

# POINT of VIEW



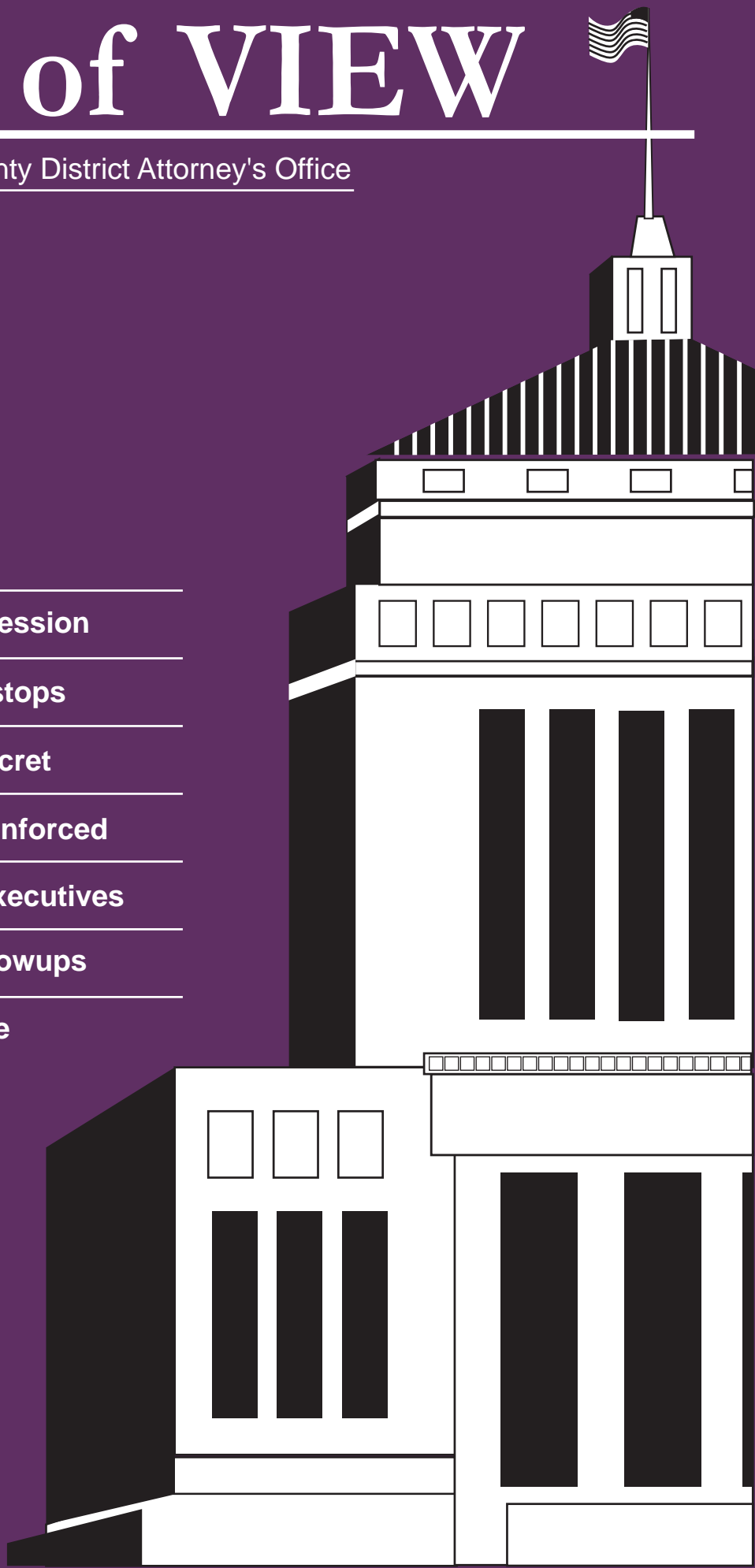
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## Point of View

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# Arrests

*“An arrest is distinguished by the involuntary, highly intrusive nature of the encounter.”<sup>1</sup>*

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

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

- (1) **GROUND FOR ARREST:** Grounds for an arrest means having probable cause.
- (2) **MANNER OF ARREST:** The requirements pertaining to the arrest procedure include giving notice, the use of deadly and non-deadly force, the issuance and execution of arrest warrants, restrictions on warrantless misdemeanor arrests, searches incident to arrest, and entries of homes to arrest an occupant.
- (3) **POST-ARREST PROCEDURE:** In this category are such things as booking, phone calls, attorney visits, disposition of arrestees, probable cause hearings, arraignment, and even “perp walks.”

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

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

## Probable Cause

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

<sup>1</sup> *Cortez v. McCauley* (10<sup>th</sup> Cir. 2007) 478 F.3d 1108, 1115.

<sup>2</sup> *California v. Hodari D.* (1991) 499 U.S. 621, 624.

<sup>3</sup> *Brinegar v. United States* (1949) 338 U.S. 160, 176.

<sup>4</sup> See *Virginia v. Moore* (2008) \_\_ U.S. \_\_ [2008 WL 1805745] [“Arrest ensures that a suspect appears to answer charges and does not continue a crime”]; *Terry v. Ohio* (1968) 392 U.S. 1, 16 [“[I]n traditional terminology, arrests are ‘seizures of the person which eventuate in a trip to the station house and prosecution for crime’”].

<sup>5</sup> See *California v. Hodari* (1991) 499 U.S. 621, 626; Pen. Code §§ 841, 835.

<sup>6</sup> See *Dunaway v. New York* (1979) 442 U.S. 200, 212 [“the detention of petitioner was in important respects indistinguishable from a traditional arrest”]; *People v. Campbell* (1981) 118 Cal.App.3d 588, 597.

<sup>7</sup> See *People v. Hubbard* (1970) 9 Cal.App.3d 827, 833 [“[T]he violator is, during the period immediately preceding his execution of the promise to appear, under arrest.”]; *U.S. v. \$404,905* (8<sup>th</sup> Cir. 1999) 182 F.3d 643, 648 [“A traffic stop is not investigative; it is a form of arrest, based upon probable cause”].

