activity."].

[80] See *Illinois v. McArthur* (2001) 531 U.S. 326, 331-32.

[81] *Segura v. United States* (1984) 468 U.S. 796, 812 ["There is no evidence that the agents in any way exploited their presence in the apartment; they simply awaited issuance of the warrant."].

Post-Arrest Procedure

The consequences of prolonged detention may be more serious than the interference occasioned by arrest.[1]

The minute a suspect is arrested and taken into custody, a clock starts ticking. It's set for 48 hours and it is counting down the time within which officers, prosecutors, and judges must do certain things. The main objectives of these time limits are to make sure there was probable cause to make the arrest and that there is an orderly and timely transfer of control of the suspect from law enforcement to the judiciary. As we will discuss, these controls include booking, cite-and-release requirements, probable cause reviews, and arraignment.

Booking

"Booking" is defined as the "recordation of an arrest in official police records" and the taking of the arrestee's fingerprints and photograph.[2] Although booking is not expressly mandated by the Penal Code,[3] it is considered standard procedure.[4]

In conjunction with the booking process, the arrestee has a right to make completed telephone calls to an attorney, a bail bondsman, and a relative, and 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 "physically impossible."[5] Officers must also permit the arrestee to visit with an attorney if the arrestee or a relative requests such a visit.[6]

Disposition Of Arrestees

If officers have probable cause to arrest a person for any crime—felony, misdemeanor, or infraction—they may, per the Fourth Amendment, transport him to court or jail for booking.[7] But California imposes restrictions which require that officers cite and release people who have been arrested for certain misdemeanors. For details, see page 24.

Probable Cause Review

If the arrest was made without a warrant, and if the arrestee will not be cited and released or released on bail or his own recognizance, he has a constitutional right to have a judge review the facts upon which probable cause was based to make sure that officers did, in fact, have probable cause. As the Supreme Court explained, "[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispending with the magistrate's neutral judgment evaporate."[8] Consequently, if the judge determines that probable cause exists, the suspect may be detained pending further court order. If not, he must be released unless other charges or holds are pending.[9] This procedure is commonly known as a Probable Cause Review or *Gerstein-Riverside* Review.[10]

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[1] *Gerstein v. Pugh* (1975) 420 U.S. 103, 114.
[2] See *People v. Superior Court (Logue)* (1973) 35 Cal.App.3d 1, 6.
[3] See Pen. Code § 853.6(g).
[4] See 3 LaFave, *Search and Seizure* (Fourth Edition) at p. 46 ["law enforcement agencies view booking as primarily a process for their own internal administration"].
[5] See Pen. Code § 851.5. **NOTE**: Evidence may not be suppressed on grounds it was the fruit of a violation of such a statute. See *People v. Lessie* (2010) 47 Cal.4th 1152, 1170.
[6] See Pen. Code § 825(b).
[7] See *Virginia v. Moore* (2008) 553 U.S. 164; *Atwater v. Lago Vista* (2001) 532 U.S. 318; 354; *People v. McKay* (2002) 27 Cal.4th 601, 607, 618.
[8] *Gerstein v. Pugh* (1975) 420 U.S. 103, 113-14.
[9] See *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, 1080.
[10] See *Gerstein v. Pugh* (1975) 420 U.S. 103; *County of Riverside v. McLaughlin* (1991) 500 U.S. 44.

TIME RESTRICTIONS: In the past, some courts would rule that probable cause determinations must be conducted immediately after booking. The idea that a constitutional violation will result unless officers can account for every minute of their time between the arrest and Probable Cause Review was, of course, unsound. As the Supreme Court pointed out, the law requires promptness—not immediacy.[11] Furthermore, in determining whether the officers were sufficiently prompt, the courts "must allow for a substantial degree of flexibility."[12]

The Court was also aware that a rule requiring a prompt probable cause review would result in lots of litigation and uncertainty because "promptness" means different things to different people. To avoid this problem, the Court ruled that when the probable cause review occurs within 48 hours of the suspect's arrest, any delays will be presumed to be reasonably necessary.[13] Although the suspect may attempt to rebut this presumption, the presumption is fairly strong. As the Court explained, "[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement."[14]

On the other hand, if the probable case determination was made after 48 hours, the prosecution will have the burden of proving that the delay was reasonably necessary.[15] Note that in calculating the time limits, no allowance is made for weekends and holidays. It's a straight 48 hours.[16]

HOW PROBABLE CAUSE IS DETERMINED: To obtain a probable cause review, officers will ordinarily prepare a "Declaration of Probable Cause" in which the arresting officer sets forth the facts upon which probable cause was based. The declaration may include attachments, such as the arrest report and witness statements. Declarations of Probable Cause may be submitted to the judge by hand or, in some counties, by means of a fax or secure email system.

