Searches Incident to Arrest

It is a difficult exercise at best to predict a criminal suspect's next move."[1]

Taking a suspect into custody is almost always a "tense and risky undertaking."[2] This is especially so whenever the crime was a felony because many of today's felons are not only violent and well armed, they are often desperate. And they know that if officers are able to handcuff them, they will be spending years, decades, or the rest of their lives in prison. As the D.C. Circuit observed, "A willful and apparently violent arrestee, faced with the prospect of long-term incarceration, could be expected to exploit every available opportunity."[4]

But even if the crime was not a high-stakes felony, there is still a threat of violence because people who are about to lose their freedom—even for a short time—may act impulsively and "attempt actions which are unlikely to succeed."[5] In the words of the Seventh Circuit, "It is the threat of arrest or the arrest itself which may trigger a violent response—regardless of the nature of the offense which first drew attention to the suspect."[6]

For these reasons, officers who have arrested a suspect, or who are about to do so, may ordinarily conduct a limited search for the purpose of locating and securing any weapons or destructible evidence in his possession. And unlike most other police searches, searches incident to arrest may be conducted as a matter of routine, regardless of the nature of the crime for which the suspect was arrested or his state of mind.[7] As the United States Supreme Court explained, "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm or to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[8]

Still, as we will discuss in this article, there are certain restrictions on when and how officers may conduct these searches.

Requirements

Officers may search a suspect incident to an arrest if (1) they have probable cause to arrest him, (2) the arrest was "custodial" in nature; and (3) the search was "contemporaneous" with the arrest.

Lawful arrest

In the context of searches incident to arrest, an arrest is deemed lawful if officers had probable cause to arrest the suspect.[9] This rule may have some practical consequences.

SEARCH BEFORE OR AFTER ARREST: If officers have probable cause to arrest, they may conduct the search before or after they had placed the suspect under arrest.[10] Thus, the search "need not be delayed until the arrest is effected."[11]

OFFICER'S MOTIVATION IMMATERIAL: If there was probable cause, the arrest is lawful regardless of the officer's motivation for conducting the search.[12]

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[1] *U.S. v. Reilly* (9th Cir. 2000) 224 F.3d 986, 993. Also see *Washington v. Chrisman* (1982) 455 U.S. 1, 7 ["There is no way for an officer to predict reliability how a particular subject will react to arrest or the degree of the potential danger."].
[2] *State v. Murdock* (Wis. 1990) 155 Wis.2d 217, 231.
[3] See *U.S. v. Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 670.
[4] *U.S. v. Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 670.
[5] *U.S. v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[6] *U.S. v. Arango* (7th Cir. 1989) 879 F.2d 1501, 1505.
[7] See *Washington v. Chrisman* (1992) 455 U.S. 1, 7; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1214 ["An officer need not have particularized cause to believe an arrestee is actually armed or possesses contraband in order to search him."].
[8] *United States v. Robinson* (1973) 414 U.S. 218, 235. Emphasis omitted.
[9] See *Virginia v. Moore* (2008) 553 U.S. 164, 177; *People v. Fay* (1986) 184 Cal.App.3d 882, 892.
[10] *Rawlings v. Kentucky* (1980) 448 U.S. 98, 111; *People v. Limon* (1993) 17 Cal.App.4th 524, 538.
[11] *U.S. v. Smith* (9th Cir. 2004) 389 F.3d 944, 951.
[12] See *Whren v. United States* (1996) 517 U.S. 806, 812-13.

OFFICERS UNSURE ABOUT PROBABLE CAUSE: If the court finds there was probable cause, it is immaterial that the officers were unsure about it when they conducted the search. "It is not essential," said the Court of Appeal, "that the arresting officer at the time of the arrest or search have a subjective belief that the arrestee is guilty of a particular crime so long as the objective facts afford probable cause."[14]

For example, in *People v. Loudermilk*[15] two Sonoma County sheriff's deputies detained a hitchhiker at about 4 A.M. because he matched the description of a man who had shot another man about an hour earlier in nearby Healdsburg. When the hitchhiker, Loudermilk, claimed he had no ID in his possession, one of the deputies started to search his wallet and, as he did so, Loudermilk spontaneously exclaimed, "I shot him. Something went wrong in my head." Prosecutors used this statement against Loudermilk at trial and he was convicted of assault with a deadly weapon.

On appeal, he contended that his statement should have been suppressed because it was made in response to the deputy's warrantless search of his wallet which, according to Loudermilk, did not qualify as a search incident to arrest because the deputy had testified that he did not think he had probable cause at that point. Said the court:

> [I]t makes no difference that the detaining officer did not himself believe he had probable cause to arrest. The lawfulness of the search is examined under a standard of objective reasonableness, without regard to the underlying intent or motivation of the officers involved.