<sup>8</sup> See *Berkemer v. McCarty* (1984) 468 U.S. 420, 439, fn.29.

<sup>9</sup> See *People v. McKay* (2002) 27 Cal.4<sup>th</sup> 601, 613-14 [“[N]early every circuit to address the issue [has] held that, once the officer has probable cause to believe a violation of law has occurred, the constitutionality of the arrest does not depend upon compliance with state procedures that are not themselves compelled by the Constitution.”].

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

**DEFINED:** Probable cause to arrest exists if there was a “fair probability” or “substantial chance” that the suspect committed a crime.<sup>10</sup>

**WHAT PROBABILITY IS REQUIRED:** Probable cause requires neither a preponderance of the evidence, nor “any showing that such belief be correct or more likely true than false.”<sup>11</sup> Consequently, it requires something less than a 51% chance.<sup>12</sup>

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

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

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

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

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

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

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<sup>10</sup> See *Illinois v. Gates* (1983) 462 U.S. 213, 244; *U.S. v. Brooks* (9<sup>th</sup> Cir. 2004) 367 F3 1128, 1133-34.

<sup>11</sup> *Texas v. Brown* (1983) 460 U.S. 730, 742.

<sup>12</sup> See *People v. Alcorn* (1993) 15 Cal.App.4<sup>th</sup> 652, 655 [there was probable cause when only a 50% chance existed]; *People v. Tuadles* (1992) 7 Cal.App.4<sup>th</sup> 1777, 1783 [“requires less than a preponderance of the evidence”].

<sup>13</sup> See *Henry v. United States* (1959) 361 U.S. 98, 101 [“Arrest on mere suspicion collides violently with the basic human right of liberty.”]; *People v. Gonzalez* (1998) 64 Cal.App.4<sup>th</sup> 432, 439 [“Arrests made without probable cause in the hope that something might turn up are unlawful.”].

<sup>14</sup> *Gerstein v. Pugh* (1975) 420 U.S. 103, 120, fn.21.

<sup>15</sup> See *People v. White* (2003) 107 Cal.App.4<sup>th</sup> 636, 641 [“[A]n officer’s reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant’s conduct.”]; *U.S. v. Turner* (10<sup>th</sup> Cir. 2009) \_\_ F.3d \_\_ [2009 WL 161737] [“[T]he probable cause inquiry . . . requires merely that officers had reason to believe that a crime—any crime—occurred.”].

<sup>16</sup> See *People v. Teresinski* (1982) 30 Cal.3d 822, 831.

<sup>17</sup> *BeVier v. Hucal* (7<sup>th</sup> Cir. 1986) 806 F.2d 123, 128.

<sup>18</sup> (2007) 147 Cal.App.4<sup>th</sup> 1033.

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

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

## Warrantless Arrests

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

### Arrests for felonies and “wobblers”

If the suspect was arrested for a felony, the only requirement under the Fourth Amendment and California law is that they have probable cause.<sup>23</sup> That’s also true if the crime was a “wobbler,” mean-

ing a crime that could have been prosecuted as a felony or misdemeanor.<sup>24</sup> Accordingly, if the crime was a felony or wobbler, officers may make the arrest at any time of the day or night,<sup>25</sup> and it is immaterial that the crime did not occur in their presence.<sup>26</sup>

### Arrests for misdemeanors

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

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

- (1) **IN THE PRESENCE:** The crime was committed in the officers’ presence. (See the “in the presence rule,” below.)
- (2) **DOMESTIC VIOLENCE:** The crime was a domestic assault or battery.
- (3) **CITIZEN’S ARREST:** The arrest was made by a citizen.
- (4) **PUBLIC PLACE:** The suspect was arrested in a public place.<sup>27</sup>

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

<sup>19</sup> (10<sup>th</sup> Cir. 2007) 478 F.3d 1108.

<sup>20</sup> See *Wong Sun v. United States* (1963) 371 U.S. 471, 481-82 [“The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police”].

<sup>21</sup> *Gerstein v. Pugh* (1975) 420 U.S. 103, 113.

<sup>22</sup> See *United States v. Watson* (1976) 423 U.S. 411, 423; *U.S. v. Bueno-Vargas* (9<sup>th</sup> Cir. 2004) 383 F.3d 1104, 1107, fn.4.

<sup>23</sup> See *Carroll v. United States* (1925) 267 U.S. 132 156; Pen. Code § 836(a)(3).

<sup>24</sup> See *People v. Stanfill* (1999) 76 Cal.App.4<sup>th</sup> 1137, 1144.

<sup>25</sup> See Pen. Code § 840 [“An arrest for the commission of a felony may be made on any day and at any time of the day or night.”].

<sup>26</sup> See Pen. Code § 836(a)(2).

<sup>27</sup> See Pen. Code §§ 836(1); 840; *People v. Graves* (1968) 263 Cal.App.2d 719, 730.

<sup>28</sup> See *United States v. Santana* (1976) 427 U.S. 38, 42.

<sup>29</sup> See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629

<sup>30</sup> See *United States v. Santana* (1976) 427 U.S. 38, 42.



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

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

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

The question arises: Is a crime committed in the officers’ presence if they watched a video of the suspect committing it at an earlier time? It appears the answer is no.<sup>40</sup> What if officers watched it live on a television or computer monitor? While there is no direct authority, it would appear that the crime would be occurring in their presence because there

does not seem to be a significant difference between watching a crime-in-progress on a computer screen and watching it through a telescope.

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

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

Similarly, in a shoplifting case, *People v. Lee*,<sup>44</sup> an officer in an apparel store saw Lee walk into the

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<sup>31</sup> See Pen. Code § 836(a)(1); *People v. Johnson* (1981) 123 Cal.App.3d 495, 499.

<sup>32</sup> *People v. Bradley* (1957) 152 Cal.App.2d 527, 532.