In determining whether probable cause exists, judges do not examine the facts hypercritically; nor do they conduct extensive examinations of the weight of the evidence or the credibility of witnesses.[17] Instead, they apply the same standards they use in deciding whether to issue a search or arrest warrant;[18] i.e., does a commonsense reading of the documents demonstrate a "fair probability" that the suspect committed the crime for which he was arrested.[19]

CONSEQUENCES OF VIOLATION: There is some uncertainty as to whether evidence may be suppressed if it was obtained as the result of a tardy probable cause determination. While there is one California case in which suppression was ordered,[20] there were some usual circumstances. Moreover, at least three circuit courts, including the Ninth Circuit, have ruled that suppression is not always required.[21]

Furthermore, it is arguable that evidence should not be suppressed as the result of a violation if the court at the motion to suppress ruled that probable cause to arrest did, in fact exist;[22] or if the court finds that, pursuant to the Fruit of the Poisonous Tree Rule, the taint from the delay had been attenuated. In any event, it is clear that an arrestee may not be released from custody based on a tardy probable cause determination, nor may his charges be dismissed.[23]

[11] See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 54.
[12] *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.
[13] See *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1070.
[14] See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.
[15] See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 57.
[16] See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56-58.
[17] See *Gerstein v. Pugh* (1975) 420 U.S. 103, 120-21.
[18] See *Gerstein v. Pugh* (1975) 420 U.S. 103, 120-21.
[19] See *Illinois v. Gates* (1983) 462 U.S. 213, 238; *Safford Unified School District v. Redding* (2009) 557 U.S. 364, 371.
[20] *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1166-67.
[21] See *New York v. Harris* (1990) 495 U.S. 14, 18; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053, 1071.
[22] See *Powell v. Nevada* (1994) 511 U.S. 79, 90 (conc. opn. of Thomas, J.).
[23] See *Gerstein v. Pugh* (1975) 420 U.S. 103, 123; *People v. Valenzuela* (1978) 86 Cal.App.3d 427, 431.

Arraignment

If prosecutors charged the arrestee with the crime for which he was arrested or some other crime, he must be arraigned. An arraignment is usually the first court appearance during which, among other things, a defense attorney is appointed or is present; 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 unless (1) he was released from custody, or (2) he was being held on other charges or a parole hold. Unlike the time limit for probable cause reviews, the 48-hour countdown does not include Sundays and holidays. If time expires when court is in session, the defendant may be arraigned any time that day. If court was not in session, he may be arraigned the following day.[24]

CHARGING DELAYS: Arraignments will sometimes be delayed because prosecutors needed additional time to make a charging decision and otherwise cope "with the everyday problems of processing suspects through an overly burdened criminal justice system."[25] Delays for these purposes might be even longer on Mondays because the number of weekend arrests "is often higher and available resources tend to be limited."[26]

Although prosecutors can usually perform these duties on time, delays happen. In most cases, however, brief delays for charging are usually viewed as reasonable if officers and prosecutors were diligent. This is because it is in the best interests of the arrestee, that the charging process not be rushed—that charges be filed only after careful review.[27] As with probable cause reviews, in determining whether a delay was reasonably necessary, the courts allow some flexibility, especially for the following reasons.

DEFENDANT INJURED OR SICK: The defendant was unable to appear in court because he was sick or injured. As the California Supreme Court observed, "[I]t would be an unreasonable application of [the arraignment statute] to require that a hospitalized defendant be taken before a magistrate until it was possible to do so without jeopardy to his health."[28]

DEFENDANT IN CUSTODY ON PENDING CHARGES IN ANOTHER COUNTY: The defendant was in custody in another county as a result of charges filed in that county. In such cases, the defendant need not be arraigned until the out-of-county prosecution has concluded.[29]

INVESTIGATIVE DELAYS: A delay for further investigation will usually be considered justifiable if (1) the crime was serious; (2) officers were at all times diligently engaged in actions they reasonably believed were required 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.[30] On the other hand, delays have been deemed unjustified when their purpose was to allow the arresting officer to get some sleep, the delay occurred because the arresting officer's shift had ended, the delay was "not unusual," and the delay was "motivated by ill will" against the defendant.[31] POV

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[24] See Pen. Code §§ 825(a); *People v. Gordon* (1978) 84 Cal.App.3d 913, 922; *People v. Turner* (1994) 8 Cal.4th 137, 175.
[25] *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 55. Also see *People v. Williams* (1977) 68 Cal.App.3d 36, 43 [delay "for the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed; and to complete the necessary clerical and administrative tasks to prepare a formal pleading"].
[26] *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 55.
[27] See *People v. Turner* (1994) 8 Cal.4th 137, 175; *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56.
[28] See *In re Walker* (1974) 10 Cal.3d 764, 778.
[29] See *Ng v. Superior Court* (1992) 4 Cal.4th 29, 36.
[30] See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 54; *People v. Bonillas* (1989) 48 Cal.3d 757, 788.
[31] See *Riverside v. McLaughlin* (1991) 500 U.S. 44, 55-56; *People v. Thompson* (1980) 27 Cal.3d 303, 329.