ARREST FOR "WRONG" CRIME: If a court rules that officers had arrested the suspect for a crime for which they lacked probable cause, the arrest will nevertheless be deemed lawful if there was probable cause to arrest him for some other crime. As the Court of Appeal observed,"Courts have never hesitated to overrule an officer's determination he had probable cause to arrest. We see no reason why a court cannot find probable cause, based on facts known to the officer, despite the officer's judgment none existed."[16]

Custodial arrest

The second requirement—that the arrest be "custodial"—means that officers must have intended to, or were required to, transport him from the scene of the arrest; i.e., he will not be cited and released. This is required because "the primary objective of searches incident to arrest is to ensure [the officers'] safety during the extended exposure which follows the taking of a suspect into custody and transporting him to the police station."[17] Similarly, an arrest will be deemed custodial if officers had decided to transport the arrestee to a detox facility, mental health facility, or hospital;[18] or if the arrestee was a minor who would be transported to his home, juvenile hall, school, or a curfew center.[19]

For example, in *People v. Sanchez*[20] a San Jose officer, having just arrested Sanchez for being drunk in public, searched his clothing and found drugs. Sanchez argued there was insufficient need to conduct a search incident to arrest because he would automatically be released from custody after spending some time in the drunk tank. In rejecting this argument, the court pointed out that what matters is that "the officer testified he fully intended to book appellant into jail; he did not plan to release appellant."

In contrast, in *U.S. v. Parr*[21] an officer in Portland searched Parr after he learned that Parr was driving

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[14] *People v. Le* (1985) 169 Cal.App.3d 186, 193.
[15] (1987) 195 Cal.App.3d 996,
[16] *People v. Adams* (1985) 175 Cal.App.3d 855, 863. Also see *Florida v. Royer* (1983) 460 U.S. 491, 507.
[17] *Virginia v. Moore* (2008) 553 U.S. 164, 177. Also see *United States v. Robinson* (1973) 414 U.S. 218; *U.S. v. Jackson* (7th Cir. 2004) 377 F.3d 715, 717 ["it is *custody*, and not a stop itself, that makes a full search reasonable"].
[18] See *People v. Boren* (1987) 188 Cal.App.3d 1171, 1177.
[19] See *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1248 [transport home."]; *In re Charles C.* (1999) 76 Cal.App.4th 420, 424 [transport home]; *People v. Humberto O.* (2000) 80 Cal.App.4th 237 [transport to school]; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860 [transport to curfew center]; *People v. Breault* (1990) 223 Cal.App.3d 125, 132 [protective custody].
[20] (1985) 174 Cal.App.3d 343.
[21] (9th Cir. 1988) 843 F.2d 1228.

on a suspended license. During the search, the officer found stolen mail, but the court suppressed it because the officer testified that he had decided to release Parr pending submission of the case to prosecutors. Similarly, in *People v. Macabeo*[22] the California Supreme Court ruled that an arrest for running a stop sign was not custodial because, even though the officer could have lawfully transported the arrestee to jail, there were no "objective indicia" to suggest that he would have done so.

The question arises: Is an arrest "custodial" if officers were required under California law to cite and release the suspect? Technically, this does not matter because the Penal Code permits officers to book any person they have arrested; i.e., "nothing prevents an officer from first booking an arrestee."[23]

Furthermore, because California courts can ordinarily suppress evidence only if the search violated the Fourth Amendment, a violation of a state statute seldom constitutes grounds to suppress.[24] As the California Supreme Court explained in *People v. McKay,* if officers have probable cause, "a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."[25] The court added, however, that "we in no way countenance violations of state arrest procedure," and that "violation of those rights exposes the peace officers and their departments to civil actions seeking injunctive or other relief."

Contemporaneous search

The third requirement is that the arrest and search must have been contemporaneous. Although the word "contemporaneous," in common usage, refers to situations in which two acts occur at about the same time, the courts have consistently ruled that the circumstances surrounding most arrests are much too erratic and unpredictable to require a strict succession of events. Instead, the Supreme Court ruled that the arrest and search need only be "substantially contemporaneous."[26] This simply means that the search must have been conducted in conjunction with the arrest and not at a later time or place.