<sup>33</sup> See Penal Code § 853.6(h) [notice to appear is authorized only if the suspect is “arrested”]

<sup>34</sup> *United States v. Watson* (1976) 423 U.S. 411, 418.

<sup>35</sup> See *Barry v. Fowler* (9<sup>th</sup> Cir. 1990) 902 F.2d 770, 772; *Woods v. City of Chicago* (7<sup>th</sup> Cir. 2001) 234 F.3d 979 995; *U.S. v. McNeill* (4<sup>th</sup> Cir. 2007) 484 F.3d 301, 311. **NOTE:** The United States Supreme Court has not ruled on the issue. See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 340, fn11.

<sup>36</sup> Pen. Code § 836(a)(1).

<sup>37</sup> See *People v. McKay* (2002) 27 Cal.4<sup>th</sup> 601, 608.

<sup>38</sup> See *Royton v. Battin* (1942) 55 Cal.App.2d 861, 866 [officer observed fish and game code violations by means of telescope].

<sup>39</sup> See *People v. Cahill* (1958) 163 Cal.App.2d 15, 19 [officer overheard solicitation of prostitution]; *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 [“The test is whether the misdemeanor is apparent to the officer’s senses.”].

<sup>40</sup> See *Forgie-Buccioni v. Hannaford Brothers, Inc.* (1<sup>st</sup> 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.”].

<sup>41</sup> See *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 712 [“The term ‘in his presence’ is liberally construed.”].

<sup>42</sup> *In re Alonzo C.* (1978) 87 Cal.App.3d 707, 713.

<sup>43</sup> (1957) 148 Cal.App.2d 855. ALSO SEE *People v. Bradley* (1957) 152 Cal.App.2d 527 [bookmaking].

<sup>44</sup> (1984) 157 Cal.App.3d Supp. 9.

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

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

**ASSAULT AT SCHOOL:** Assault or battery on school property when school activities were occurring.<sup>45</sup>

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

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

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

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

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

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

**DUI PLUS:** Even though officers did not see the suspect driving a vehicle, they may arrest him for

DUI if, (1) based on circumstantial evidence, they had probable cause to believe he had been driving while under the influence; and (2) they had probable cause to believe that one or more of the following circumstances existed:

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

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

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

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

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

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

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

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

## Warrant Arrests

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

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

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

## The basics

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

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

**WHEN A WARRANT TERMINATES:** An arrest warrant remains valid until it is executed or recalled.<sup>54</sup>

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

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

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<sup>49</sup> *Gerstein v. Pugh* (1975) 420 U.S. 103, 113.

<sup>50</sup> See *United States v. Leon* (1984) 468 U.S. 897; *People v. Palmer* (1989) 207 Cal.App.3d 663, 670.

<sup>51</sup> *Steagald v. United States* (1981) 451 U.S. 204, 212. ALSO SEE *Wong Sun v. United States* (1963) 371 U.S. 471, 481-82 [“The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess and weight and credibility of the information which the complaining officer adduces as probable cause.”].

<sup>52</sup> See Pen. Code §§ 816 [“A warrant of arrest shall be directed generally to any peace officer ... and may be executed by any of those officers to whom it may be delivered.”].

<sup>53</sup> *People v. Fisher* (2002) 96 Cal.App.4th 1147, 1150. ALSO SEE Code of Civil Procedure § 262.1 [“A sheriff or other ministerial officer is justified in the execution of, and shall execute, all process and orders regular on their face”].

<sup>54</sup> See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1071 [“Once an individual is arrested and is before the magistrate, the ‘complaint’ is *functus officio*” [“having served its purpose”]; *People v. Case* (1980) 105 Cal.App.3d 826, 834.

<sup>55</sup> See *Herndon v. County of Marin* (1972) 25 Cal.App.3d 933, 937 [“It is not [the officer’s] duty to investigate the procedure which led to the issuance of the warrant, nor is there any obligation on his part to pass judgment upon the judicial act of issuing the warrant or to reflect upon the legal effect of the adjudication. On the contrary, it is his duty to make the arrest.”].

<sup>56</sup> See *Milliken v. City of South Pasadena* (1979) 96 Cal.App.3d 834, 842 [“But if [the officer] had actual knowledge that the arrest warrant did not constitute the order of the court because it had been recalled, then he could not rely upon the warrant.”]; *People v. Fisher* (2002) 96 Cal.App.4th 1147, 1151 [court notes that “perhaps there could be circumstances where law enforcement officers, at the time they execute a warrant, are confronted with facts that are so fundamentally different from those upon which the warrant was issued that they should seek further guidance from the court”].



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

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

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

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

The question has arisen on occasion: If officers are inside a person's home after 10 P.M. because, for instance, they are taking a crime report, can they arrest an occupant if they should learn that he is wanted on a misdemeanor warrant that is not endorsed for night service? Although there is no case

law directly on point, the California Court of Appeal has pointed out that the purpose of the time limit on misdemeanor arrests "is the protection of an individual's right to the security and privacy of his home, particularly during night hours and the avoidance of the danger of violent confrontations inherent in unannounced intrusion at night."<sup>63</sup> It is at least arguable that none of these concerns would be implicated if officers had been invited in. But, again, the issue has not been decided.

### Conventional arrest warrants

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

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

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

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

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

<sup>61</sup> See Pen. Code § 840; *People v. Schmel* (1975) 54 Cal.App.3d 46, 51.

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

<sup>63</sup> *People v. Whitted* (1976) 60 Cal.App.3d 569, 572.

<sup>64</sup> See Pen. Code §§ 806, 813(a).

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

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

**MISDEMEANOR WARRANTS:** Warrants may be issued for misdemeanors, as well as felonies.<sup>67</sup>

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

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

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

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

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

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<sup>66</sup> *In re Walters* (1975) 15 Cal.3d 738, 748.

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

<sup>68</sup> See Pen. Code § 815.

<sup>69</sup> See Pen. Code § 815a.

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

<sup>71</sup> (1967) 255 Cal.App.2d 137, 142.