Misdemeanors and Infractions Disposition of Arrestees

Under the Fourth Amendment, officers may transport an arrestee to jail or a police station if they have probable cause to arrest for any felony or misdemeanor. Under California law, however, there are certain restrictions pertaining to misdemeanors and infractions. Specifically, the arrestee must be cited and released except as follows:*

Misdemeanor arrests: A person who was arrested for a misdemeanor may be taken into custody for any of the following reasons:

- Arrest on warrant that said no cite and release.
- It was reasonably likely that the offense would continue.
- It was reasonably likely that the safety of persons or property would be immediately endangered if the arrestee was cited and released.
- The arrest was for domestic violence, a violation of a protective court order involving domestic violence, a crime of violence, a crime involving a firearm, resisting arrest, or furnishing false information to a peace officer.
- Arrest for any of the following Vehicle Code sections: 2800, 10852, 10853, 14601, 14601.1, 14601.2, 20002, 20003, 21200.5, 21461.5, 23103, 23104, 23109, 23152, 23332, 40303.
- Arrest for Penal. Code sections: 827.1, 853.6(i).
- Arrestee without satisfactory ID.
- Arrestee constituted a danger to himself or others due to alcohol or drugs.
- Arrestee required a medical exam or care, or was otherwise unable to care for his safety.
- Arrestee was charged with another crime for which he was ineligible for release.
- Arrestee had outstanding warrants.
- Arrestee refused to sign a promise to appear.
- Officer decided to book the arrestee before citing and releasing him.**

Infraction arrests: Cite and release except as follows:

- Arrestee was arrested for a violation of the Vehicle Code and demanded an immediate appearance before a judge.
- Arrestee refused to sign a promise to appear.
- Arrestee unable to provide satisfactory ID or refused to provide a thumbprint or fingerprint on the promise to appear.

Outright release: Officers may release an arrestee from custody without obtaining a promise to appear as follows:

- Officers determined there were insufficient grounds for a complaint.
- Plain drunk arrest; no further proceedings were desirable.
- Arrest for being under influence of drugs; arrestee taken to treatment facility and no further proceedings are desirable.

* See Pen. Code §§ 827.1, 849(b), 853.5, 853.6; Veh. Code §§ 40302, 40303(b). Also see *Virginia v. Moore* (2008) 553 U.S. 164; *Atwater v. Lago Vista* (2001) 532 U.S. 318; 354; *People v. McKay* (2002) 27 Cal.4th 601, 607, 618.

** **NOTE:** Based on the voters' intent in passing Proposition 47 in 2014, it is reasonable to infer that arrestees should ordinarily be released at the scene unless there was some overriding reason to book them. For the same reason, they should be released promptly after the booking procedure has been completed, which would seem to mean they can neither be interrogated nor held for a lineup (unless they consent to it), and they must not be temporarily housed in the general population of the facility.

Recent Cases

U.S. v. Ulbricht

(2nd Cir. 2017) 858 F.3d 71

Issue

When officers write search warrants for electronic communications or data, how much specificity is required when they describe the information to be seized?

Facts

This is the case about the audacious "Silk Road" website which, between 2011-2013 operated on the Darknet.[1] According to the court, Silk Road was a "massive, anonymous criminal marketplace" on which users could buy and sell drugs, illegal weapons, false IDs, computer hacking software, and other contraband; and they could pay for it anonymously via a digital currency called Bitcoin.

The suspected creator and operator of Silk Road was Ross Ulbricht, a young physicist and fearless libertarian, whose user name was Dread Pirate Roberts or DPR. In 2012, federal investigators in New York and Maryland began the seemingly impossible task of gathering information about the site and the mysterious person who ran it. Eventually, they developed a strong case against Ulbricht but, in order to obtain a conviction they needed to catch him in the act of working on the site as an administrator—and they must do so before he was able to activate an emergency destruction program.

Their opportunity arose in 2013 when investigators followed Ulbricht as he walked into a branch of the San Francisco Public Library. He was carrying his laptop, and the investigators were aware that many people who conduct illegal internet operations often do so at libraries and coffee shops because they are often able to sit in places where others cannot see their monitors. Shortly after Ulbricht sat down and started using his laptop, investigators who were conducting surveillance of the site from another location were alerted that DPR had just logged into Silk Road as an administrator. This provided them with the proof they needed, so they sent a signal to agents inside the library who rushed him and grabbed the laptop before he could encrypt the data.

After seizing the laptop, investigators obtained a warrant to search it and, during the search, they found "overwhelming evidence" that Ulbricht created and continued to administer Silk Road. Also on the laptop, they found evidence that the site had processed transactions totaling approximately $183 million. Prosecutors used this evidence at trial and Ulbricht was convicted of, among other things, engaging in a continuing criminal enterprise and conspiring to obtain unauthorized access to a computer for the purpose of furthering the enterprise. He was sentenced to life in prison.