Scope of the Search

Although officers may conduct searches incident to arrest as a matter of routine, the search must be reasonable in its scope. This means it must be limited to "the arrestee's person and the area within his immediate control," meaning "the area from within which he might gain possession of a weapon or destructible evidence."[27] Note that the test is whether the search was limited to places and things within the arrestee's immediate control *at the time of the search*—not at the time of the arrest.[28]

Search of the arrestee's person

Because the clothing worn by an arrestee is necessarily within his immediate control (even if he was handcuffed[29]), officers may conduct a "full search" of it to locate and seize any weapons or evidence that might be hidden.[30] As the Supreme Court observed, "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape."[31]

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[22] (2016) 1 Cal.5th 1206.
[23] Pen. Code § 853.6(a)(1).
[24] See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318; *Virginia v. Moore* (2008) 553 U.S. 164.
[25] (2002) 27 Cal.4th 601, 619. Also see *People v. Gomez* (2004) 117 Cal.App.4th 531, 539.
[26] See *Shipley v. California* (1969) 395 U.S. 818, 819 ["a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest"]; *Stoner v. California* (1964) 376 U.S. 483, 486 ["a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest"]; *Vale v. Louisiana* (1970) 399 U.S. 30, 330.
[27] *Arizona v. Gant* (2009) 556 U.S. 332, 339; *Chimel v. California* (1969) 395 U.S. 752, 763. Also see *People v. Johnson* (2018) 21 Cal.App.5th 1026, 1037 [search was not "incident to arrest" since it occurred two blocks away from the site of the arrest].
[28] See *Arizona v. Gant* (2009) 556 U.S. 332, 343; *People v. Leal* (2009) 178 Cal.App.4th 1051, 1060.
[29] See *U.S. v. Sanders* (5th Cir. 1993) 994 F.2d 200, 209.
[30] See *United States v. Robinson* (1973) 414 U.S. 218, 235; *U.S. v. Knapp* (10th Cir. 2019) 917 F.3d 1161, 1166.
[31] *Chimel v. California* (1969) 395 U.S. 752, 762-63. Edited.

Although the term "full search" is vague, it includes a "relatively extensive exploration" of the arrestee, including his pockets,[32] and most containers inside the clothing.[33] Officers may not, however, conduct a strip search or any other exploration that is "extreme or patently abusive."[34] Furthermore, in the unlikely event it becomes necessary to remove some of the arrestee's clothing to conduct a full search, officers must do so with appropriate regard for the arrestee's legitimate privacy interests.[35] Note that, before conducting the search, officers may ask the arrestee if he possesses any weapons or evidence; these questions need not be preceded by a *Miranda* warning.[36]

Search of personal property

Containers and other personal property in close proximity to the arrestee at the time of the arrest may be searched incident to the arrest if the arrestee could have accessed the contents when the search occurred.[37] Exception: Cell phones may not be searched as an incident to arrest.[38] The following circumstances are relevant in determining whether the arrestee had access to a container or other personal property.

ARRESTEE'S PROXIMITY TO THING SEARCHED: In determining whether an unsecured arrestee had immediate access to a place or thing at the time of the search, one of the main factors is the distance between the two.[39] Although the area accessible to an arrestee is sometimes called "grabbing distance,"[40] it is not limited to places and things that were literally within his reach or "wingspan."[41] Instead, officers may ordinarily search places and things that were within his "lunging" distance.[42]

For example, in ruling that a search of a backpack qualified as a search incident to arrest, the Fourth Circuit in the recent case of *U.S. v. Ferebee*[43] pointed out that "Ferebee was only a few steps away from the backpack. He was handcuffed, but he still could walk around somewhat freely and could easily have made a break for the backpack," and "indeed, the body-camera video reveals that after Ferebee was handcuffed and led outside, he managed to wad up and throw away his marijuana joint without attracting the attention of the police officers around him."

In determining whether something was within lunging distance, officers may consider that arrestees may act irrationally—that their fear of incarceration may motivate them to try to reach places some distance away. Thus, in discussing this issue, the courts have noted the following:

- Officers are not required "to calculate the probability that weapons or destructible evidence may be involved,"[44] or "to presume that an arrestee is wholly rational."[45]
- "[Officers] cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[46]
- "[W]e cannot require an officer to weigh the arrestee's probability of success in obtaining a weapon or destructible evidence hidden within his or her immediate control."[47]