<sup>72</sup> (7<sup>th</sup> Cir. 1981) 664 F.2d 639, 647.

<sup>73</sup> (3d Cir. 1983) 703 F.2d 745, 748.

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

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

<sup>76</sup> (E.D. Pa. 1984) 596 F.Supp. 86, 90.

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

## Ramey warrants

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

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

- (1) **Prepare declaration:** Officers must prepare a “Declaration of Probable Cause” setting forth the facts upon which probable cause is based.
- (2) **Prepare *Ramey* warrant:** Officers will also complete the *Ramey* warrant which must contain the following: the arrestee’s name, the name of the court, name of the city or county in which the warrant was issued, a direction to peace officers to bring the arrestee before a judge, the signature and title of issuing judge, the time the warrant was issued, and the amount of bail (if any).<sup>80</sup> See page 11 for a sample *Ramey* warrant.
- (3) **Submit to judge:** Officers submit the declaration and warrant to a judge. This can be done in person, by fax, or by email.<sup>81</sup>

## Other arrest warrants

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

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

**INDICTMENT WARRANT:** An indictment warrant is issued by a judge on grounds that the suspect had been indicted by a grand jury.<sup>82</sup>

**PAROLE VIOLATION WARRANT:** Issued by the parole authority when there is probable cause to believe that a parolee violated the terms of release.<sup>83</sup>

**PROBATION VIOLATION WARRANT:** Issued by a judge based on probable cause to believe that a probationer violated the terms of probation.<sup>84</sup>

**BENCH WARRANT:** Issued by a judge when a defendant fails to appear in court.<sup>85</sup>

**WITNESS FTA WARRANT:** Issued by a judge for the arrest of a witness who has failed to appear in court after being ordered to do so.<sup>86</sup>

## Arrest Formalities

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

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

<sup>78</sup> Pen. Code § 817.

<sup>79</sup> See Pen. Code §§ 817(a)(2), 840.

<sup>80</sup> See Pen. Code §§ 815, 815a, 816; *People v. McCraw* (1990) 226 Cal.App.3d 346, 349.

<sup>81</sup> See Pen. Code § 817(c). **NOTE:** For information on the procedure for obtaining a warrant by fax or email, see the chapter on arrest warrants in *California Criminal Investigation*.

<sup>82</sup> See Pen. Code § 945.

<sup>83</sup> See Pen. Code § 3060.

<sup>84</sup> See Pen. Code § 1203.2.

<sup>85</sup> See Pen. Code §§ 978.5; 813(c); 853.8; 983; *Allison v. County of Ventura* (1977) 68 Cal.App.3d 689, 701-2.

<sup>86</sup> See Code of Civil Procedure § 1993.

<sup>87</sup> See Pen. Code § 841.

<sup>88</sup> See *People v. Sjosten* (1968) 262 Cal.App.2d 539, 545; *Lowry v. Standard Oil Co.* (1942) 54 Cal.App.2d 782, 791.

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

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

**SPECIFY CRIME:** If the suspect wants to know what crime he is being arrested for, officers must tell him.<sup>93</sup> (As noted earlier, it is immaterial that officers specified the “wrong” crime.)

## Searches Incident to Arrest

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

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

## Requirements

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

- (1) **Probable cause:** There must have been probable cause to arrest the suspect.
- (2) **Custodial arrest:** The arrest must have been “custodial” in nature, meaning that officers had decided to transport the arrestee to jail, a police station, a detox facility, or a hospital.
- (3) **Contemporaneous search:** The search must have occurred promptly after the arrest was made.<sup>95</sup>

## Scope of search

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

**ARRESTEE’S CLOTHING:** Officers may conduct a “full search” of the arrestee.<sup>96</sup> Although the term “full search” is vague, the courts have ruled that it permits a more intensive search than a pat down; and that it entails a “relatively extensive exploration” of the arrestee, including his pockets.<sup>97</sup>

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

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<sup>89</sup> See *People v. Vasquez* (1967) 256 Cal.App.2d 342

<sup>90</sup> See *People v. Kelley* (1969) 3 Cal.App.3d 146, 151.

<sup>91</sup> Pen. Code § 841.

<sup>92</sup> See *People v. Logue* (1973) 35 Cal.App.3d 1, 5 [“A police officer’s uniform is sufficient indicia of authority to make the arrest.”].

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

<sup>94</sup> *United States v. Robinson* (1973) 414 U.S. 218, 235.

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

<sup>96</sup> *United States v. Robinson* (1973) 414 U.S. 218, 235.

<sup>97</sup> *United States v. Robinson* (1973) 414 U.S. 218, 227.

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



# 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: [Insert name and agency], hereinafter "Declarant"

**ORDER:** Proof by Declaration of Probable Cause having been made on this date by Declarant, 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, and 848.

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

**Bail:** ☐ No bail

☐ Bail is set at \$ \_\_\_\_\_.

**Night service authorization** [required only for misdemeanors]

☐ Good cause for night service having been established in the Declaration of Probable Cause, this warrant may be executed at any hour of the day or night.

Date and time 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 hair: \_\_\_\_\_

Color eyes: \_\_\_\_\_

Scars, marks, tattoos: \_\_\_\_\_

Vehicle(s) driven by Arrestee: \_\_\_\_\_

Other information: \_\_\_\_\_

# SUPERIOR COURT OF CALIFORNIA

County of \_\_\_\_\_



## SEARCH and ARREST

WARRANT  
Steagald Warrant

THE PEOPLE OF THE STATE OF CALIFORNIA

To any peace officer in \_\_\_\_\_

County: \_\_\_\_\_

Warrant No. \_\_\_\_\_

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

Premises to search: [Insert address], hereinafter "Premises"

Affiant: [Insert affiant's name and agency], hereinafter "Affiant"

**FINDINGS:** Based on the Affidavit sworn to and subscribed before me on this date by Affiant, I hereby make the following findings:

**Arrest:** There is probable cause to believe that Arrestee committed the following crime(s):  
[List crime(s)]

**Search:** There is probable cause to believe Arrestee is now inside the Premises and will continue be there when this warrant is executed.