Discussion

On appeal, Ulbricht argued that the evidence discovered in his laptop should have been suppressed because the warrant did not adequately describe the digital information that the investigators were authorized to search for and seize. For example, he objected to the following descriptions:

- "[A]ny communications or writings by Ulbricht, which may reflect linguistic patterns or idiosyncrasies associated with DPR."
- "[A]ny evidence concerning any computer equipment, software, or user names by Ulbricht."
- "[A]ny evidence concerning Ulbricht's technical expertise concerning [the Darknet], Bitcoins, and other computer programming issues."

[1] What is "The Darknet"? The Darknet is "a special network on the Internet designed to make it practically impossible to physically locate the computers hosting or accessing websites on the network." *Ulbricht* at fn.2. Users of The Darknet "deliberately hide from the prying eyes of the searchable Web. They cloak themselves in obscurity with specialized software that guarantees encryption and anonymity between users, as well as protocols or domains that the average webizen will never stumble across." *PC World*, August 2, 2013.

Ulbricht was correct that search warrants must contain a "particular" description of the places to be searched and the evidence to be seized.[2] As might be expected, however, it is impossible to define what constitutes a "particular" description. Instead, the courts usually say something nebulous such as the description must impose a "meaningful restriction" on what officers may search for and seize.[3] While this requirement seldom causes problems when officers want to search for physical evidence, such as illegal drugs and weapons), it may be a big problem when they want to search for information and data stored in a computer or other electronic communications device. This is because, as the court in *Ulbricht* pointed out, "officers cannot readily anticipate how a suspect will store information related to the charged crimes. Files and documents can easily be given misleading or coded names, and words that might be expected to occur in pertinent documents can be encrypted."

Were the descriptions contained in the Silk Road warrants sufficiently particular? The court ruled they were because the affiant—who was obviously well-trained for the job—utilized at least four methods of describing evidence that he or she had never seen. Because these methods can be used in a variety of cases, we have included a summary of each:

(1) SEARCH PROTOCOLS: A affidavit may contain a "search protocol" in which the affiant describes a certain procedure by which officers can identify seizable evidence. And if the judge issues the warrant, officers will be authorized to utilize this procedure. For example, a search protocol for a computer might require "an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches."[4]

In *Ulbricht*, the affiant included three such protocols. First, the agents were authorized to start with a "key word" search in which they utilized a software program that examines all of the files, looking for certain words that are indicative of, or otherwise related to, seizable information. Second, they were instructed that when they found such a file they must begin by "cursorily reading the first few" pages to make sure that it contains relevant information. Third, in order to link Ulbricht to Silk Road, they were authorized "to compare Ulbricht's writings to DPR's posts to confirm that they were the same person, by identifying both linguistic patters and distinctive shared political or economic view."

(2) **INCORPORATION BY REFERENCE**: An affiant may also be able to provide a more complete description of communications and data by incorporating the entire search warrant affidavit into the warrant; e.g., "Attached hereto and incorporated by reference is the affidavit in support of this warrant." This was done in *Ulbricht* and the court pointed out that "[b]y incorporating the affidavit by reference, the Laptop Warrant lists the charged crimes, describes the place to be searched, and designates the information to be seized in connection with the specified offenses."

(3) **"PERMEATED WITH FRAUD"**: It happens sometimes that a business is so corrupt—so "permeated with fraud"—that there is probable cause to believe that all or substantially all of the documents stored in its computers (and in file cabinets) constitute evidence of a crime. In such cases, the description of the evidence may be quite broad, and may even permit officers to search for and seize *all* stored communications and data.[5] Because the affidavit established that Silk Road was the quintessential "permeated with fraud" operation, the court ruled there was an "ample basis for the issuing magistrate judge to conclude that evidence related to Silk Road and Ulbricht's uses of the DPR username likely permeated Ulbricht's computer."

(4) **USING REASONABLY AVAILABLE INFORMATION**: Finally, the courts permit a more general description if it reasonably appeared that the affiant provided as much descriptive information as he or she could be

[2] See *U.S. v. SDI Future Health, Inc.* (9th Cir. 2009) 568 F.3d 684, 702 ["Particularity means that the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize."].
[3] See *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 249; *Andresen v. Maryland* (1976) 427 U.S. 463, 480; *Maryland v. Garrison* (1987) 480 U.S. 79, 84; *Lo-Ji Sales, Inc. v. New York* (1979) 442 U.S. 319, 325.
[4] *U.S. v. Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094.
[5] See *People v. Hepner* (1994) 21 Cal.App.4th 761, 778; *U.S. v. Smith* (9th Cir. 2005) 424 F.3d 992, 1006.

expected to provide under the circumstances.[6] As the court explained in *U.S. v. Young*, "Courts tend to tolerate a greater degree of ambiguity where law enforcement agents have done the best that could reasonably be expected under the circumstances, have acquired all the descriptive facts which a reasonable investigation could be expected to cover, and have insured that all those facts were included in the warrant."[7] This was a factor in *Ulbricht* because the court pointed out that the agents "did the best that could reasonably be expected under the circumstances," and that they "acquired all the descriptive facts which a reasonable investigation could be expected to cover, and had insured that all those facts were included in the warrant."