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[33] See *U.S. v. Knapp* (10th Cir. 2019) 917 F.3d 1161, 1167.
[34] *United States v. Robinson* (1973) 414 U.S. 218, 236; *People v. Laiwa* (1983) 34 Cal.3d 711, 726.
[35] *Illinois v. Lafayette* (1983) 462 U.S. 640, 645; *U.S. v. Edwards* (4th Cir. 2011) 666 F.3d 877, 883.
[36] See *New York v. Quarles* (1984) 467 U.S. 649, 656; *U.S. v. Simpkins* (1st Cir. 2020) __ F.3d __ [2020 WL 6067397].
[37] See *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1233-34; *U.S v. Knapp* (10th Cir. 2019) 917 F.3d 1161, 1168.
[38] See *Riley v. California* (2014) 573 U.S. 373, 403; *People v. Macabeo* (2016) 1 Cal.5th 1206, 1219.
[39] See *U.S. v. Neely* (5th Cir. 2003) 345 F.3d 366, 371-72.
[40] *Chimel v. California* (1969) 395 U.S. 752, 763: *U.S. v. Tejada* (7th Cir. 2008) 524 F.3d 809, 811.
[41] See *U.S. v. Ingram* (N.D.N.Y. 2001) 164 Fed.Supp.2d 310, 314 ["The scope of the search is not limited to the suspect's person, but extends to the suspect's 'wingspan,' or "the area from within which the arrestee might gain possession of a weapon or destructible evidence."].
[42] See *Thornton v. United States* (2004) 541 U.S. 615, 621 ["nor is an arrestee less likely to attempt to lunge for a weapon"].
[43] (4th Cir. 2020) 957 F.3d 406.
[44] *United States v. Chadwick* (1977) 433 U.S. 1, 15.
[45] *U.S. v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[46] *U.S. v. Lyons* (D.C. Cir 1983) 706 F.2d 321, 330.
[47] *State v. Murdock* (Wis. 1990) 455 N.W.2d 618, 626. Also see *U.S. v. Tejada* (7th Cir. 2008) 524 F.3d 809, 812.

Still, the place or thing "must be conceivably accessible to the arrestee—assuming that he was neither an acrobat nor a Houdini."[48] 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.[49] In contrast, the Third Circuit ruled that a search of a gym bag at the feet of a handcuffed arrestee because, "[a]lthough he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor."[50]

OTHER SUSPECTS HAD IMMEDIATE ACCESS: To date, the courts in three cases have ruled that, although the arrestee did not have immediate access to the thing that was searched, the search was lawful because there were other suspects who did.[51]

IF THE ARRESTEE FLED: Before the Supreme Court announced the "immediate access" requirement, the courts generally ruled that, if the arrestee fled when officers tried to arrest him, the officers could search places and things that were under his immediate control at the time they attempted to arrest him, plus places and things under his immediate control when he was arrested.[52] They reasoned that the law should not give arrestees the ability to thwart the discovery of incriminating evidence by defying officers and forcibly distancing themselves from it. It is unclear whether these searches would be permitted under the "immediate access" rule. In any event, if the item or its contents have apparent value, or if its value cannot be determined, officers may ordinarily conduct an inventory search.

COMPARE INVENTORY SEARCHES OF CONTAINERS: It should be noted that personal property may also be searched if officers have a duty to transport the property to a police facility for safekeeping. These searches are permitted because it is reasonable for officers to inventory the contents of he containers to provide the owner with an inventory of the contents and to make sure they do not contain weapons, explosives, or dangerous chemicals. As he Supreme Court observed, "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."[53] The Court also ruled that these searches are permitted "to ensure that it is harmless, to secure valuable items, and to protect against false claims of loss or damage."[54] Thus, in ruling that such searches were lawful, the courts have explained:

- "An inventory search is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items (such as might be kept in a towed car), and to protect against false claims of loss or damage."[55]
- The officer had authority "to search the person of the defendant which would include the jacket that defendant indicated he wished to take with him to jail."[56]
- It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it."[57]

Three other things should be noted. First, such a search may be invalidated if the court concludes that

[48] *U.S. v. Queen* (7th Cir. 1988) 847 F.2d 346, 353.
[49] *U.S. v. McCraney* (6th Cir. 2012) 674 F.3d 614, 619-20.
[50] *U.S. v. Shakir* (3rd Cir. 2010) 616 F.3d 315, 321.
[51] See *U.S. v. Davis* (8th Cir. 2009) 569 F.3d 813, 817 ["Although Davis had been detained, three unsecured and intoxicated passengers were standing around a vehicle redolent of recently smoked marijuana."]; *U.S. v. Goodwin-Bey* (8th Cir. 2009) 584 F.3d 1117 [officers had reasonable suspicion to believe that one of the occupants had recently displayed a firearm].
[52] See *People v. Pressley* (1966) 242 Cal.App.2d 555, 559-60 ["[T]he actual arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away. But we do not think that this is controlling. The process of arrest had begun at the door"].
[53] *Cooper v. California* (1967) 386 U.S. 58, 61-62.
[54] *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1. Also see *Cooper v. California* (1967) 386 U.S. 58, 61-62.
[55] *Whren v. United States* (1996) 517 U.S. 806, 811, fn.1.
[56] *People v. Topp* (1974) 40 Cal.App.3d 372, 378. Also see *U.S. v. Lyons* (D.C. Cir. 1983) 706 F.2d 321, 331 [ok to search jacket "for weapons before giving it to him"].
[57] *Cooper v. California* (1967) 386 U.S. 58, 61-62.