**ORDER:** You are hereby ordered to search forthwith the Premises for Arrestee and, if located, place Arrestee under arrest and bring Arrestee before any magistrate in this county pursuant to Penal Code §§ 821, 825, and 848.

☐ No Bail ☐ Bail is set at \$ \_\_\_\_\_.

☐ Night Service: Good cause for night service having been established in the Affidavit, this warrant may be executed at any hour of the day or night.

Date and time 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 hair: \_\_\_\_\_

Color eyes: \_\_\_\_\_

Scars, marks, tattoos: \_\_\_\_\_

Vehicle(s) driven by Arrestee: \_\_\_\_\_

Other information: \_\_\_\_\_



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

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

**CELL PHONES:** This is currently a hot topic: Can officers search the arrestee's cell phone for evidence pertaining to the crime for which he was arrested?<sup>103</sup>

At least two federal circuit courts have upheld such searches in published opinions,<sup>104</sup> while some district courts have ruled otherwise.<sup>105</sup> Stay tuned.

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

**ITEMS TO GO WITH ARRESTEE:** If the arrestee wants to take an item with him, and if officers permit it, they may search the item.<sup>107</sup>

**VEHICLES:** Officers may search the passenger compartment of a vehicle in which the arrestee was an occupant.<sup>108</sup>

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

## Use of Force

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

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<sup>99</sup> **NOTE:** While more intrusive searches based on reasonable suspicion are permitted at jail before the arrestee is admitted into the general population (see Pen. Code § 4030(f)), we doubt that anything less than probable cause would justify such a search in the field.

<sup>100</sup> See *Illinois v. Lafayette* (1983) 462 U.S. 640, 645 ["[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street"].

<sup>101</sup> See *United States v. Robinson* (1973) 414 U.S. 218, 223; *In re Humberto O.* (2000) 80 Cal.App.4<sup>th</sup> 237, 243.

<sup>102</sup> See *Chimel v. California* (1969) 395 U.S. 752, 763.

<sup>103</sup> See *U.S. v. Skinner* (E.D. Tenn. 2007) 2007 WL 1556596 ["To say that case law is substantially undeveloped as to what rights are accorded a cell phone's user, particularly in these circumstances, would be an understatement."].

<sup>104</sup> See *U.S. v. Finley* (5<sup>th</sup> Cir. 2007) 477 F.3d 250, 260; *U.S. v. Murphy* (4<sup>th</sup> Cir. 2009) \_\_ F.3d \_\_ [2009 WL 94268].

<sup>105</sup> See, for example, *U.S. v. Park* (N.D. Cal. 2007) 2007 WL 1521573; *U.S. v. Wall* (S.D. Fla. 2008) [2008 WL 5381412]. ALSO SEE *U.S. v. Zavala* (5<sup>th</sup> Cir. 2008) 541 F.3d 562 [search of cell phone unlawful because officers did not have probable cause to arrest].

<sup>106</sup> See *U.S. v. Ortiz* (7<sup>th</sup> Cir. 1996) 84 F.3d 977, 984 ["[I]s imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence."]; *U.S. v. Reyes* (S.D. N.Y. 1996) 922 F.Supp. 818, 833 ["[T]he search of the memory of Pager #1 was a valid search incident to Reyes' arrest."]; *U.S. v. Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["The search conducted by activating the pager's memory is therefore valid."].

<sup>107</sup> See *People v. Topp* (1974) 40 Cal.App.3d 372, 378; *U.S. v. Garcia* (9<sup>th</sup> Cir. 2000) 205 F.3d 1182.

<sup>108</sup> See *New York v. Belton* (1981) 453 U.S. 454.

<sup>109</sup> See *Chimel v. California* (1969) 395 U.S. 752, 763.

<sup>110</sup> See *Maryland v. Buie* (1990) 494 U.S. 325, 334.

<sup>111</sup> See *Graham v. Connor* (1989) 490 U.S. 386, 396 ["[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."]; Pen. Code § 835a [the officer "need not retreat or desist from his efforts by reason of the resistance or threatened resistance"].

<sup>112</sup> *Lee v. Ferraro* (11<sup>th</sup> Cir. 2002) 284 F.3d 1188, 1200.

<sup>113</sup> See *Saucier v. Katz* (2001) 533 U.S. 194, 202; *Graham v. Connor* (1989) 490 U.S. 386, 395.

<sup>114</sup> *Tatum v. City and County of San Francisco* (9<sup>th</sup> Cir. 2006) 441 F.3d 1090, 1095.

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

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

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

Because the reasonableness of any use of force will ultimately depend on the severity or “quantum” of the force utilized by officers, the courts usually begin their analysis by determining whether the force was deadly, non-deadly, or insignificant.<sup>120</sup>

### Non-deadly force

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

Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.<sup>123</sup>

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

<sup>115</sup> *Scott v. Harris* (2007) 550 U.S. 372, \_\_.

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

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

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

<sup>119</sup> (9<sup>th</sup> Cir. 1994) 25 F.3d 804, 807.

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

<sup>121</sup> See *Smith v. City of Hemet* (9<sup>th</sup> Cir. 2005) 394 F.3d 689, 705.

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

<sup>123</sup> (1989) 490 U.S. 386, 396.

<sup>124</sup> *Drummond v. City of Anaheim* (9<sup>th</sup> Cir. 2003) 343 F.3d 1052, 1057.