For these reasons, the court ruled that the agents' description of the communications and data in Ulbricht's laptop was sufficient, and it affirmed Ulbricht's conviction and sentence.

In re D.W.

(2017) __ Cal.App.5th __ [2017 WL 3334592][8]

Issue

If officers have probable cause to believe that a person possessed an ounce or less of marijuana, may they search him for the marijuana as a routine incident to the arrest?

Facts

Two San Francisco police officers on patrol saw several young men standing on a corner in a high crime area. Because some of the men were known gang members, the officers decided to stop and talk with them. One of the men was a minor who was identified here as D.W. When an officer smelled the odor of marijuana coming from D.W.'s clothing and breath, he said, "Man, you smell like marijuana," and D.W. responded by admitting that he had just smoked some. Consequently, the officer searched D.W. for more marijuana and found a revolver under his backpack. After D.W. was charged, he filed a motion to suppress the gun, and the motion was denied. He appealed.

Discussion

D.W. argued that the search constituted an illegal search incident to arrest, and the court agreed. This ruling was based on the settled law that officers may not search an arrestee incident to an arrest unless they would be transporting him to a police station, jail, or other place of confinement.[9]

The problem in *D.W.* was that the defendant could not be legally transported from the scene because the officer had probable cause to believe that D.W. possessed only a small amount of marijuana. And, at the time, possession of one ounce or less of marijuana was merely an infraction which must ordinarily be disposed of by means of citation and release. (Now it's not a crime at all.) Consequently, the court ruled that the search of D.W. could not qualify as a search incident to arrest. because "when officers decided to search D.W., they had neither cause to make a custodial arrest nor evidence that he was guilty of anything more than an infraction."

Comment

D.W. was decided before Proposition 64 became law last year, but its fundamental ruling still applies: Officers may not conduct a search incident to an arrest for possession of an illegal substance unless they reasonably believed the substance was, in fact, illegal to possess. And because small quantities of marijuana are no longer *ipso facto* illegal to possess, a light odor of marijuana will not support a custodial arrest.

There is, however, another type of search whose validity does not depend on the amount of marijuana in the suspect's possession. It is known as a "probable cause search" and it is generally permit-

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[6] See *People v. Robinson* (2010) 47 Cal.4th 1104, 1132; *People v. Smith* (1986) 180 Cal.App.3d 72, 89.
[7] (2nd Cir. 1984) 745 F.2d 733, 759.
[8] **NOTE**: This previously depublished case was ordered published on August 2, 2017.
[9] See *Birchfield v. North Dakota* (2016) __ U.S. __ [136 S.Ct. 2160]; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1212. NOTE: The rationale is that the danger to officers "is far greater in the case of the extended exposure which follows the taking of a suspect into custody," especially because of the "attendant proximity, stress and uncertainty." *United States v. Robinson* (1973) 414 U.S. 218, 234, 35, fn.5.

ted whenever officers have probable cause to believe that a person they have encountered possesses illegal drugs in any amount. Thus, the search in *D.W.* might have been upheld as a probable cause search because straight possession of marijuana was still an infraction when the search occurred. But, for some reason, that theory was not considered.

So, how do things stand now that possession of one ounce or less of marijuana is no longer a crime in California? Although the appellate courts have not yet had an opportunity to address the issue, it appears that officers will still be able to conduct probable cause searches for marijuana in a suspect's possession—but only if they also have probable cause to believe the marijuana was possessed under circumstances that made possession illegal under the terms of Proposition 64. What are those circumstances? There are six of them, and they have now been incorporated into the Health and Safety Code, as follows:

MORE THAN ONE OUNCE: As noted, a person cannot possess more than an ounce of recreational marijuana.[10] In many cases, however, it is difficult to prove how much marijuana a suspect possesses until officers have conducted a search. Thus, it appears that a search would be permitted only if the arresting officer was able to articulate why he believed the amount exceeded one ounce.

In Colorado, which is another recreational marijuana state, an appellate court recently ruled that an alert by a K-9 who is sniffing a vehicle will not automatically provide officers with probable cause to search the vehicle because K-9's cannot determine whether the quantity of marijuana they have detected exceeds one ounce.[11] This ruling (which is discussed next), seems consistent with the court's observation in *D.W.* that "even if the officers could reasonably conclude that the smell of marijuana and D.W.'s admission that he just smoked some meant he had more, it would have been mere conjecture to conclude that he possessed enough to constitute a jailable offense."

MINOR IN POSSESSION: A minor cannot possess any amount of marijuana.[12] So, if officers had probable cause to believe the suspect was a minor, a search based on probable cause would be lawful.

OPEN CONTAINER: If officers saw an open container of marijuana in an occupied vehicle, a probable cause search to seize the container would be permitted because possession of an open container of marijuana is treated the same as an open container of alcohol.[13]

INGESTING IN VEHICLE: A search would be permitted if officers had probable cause to believe that the driver or a passenger in a vehicle were smoking or ingesting marijuana.[14]

IMPAIRED DRIVER: A search would also be permitted if officers had probable cause to believe the driver was impaired as the result of smoking or ingesting marijuana.[15]

MARIJUANA IN PUBLIC PLACES, SCHOOLS: Finally, a search would be lawful if officers had probable cause to believe the arrestee was smoking it in a public place or at a school.[16]

In summary, if any of these circumstances existed, the marijuana in the suspect's possession would almost certainly constitute "contraband," which would mean that a search based on probable cause would be permitted.