the officers' objective in searching the container was to obtain evidence of a crime.[58] Second, if officers have probable cause to search an item belonging to the arrestee, they may also seize it and promptly apply for a search warrant.[59] Third, as noted earlier, officers may not search the contents of cell phones as an incident to arrest.

Search of vehicles

In the past, officers were permitted to search the passenger compartment of vehicles for weapons and evidence whenever they made a custodial arrest of an occupant. These were known as *"Belton"* searches.[60] But, in 2009, the Supreme Court in *Arizona v. Gant* ruled that *Belton* searches would be permitted only if the arrestee had immediate access to the passenger compartment at the moment the search was conducted.[61] Because officers seldom permit arrestees to have unfettered access to anything, *Belton* searches have become virtually extinct. As the result, most vehicle searches are based on probable cause, inventory search of towed vehicle, or consent.

Search of homes

A search of a residence incident to an arrest is permitted only if (1) the arrest occurred inside the residence,[62] and (2) the search was limited to places and things to which the arrestee had immediate access when the search occurred; e.g., under a bed on which the arrestee was lying, inside a duffel bag at the foot of a bed on which the arrestee was lying.[63] Thus, officers may not routinely search beyond the room in which the arrest occurred. As the court explained in *People v. Bagwell*, "routine searches of rooms other than that in which an arrest is made will not be tolerated."[64] Thus, in *Guidi v. Superior Court* the court ruled that a search of the arrestee's kitchen was unlawful because he had been arrested in the living room.[65] And in *People v. Block* a search that occurred upstairs was ruled unlawful because the suspect was arrested downstairs.[66] Furthermore, a search of an area distant from the arrest scene will not be permitted if officers compelled the arrestee to go there without good cause.[67] As the Court of Appeal explained, "The police should not be allowed to extend the scope of [the search] by having a person under arrest move around the room at their request."[68]

If, however, the suspect was arrested outside his home but requested permission to enter (e.g., to get a jacket), and if officers granted the request, they may accompany him and stay "literally at [his] elbow at all times."[69] Thus, in *U.S. v. Garcia* the court observed that "[i]t would have been folly for the police to let [the arrestee] enter the home and root about [for identification] unobserved."[70] POV

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[58] See *Colorado v. Bertine* (1987) 479 U.S. 367, 372; *People v. Wallace* (2017) 15 Cal.App.5th 82, 90.

[59] See *Riley v. California* (2014) 573 U.S. 373, 388; *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"].

[60] See *New York v. Belton* (1981) 453 U.S. 454.

[61] (2009) 556 US 332.

[62] See *Chimel v. California* (1969) 395 U.S. 752, 763; *Vale v. Louisiana* (1970) 399 U.S. 30, 33-34.

[63] See *People v. Arvizu* (1970) 12 Cal.App.3d 726, 729.

[64] (1974) 38 Cal.App.3d 127, 131.

[65] (1973) 10 Cal.3d 1, 7.

[66] (7th Cir. 2004) 376 F.3d 648, 651.

[67] See *Shipley v. California* (1969) 395 U.S. 818, 820; *People v. Mendoza* (1986) 176 Cal.App.3d 1127, 1132.

[68] *Eiseman v. Superior Court* (1971) 21 Cal.App.3d 342, 350.

[69] *Washington v. Chrisman* (1982) 455 U.S. 1, 6. Also see *People v. Breault* (1990) 223 Cal.App.3d 125, 133 ["*Chrisman* does not require a showing of exigent circumstances. [The officer] lawfully accompanied Emily into the house and properly seized the marijuana [in plain view]."]: *U.S. v. Reid* (8th Cir. 2014) 769 F.3d 990, 992 ["When an arrestee chooses to reenter her home for her own convenience, it is reasonable for officers to accompany her and to monitor her movements."]; *U.S. v. Nascimento* (1st Cir. 2007) 491 F.3d 25, 50 ["[I]t was not inappropriate for the police to escort Nascimento to his bedroom in order that he might get dressed."].

[70] (7th Cir. 2004) 376 F.3d 648, 651.