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

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

Although force is seldom necessary if the arrestee was not presently resisting, there may be a need for it if the suspect had been actively resisting and, although he was not combative at the moment, he was not yet under the control of the arresting officers. This is especially true if there was probable cause to arrest him for a serious felony.<sup>130</sup> For example, in ruling that officers did not use excessive force in pulling a bank robbery suspect from his getaway car, the court in *Johnson v. County of Los Angeles* noted that, even though the suspect was not “actively resisting arrest,” it is “very difficult to imagine that

any police officer facing a moving, armed bank robbery suspect would have acted any differently—at least not without taking the very real risk of getting himself or others killed. The need to quickly restrain Johnson by removing him from the car and handcuffing him was paramount.”<sup>131</sup>

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

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

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

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

<sup>127</sup> *Arpin v. Santa Clara Valley Transportation Agency* (9<sup>th</sup> Cir. 2001) 261 F.3d 912, 921.

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

<sup>129</sup> (1<sup>st</sup> Cir. 2008) 547 F.3d 1, 10.

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

<sup>131</sup> (9<sup>th</sup> Cir. 2003) 340 F.3d 787, 793.

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

<sup>133</sup> (2007) 550 U.S. 372, \_\_.

<sup>134</sup> (9<sup>th</sup> Cir. 2003) 340 F.3d 959, 965.

<sup>135</sup> See *Forrester v. City of San Diego* (9<sup>th</sup> 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.”].

<sup>136</sup> (11<sup>th</sup> Cir. 2002) 284 F.3d 1188, 1198.

example, utilizing a control hold,<sup>137</sup> pepper spray,<sup>138</sup> “hard pulling,”<sup>138</sup> or a trained police dog<sup>140</sup> will often be deemed reasonably necessary if officers were facing resistance that was moderate to severe.

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

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

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

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

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

<sup>138</sup> See *Smith v. City of Hemet* (9<sup>th</sup> Cir. 2005) 394 F.3d 689, 703-4; *McCormick v. City of Fort Lauderdale* (11<sup>th</sup> 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* (11<sup>th</sup> Cir. 2002) 311 F.3d 1340, 1348 [“[P]epper spray is a very reasonable alternative to escalating a physical struggle with an arrestee.”]; *Gaddis v. Redford Township* (6<sup>th</sup> Cir. 2004) 364 F.3d 763, 775 [“[The officer] used an intermediate degree of nonlethal force to subdue a suspect who had previously attempted to evade arrest, was brandishing a knife, showed signs of intoxication or other impairment, and posed a clear risk of leaving the scene behind the wheel of a car.”].

<sup>139</sup> *Johnson v. City of Los Angeles* (9<sup>th</sup> Cir. 2003) 340 F.3d 787, 793.

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

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

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

<sup>143</sup> (W.D. Wash. 2007) 507 F.Supp.2d 1137, 1144.

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

<sup>145</sup> (11<sup>th</sup> Cir. 2004) 369 F.3d 1270.



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

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

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

## Deadly force

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

Under the Fourth Amendment, the test for determining whether deadly force was justified is essentially the same as the test for non-deadly force. In

both cases, the use of force is lawful if it was reasonable under the circumstances.<sup>150</sup> The obvious difference is that deadly force cannot be justified unless there was an especially urgent need for it. As the United States Supreme Court observed, “[N]otwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched.”<sup>151</sup>

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

- (1) **RESISTING ARREST:** The arrestee must have been fleeing or otherwise actively resisting arrest.
- (2) **THREAT TO OFFICERS OR OTHERS:** Officers must have had probable cause to believe that the arrestee posed a significant threat of death or serious physical injury to officers or others.<sup>154</sup>
- (3) **WARNING:** Officers must, “where feasible,” warn the arrestee that they are about to use deadly force.<sup>155</sup>

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

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<sup>146</sup> (E.D. Cal. 2008) 551 F.Supp.2d 1149.

<sup>147</sup> *Deorle v. Rutherford* (9<sup>th</sup> Cir. 2001) 272 F.3d 1272, 1282-3.

<sup>148</sup> See *Vera Cruz v. City of Escondido* (9<sup>th</sup> Cir. 1997) 139 F.3d 659, 660.

<sup>149</sup> *Smith v. City of Hemet* (9<sup>th</sup> Cir. 2005) 394 F.3d 689, 705 [emphasis added]. ALSO SEE *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4<sup>th</sup> 154, 165.

<sup>150</sup> See *Scott v. Harris* (2007) 550 U.S. 372, \_\_ [“*Garner* was simply an application of the Fourth Amendment’s ‘reasonableness’ test”].

<sup>151</sup> *Tennessee v. Garner* (1985) 471 U.S. 1, 10.

<sup>152</sup> *Scott v. Harris* (2007) 550 U.S. 372, \_\_.

<sup>153</sup> *Brosseau v. Haugen* (2004) 543 U.S. 194, 199.

<sup>154</sup> See *Scott v. Harris* (2007) 550 U.S. 372, \_\_, fn.9; *Munoz v. City of Union City* (2004) 120 Cal.App.4<sup>th</sup> 1077, 1103 [“An officer’s use of deadly force is reasonable only if ‘the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.’”]; *Smith v. City of Hemet* (9<sup>th</sup> Cir. 2005) 394 F.3d 689, 704 [“[A] police officer may not use deadly force unless it is necessary to prevent escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”].

<sup>155</sup> See *Tennessee v. Garner* (1985) 471 U.S. 1, 11-12 [“some warning” must be given “where feasible”].

<sup>156</sup> (1985) 471 US 1, 11.



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

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

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

## Entering a home to arrest an occupant

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

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

<sup>158</sup> (2007) 550 U.S. 372, \_\_\_, fn. 9.

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

<sup>160</sup> (4th Cir. 2005) 393 F.3d 471, 481.