People v. McKnight

(2017) __ P.3d __ [2017 WL 2981808]

Note

This case was decided by the Court of Appeals in Colorado. Although it is not binding authority in California, we are including it because its analysis seems sound and it addresses an important issue resulting from the legalization of recreational marijuana in California.

[10] See Pen. Code §§ 11362.1(a), 11357.
[11] *People v. McKnight* (2017) __ P.3d __ [2017 WL 2981808].
[12] See Health & Saf. Code §§ 11362.1(a)(1).
[13] See Health & Saf. Code §§ 11362.3(a)(4).
[14] See Health & Saf. Code §§ 11362.3(a)(8), 11362.45(a).
[15] See Health & Saf. Code §§ 11362.45(a).
[16] See Health & Saf. Code § 11362.3(a)(1), 11362.3(a)(5).

Issues

(1) Does the use of a K-9 to detect marijuana in a vehicle constitute a "search" in states where possession of small amounts of marijuana is lawful? (2) If so, did the officers have probable cause to search?

Facts

In the course of a pretext traffic stop, a police officer in Colorado recognized the passenger as a meth user. Because the vehicle had just left a known drug house, the officer requested a K9 to check it for drugs. The dog had been trained to detect a variety of drugs including marijuana, so when the dog alerted, the officers searched the vehicle and found methamphetamine. The driver, McKnight, was arrested and, after his motion to suppress the drugs was denied, he was found guilty of possession.

Discussion

McKnight argued that the drugs should have been suppressed because (1) the use of a K9 to smell the outside of a stopped vehicle constituted a "search" under the Fourth Amendment, and (2) the officers lacked probable cause for a search because the possession of marijuana is no longer a crime in Colorado.

A K9's sense of smell is so accurate that an alert will ordinarily and automatically establish probable cause to search.[17] Furthermore, the Supreme Court has ruled that a K9's act of sniffing the outside of a stopped vehicle does not constitute a "search" if the dog had been trained to detect only drugs that were illegal to possess. Said the Court, "A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."[18]

The problem in *McKnight* was that the officer did not have probable cause to believe that the amount of marijuana in McKnight's car exceeded one ounce. That is because a dog who is trained to detect marijuana will alert to any amount of marijuana—not just to amounts that are illegal to possess.

Consequently, the court ruled that (1) a K9's act of sniffing the outside of a vehicle for marijuana constitutes a "search," and (2) the dog's alert while sniffing does not automatically establish probable cause for a search. Although the court also ruled that a K9's alert is still relevant in establishing probable cause, it concluded that the combination of the alert, the passenger's known methamphetamine use, and her recent visit to a drug house were not enough.

People v. Nguyen

(2017) 12 Cal.App.5th 574

Issues

Did a search warrant impliedly authorize the search of two residences on the suspect's property?

Facts

In the course of a child pornography investigation, a San Jose police detective was able to determine the IP address of a computer that was being used to share child pornography. The ISP provided the detective with the name and address of the subscriber who was identified as Jennie Reynolds.

While driving by the house, the detective saw that, in addition to Reynolds' home, there was a structure that appeared to be a garage located about 25 feet behind the house. But if it was a garage, it was an unusually large one as it spanned the width of the lot. A car parked in the driveway leading to the structure was registered to Kevin Nguyen. The detective obtained a warrant to search the residence in front and "any and all yards, garages, carports, outbuildings, storage areas and sheds assigned to the above described premises."

When officers executed the warrant, Reynolds said she lived in the front house and Nguyen, her landlord, lived in the rear structure. The officers then searched Nguyen's home and found a laptop containing child pornography. After Nguyen was arrested and charged, he filed a motion to suppress on grounds the rear structure was not a garage, carport, storage area, or other searchable structure. The trial court agreed; the People appealed.

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[17] See *Illinois v. Caballes* (2005) 543 U.S. 405, 410; *Indianapolis v. Edmond* (2000) 531 U.S. 32, 40; *Florida v. Royer* (1983) 460 US 491, 505-6 ["The courts are not strangers to the use of trained dogs to detect the presence of controlled substances in luggage"].
[18] *Illinois v. Caballes* (2005) 543 U.S. 405, 410. Also see *United States v. Jacobsen* (1984) 466 U.S. 109, 124.

Discussion

When a warrant authorizes the search of a residence, a search of a separate structure on the property will ordinarily be deemed unlawful unless one of the following circumstances existe: (1) the warrant authorized a search of the "premises"—not just the home (e.g., a warrant to search "the *premises* at 415 Hoodlum Drive"),[19] or (2) the structure reasonably appeared to be ancillary to the residence and the warrant authorized a search of ancillary structures; e.g., "all garages, sheds, ...").[20]

Although the warrant in *Nguyen* did not expressly authorize a search of the rear structure, it *did* authorize a search of all "garages, carports, outbuildings, storage areas and sheds" on the property. Consequently, the main issue was whether the officers reasonably believed that the rear structure fell within any of these categories. The court ruled they did not.