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

### Entering the suspect's home

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

- (1) **WARRANT ISSUED:** A warrant for the suspect's arrest must have been outstanding. Either a conventional or *Ramey* warrant will suffice.<sup>163</sup>
- (2) **ARRESTEE'S HOME:** Officers must have had "reason to believe" the suspect, (a) lived in the residence, and (b) was presently inside. Although most federal courts have ruled that the "reason to believe" standard is merely reasonable suspicion,<sup>164</sup> the Ninth Circuit ruled it means probable cause.<sup>165</sup> The California Supreme Court has not yet decided.<sup>166</sup>

### Entering a third person's home

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

### Other grounds for entering

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

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

- (1) **PROBABLE CAUSE TO ARREST:** Officers must have had probable cause to arrest the suspect for a felony or misdemeanor.
- (2) **ATTEMPT TO ARREST OUTSIDE:** Officers must have attempted to make the arrest outside the residence.
- (3) **SUSPECT FLEES INSIDE:** The suspect must have tried to escape or otherwise prevent an immediate arrest by going inside the residence.<sup>168</sup>

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

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

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

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

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

<sup>166</sup> See *People v. Jacobs* (1987) 43 Cal.3d 472, 479, fn.4.

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

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

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

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

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

## Post-Arrest Procedure

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

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

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

**ATTORNEY VISITS:** Officers must permit the arrestee to visit with an attorney if the arrestee or a relative requested it.<sup>178</sup>

<sup>169</sup> See *People v. Manderscheid* (2002) 99 Cal.App.4<sup>th</sup> 355, 361-63; *People v. Amaya* (1979) 93 Cal.App.3d 424, 428 [“Thus, officers need not secure a warrant to enter a dwelling in fresh pursuit of a fleeing suspect believed to have committed a grave offense and who therefore may constitute a danger to others.”].

<sup>170</sup> See *People v. Superior Court (Kenner)* (1977) 73 Cal.App.3d 65, 69 [“A person may willingly consent to admit police officers for the purpose of discussion, with the opportunity, thus suggested, of explaining away any suspicions, but not be willing to permit a warrantless and nonemergent entry that affords him no right of explanation or justification.”]; *In re Johnny V.* (1978) 85 Cal.App.3d 120, 130 [“A consent for the purpose of talking with a suspect is not a consent to enter for the purpose of making an arrest”].

<sup>171</sup> See *People v. Evans* (1980) 108 Cal.App.3d 193, 196 [“[The officers] were inside with consent, with probable cause to arrest but with the intent to continue the investigation”]; *People v. Patterson* (1979) 94 Cal.App.3d 456, 463 [“There is nothing in the record to indicate that the police intended to arrest Patterson immediately following the entry or that they were not prepared to discuss the matter with Patterson first in order to permit her to explain away the basis of the officers’ suspicions.”]; *In re Reginald B.* (1977) 71 Cal.App.3d 398, 403 [arrest lawful when made after officers confirmed the suspect’s identity].

<sup>172</sup> See *People v. Superior Court (Logue)* (1973) 35 Cal.App.3d 1, 6.

<sup>173</sup> See Pen. Code § 7.21. ALSO SEE Pen. Code § 13100 *et seq.* [criminal offender record information].

<sup>174</sup> See 4 Witkin, *California Criminal Law* (3<sup>rd</sup> edition 2000), p. 258 [“[T]here is little statutory or case law coverage of the police practices of . . . booking arrested persons.”].

<sup>175</sup> See *Doe v. Sheriff of DuPage County* (7<sup>th</sup> Cir. 1997) 128 F.3d 586, 588 [one purpose of booking is to confirm the arrestee’s identity]; 3 LaFave *Search and Seizure* (Fourth Edition) at p. 46 [“law enforcement agencies view booking as primarily a process for their own internal administration”].

<sup>176</sup> See *Doe v. Sheriff of DuPage County* (7<sup>th</sup> Cir. 1997) 128 F.3d 586, 588.

<sup>177</sup> See Pen. Code § 851.5.

<sup>178</sup> See Pen. Code § 825(b) [“After the arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of the prisoner, visit the prisoner.”].

# “Perp Walks”

The term “perp walk” is a moniker for a post-arrest media event in which officers walk or drive an arrestee—usually a celebrity, scoundrel, or celebrity-scoundrel—from one place to another, knowing that news photographers and cameramen will be there to shoot him or her, figuratively. As the Second Circuit explained, “The ‘perp walk,’ that is, when an accused wrongdoer is led away in handcuffs by the police to the courthouse, police station, or jail, has been featured in newspapers and newscasts for decades. The normally camera-shy arrestees often pull coats over their heads, place their hands in front of their faces, or otherwise attempt to obscure their identities. A recent surge in ‘executive perp-walks’ has featured accused white collar criminals in designer suits and handcuffs.”<sup>1</sup>

Although perp walks were fairly uncommon when the Bill of Rights was ratified in 1791 (as most young people know, television was in its infancy), recent appellate court decisions have held that perp walks are regulated by the Fourth Amendment. This is because the Fourth Amendment restricts the *manner* in which arrests are conducted, as well as their justification.<sup>2</sup> Thus, perp walks are subject to the Fourth Amendment’s requirement of “reasonableness,” which means there must have been some justification for them that outweighed the “ritual degradation” that results from such exposure.<sup>3</sup> Thus, a perp walk is permitted if officers had a legitimate reason for transporting the suspect to or from the location where it occurred; e.g., upon arrival at the jail or police station.<sup>4</sup>

On the other hand, if the perp walk was staged—if it was conducted for the sole purpose of displaying the arrestee to the media—it might be deemed unlawful. For example, in *Lauro v. Charles* the court ruled that a perp walk was not justified because officers walked the arrestee outside the police station “at the request of the press, for no reason other than to allow him to be photographed.”<sup>5</sup>

It has been argued that perp walks are always justified because they might deter some criminals and that they provide the public with information about the workings of the criminal justice system. As the court noted in *Caldarola v. County of Westchester*, “The image of the accused being led away to contend with the justice system powerfully communicates government efforts to thwart the criminal element, and it may deter others from attempting similar crimes.”<sup>6</sup> The court also noted that perp walks can enhance the transparency of the criminal justice system.

Nevertheless, the scant legal authority on the issue indicates that something more is required—that there must be some specific reason for requiring an arrestee to appear in a staged perp walk. For example, it should suffice that officers had reason to believe there were additional victims or witnesses who might come forward if they saw the suspect’s face. Again quoting the court in *Caldarola*, “[A]llowing the public to view images of an arrestee informs and enables members of the public who may come forward with additional information relevant to the law enforcement investigation.”