It was not a garage, said the court, because the officers had been informed by Reynolds that Nguyen lived inside, and also because the trial judge had ruled that the structure was "plainly a separate residence." The court also ruled that the structure did not constitute a carport, outbuilding, storage area, or shed because "[t]he record holds no evidence Nguyen's residence was used in connection with the main house, or that it served as . . . anything else besides a separate residence for Nguyen. Images of the residence show it is not a small building, but a sizable structure nearly as large as the front house. It was not an outbuilding. It was a separate residence."

Consequently, the court ruled that the search of Nguyen's home was unlawful because "the facts available to and known by the police *before* the seizure established that the rear structure was Nguyen's separate residence."

People v. Cervantes

(2017) 11 Cal.App.5th 860

Issue

Did officers exceed the permissible scope of a probation search of a vehicle when they searched two bags that did not belong to the person on probation?

Fact

During a traffic stop in San Diego, police officers determined that the front-seat passenger, Tiffany Craft, was on probation with a "standard" search condition that authorized warrantless searches of her "person, vehicle, residence, property, and personal effects." Having decided to search the vehicle, the officers began by opening two bags located in the back seat directly behind the driver, Jaime Cervantes. As they did so, they discovered that both bags apparently belonged to Cervantes—not Tiffany—because they contained men's toiletries and men's clothing. Nevertheless, the officers searched both bags and found, among other things, over 185 grams of methamphetamine, 4.4 grams of heroin, and a digital scale. The officers then searched the front center console and found more methamphetamine.

After Cervantes was arrested and charged, he filed a motion to suppress the drugs on grounds they were discovered in the course of a illegal probation search. The court rejected the argument and Cervantes eventually pled guilty to a variety of drug offenses.

Discussion

On appeal, Cervantes argued that the search of the bags in the back seat exceeded the permissible scope of Tiffany's probation search condition because it should have been apparent to them that

[19] See *People v. Dumas* (1973) 9 Cal.3d 871, 881, fn.5 ["[A] warrant to search 'premises' located at a particular address is sufficient to support the search of outbuildings and appurtenances in addition to a main building when the various places searched are part of a single integral unit."]; *People v. Grossman* (1971) 19 Cal.App.3d 8, 12 [warrant to search "premises" authorized search of cabinet in adjacent carport]; *People v. McNabb* (1991) 228 Cal.App.3d 462, 469 ["The word 'premises' in a search warrant describing a house with a detached garage has been held to embrace both the house and the garage."].

[20] See *People v. Smith* (1994) 21 Cal.App.4th 942, 949-50; *People v. Barbarick* (1985) 168 Cal.App.3d 731, 740; *U.S. v. Cannon* (9th Cir. 2001) 264 F.3d 875, 880; *U.S. v. Gorman* (9th Cir. 1996) 104 F.3d 272, 274].

neither bag belonged to her. It turned out that the California Supreme Court had recently decided a case that seemed to be on point.[21] The case was *People v. Schmitz.*[22]

In *Schmitz*, as in *Cervantes*, officers made a traffic stop and determined that the front seat passenger was on parole. So they conducted a parole search of some items in the back seat and found drugs. As the result, the driver, Schmitz, was arrested and convicted. The Court of Appeal ruled the search was illegal, and the People appealed to the California Supreme Court which ruled as follows: Officers who are conducting a lawful parole search of a vehicle need not restrict the search to places and things within the parolee's immediate control but may search "those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when [the passenger became] aware of police activity." In other words, the legality of the search depends on whether the officers reasonably believed that the parolee had temporary access to the containers, not on whether the containers *belonged* to the parolee.

Although the court in *Cervantes* could have summarily resolved the case based on *Schmitz*, the court appeared to be uncertain as to exactly what the court in *Schmitz* had ruled. Specifically, it thought it was important that the court in *Schmitz* had "expressed concern" about searches of personal property belonging to someone other than the probationer or parolee. So, rather than deal with the issue of whether these particular bags located at a particular place in the vehicle were subject to a probation search, the court decided the issue based on an exception to the suppression rule known as "inevitable discovery."

Pursuant to this rule, evidence obtained as the result of an illegal search may not be suppressed if it would have been acquired inevitably by lawful means. As the U.S. Supreme Court explained, "If the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury."[23]

In applying this rule to the facts in *Cervantes* the court concluded that, even if the search of the bags was illegal, it was inevitable that the officers would have legally discovered the drugs stored inside because (1) Tiffany was, in fact, on probation with a search condition; (2) it was inevitable that the officers would have searched the console during their subsequent probation search of the vehicle; (3) the search of the console would have been within the scope of a lawful probation search because Tiffany was sitting next to it and could have stowed the drugs inside it; (4) it was therefore inevitable that the officers would have found the drugs in the console; (5), having found the drugs in the console, the officers would have had probable cause to search the entire vehicle. Thus, having concluded that the officers' discovery of the drugs in the bags was inevitable, it ruled that the drugs were not subject to suppression.

U.S. v. Spivey

(11th Cir. 2017) 861 F.3d 1207

Issue

Will consent to enter a residence be invalidated if officers lied about their objective?

Facts

Caleb Hunt was a burglar. One day while burglarizing a house in south Florida, he happened to notice some things that indicated the residents were engaged in a major identity theft operation. Among other things, he saw a credit card embossing machine and a lot of credit cards. More important (and not coincidentally, he thought), he noticed that the house contained an exceptionally large amount of high-end merchandise. Hunt, who did not subscribe to the notion of "honor among thieves," then removed the merchandise from the premises and

[21] **NOTE**: The only significant difference was that *Schmitz* involved a parole search while *Cervantes* involved a probation search. However, the court in *Cervantes* ruled this difference was irrelevant.
[22] (2012) 55 Cal.4th 909. Also see *People v. Ermi* (2013) 216 Cal.App.4th 277, 281.
[23] *Nix v. Williams* (1984) 467 U.S. 431, 444, 447. Also see *Murray v. United States* (1988) 487 U.S. 533, 539.

made a mental note that he ought to burglarize this place again. And so he did, and the second burglary was just as successful as the first. But his luck ran out shortly thereafter when he was apprehended while burglarizing another home.

While in jail, Hunt considered his options and eventually concluded that the best one was to snitch off the owners of the house and try to get a reduced sentence. So, he met with agents from the South Florida Organized Fraud Task Force and explained that he had seen "so much high-end merchandise in the house that he burgled it twice."

To confirm Hunt's story and obtain probable cause, the agents went to the house and spoke with the residents, Eric Spivey and Chenequa Austin. One of the agents identified himself as a burglary investigator and the other said he was a crime-scene technician. Spivey and Austin were happy to see that the police were taking such an interest in the burglaries and so they invited them inside to conduct their investigation. While the "crime-scene technician" pretended to dust for latent prints, the other agent was given a tour through the premises during which he saw the embossing machine, "stacks of credit cards" and "large quantities of expensive merchandise such as designer shoes and iPads." Spivey and Austin were later arrested and, when their motion to suppress the evidence was denied, they pled guilty to several federal crimes, including aggravated identify theft.

Discussion

Although Spivey and Austin freely consented to the officers' entry into their home, they argued that their consent was invalid because the officers lied about their purpose. The court rejected the argument.

There is nothing new or shocking about an officer's use of deception to obtain entry into a suspect's home. Undercover narcotics officers do it all the time. In these cases, the courts take the position that criminals who invite "fellow criminals" into their homes for an illicit purpose are knowingly taking a chance that the fellow criminal is actually an officer or informant.[24]

In contrast, a consensual entry will be invalidated if the officer lied about his identity and claimed to have a legitimate reason for entering. Thus, the courts have ruled that a suspect's consent to enter his home was ineffective when the officer obtained entry by claiming he was the driver of a car that had just collided with the suspect's car outside his home,[25] or when the officer identified himself as a friend of the Sears repairman who was currently working inside the house.[26] As the California Supreme Court observed, cases in which consent was deemed ineffective "all involve some positive act of misrepresentation on the part of officers, such as claiming to be friends, delivery men, managers, or otherwise misrepresenting or concealing their identity."[27]

The situation in *Spivey*, however, was different because the officers truthfully identified themselves but lied only about the purpose of their entry. Although this was a somewhat unusual scenario, the court ruled this type of deception was not objectionable because the officers did not lie about their identity (they said they were officers) or the nature of the intrusion (they said they wanted to enter the home). As the Ninth Circuit explained, "Not all deceit vitiates consent. The mistake must extend to the essential character of the [intrusion] itself rather than to some collateral matter which merely operates as an inducement."[28]

There is, however, an exception to this rule. Specifically, a consensual entry by a known officer is ineffective if it was induced by an officer's misrepresentation that he needed to enter because of some emergency. For example entries have been invalidated when officers told the consenting person that they had received a report that there was a bomb on the premises or that they needed to come inside and look for a missing child.[29] POV

[24] See *Lewis v. United States* (1966) 385 U.S. 206, 211; *Hoffa v. US* (1966) 385 U.S. 293.
[25] *People v. Reyes* (2000) 83 Cal.App.4th 7, 10.
[26] *People v. Mesaris* (1970) 14 Cal.App.3d 71.
[27] *Mann v. Superior Court* (1970) 3 Cal.3d 1, 9.
[28] *Theofel v. Farley-Jones* (9th Cir. 2004) 359 F.3d 1066, 1073.
[29] See *U.S. v. Cacace* (2nd Cir. 2015) 796 F.3d 176, 189; *U.S. v. Harrison* (10th Cir. 2011) 639 F.3d 1273, 1280.

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