<sup>1</sup> *Caldarola v. County of Westchester* (2<sup>nd</sup> Cir. 2003) 343 F.3d 570, 572. ALSO SEE *Lauro v. Charles* (2<sup>nd</sup> Cir. 2000) 219 F.3d 202, 203 [“The ‘perp walk’—as it is popularly known—is a wide-spread police practice in New York City in which the suspected perpetrator of a crime, after being arrested, is ‘walked’ in front of the press so that he can be photographed or filmed.”].

<sup>2</sup> See *Wilson v. Layne* (1999) 526 US 603; *Lauro v. Charles* (2<sup>nd</sup> Cir. 2000) 219 F.3d 212 [“[T]he Fourth Amendment shields arrestees from police conduct that unreasonably aggravates the intrusion on privacy properly occasioned by the initial seizure.”]; *Caldarola v. County of Westchester* (2<sup>nd</sup> Cir. 2003) 343 F.3d 570, 575 [“[W]hether conceptualized as a seizure of Freeman’s image or an exacerbation of his arrest, the County’s act of videotaping Freeman constituted a seizure under the Fourth Amendment.”].

<sup>3</sup> See *Lauro v. Charles* (2<sup>nd</sup> Cir. 2000) 219 F.3d 202, 204, 209 [the perp walk requires “a contextualized reasonableness analysis that seeks to balance the intrusion on privacy caused by law enforcement against the justification asserted for it by the state”].

<sup>4</sup> *Lauro v. Charles* (2<sup>nd</sup> Cir. 2000) 219 F.3d 202, 212 [perp walks must be “sufficiently closely related to a legitimate governmental objective.”]; *Caldarola v. County of Westchester* (2<sup>nd</sup> Cir. 2003) 343 F.3d 570, 576 [“[T]he County possessed a legitimate law enforcement justification for transporting Freeman from DOC grounds to the police station.”].

<sup>5</sup> (2<sup>nd</sup> Cir. 2000) 219 F.3d 202, 204.

<sup>6</sup> (2<sup>nd</sup> Cir. 2003) 343 F.3d 570, 573. ALSO SEE *Lauro v. Charles* (2<sup>nd</sup> Cir. 2000) 219 F.3d 202, 203 [“The perp walk both publicizes the police’s crime-fighting efforts and provides the press with a dramatic illustration to accompany stories about the arrest.”].



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

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

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

**ARRAIGNMENT:** After an arrestee has been charged with a crime by prosecutors (and thus becomes a “defendant”), he must be arraigned. An arraignment is usually a defendant’s first court appearance during which, among other things, a defense attorney is appointed or makes an appearance; the defendant is served with a copy of the complaint and is advised of the charges against him; the defendant

pleads to the charge or requests a continuance for that purpose; and the judge sets bail, denies bail, or releases the defendant on his own recognizance.

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

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

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<sup>179</sup> See *In re Walters* (1975) 15 Cal.3d 738, 743.

<sup>180</sup> See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 47.

<sup>181</sup> See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56; *Powell v. Nevada* (1994) 511 U.S. 79, 80 [“[*Riverside*] established that ‘prompt’ generally means within 48 hours of the warrantless arrest”].

<sup>182</sup> See *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 58; *Anderson v. Calderon* (9<sup>th</sup> Cir. 2000) 232 F.3d 1053, 1070 [“The *McLaughlin* Court made clear that intervening weekends or holidays would not qualify as extraordinary circumstances”].

<sup>183</sup> See *New York v. Harris* (1990) 495 U.S. 14, 18 [“Nothing in the reasoning of [*Payton v. New York*] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house.”]; *People v. Watkins* (1994) 26 Cal.App.4<sup>th</sup> 19, 29 [“Where there is probable cause to arrest, the fact that police illegally enter a home to make a warrantless arrest neither invalidates the arrest itself nor requires suppression of any postarrest statements the defendant makes at the police station.”]; Pen. Code § 836(a). **NOTE:** The United States Supreme Court indicated that even if a judge ordered the release of a suspect because of a post-arrest time limit violation, the suspect could be immediately rearrested if probable cause continued to exist. *New York v. Harris* (1990) 495 U.S. 14, 18.

<sup>184</sup> See *People v. Valenzuela* (1978) 86 Cal.App.3d 427, 431.

<sup>185</sup> Pen. Code § 825.

<sup>186</sup> See Pen. Code § 849(a); *Ng v. Superior Court* (1992) 4 Cal.4<sup>th</sup> 29, 38.

<sup>187</sup> *Ng v. Superior Court* (1992) 4 Cal.4<sup>th</sup> 29, 38; *People v. Gordon* (1978) 84 Cal.App.3d 913, 923; *O’Neal v. Superior Court* (1986) 185 Cal.App.3d 1086, 1090; *People v. Hughes* (2002) 27 Cal.4<sup>th</sup> 287, 326 [parole hold].

<sup>188</sup> See Pen. Code § 825(a)(2); *People v. Gordon* (1978) 84 Cal.App.3d 913, 922 [“Sunday was excludable”].

<sup>189</sup> See Pen. Code § 825(a)(2).

<sup>190</sup> See *People v. Gordon* (1978) 84 Cal.App.3d 913, 922.

<sup>191</sup> See Pen. Code § 825(a)(2).

<sup>192</sup> See *In re Walker* (1974) 10 Cal.3d 764, 778; *People v. Williams* (1977) 68 Cal.App.3d 36, 43.

<sup>193</sup> See *County of Riverside v. McLaughlin* (1991) 500 US 44, 54; *People v. Bonillas* (1989) 48 Cal.3d 757, 788.



# 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.<sup>1</sup> Under California law, however, there are certain restrictions. Specifically, suspects who were arrested for misdemeanors and infractions must ordinarily be cited and released except under certain circumstances.

**MISDEMEANOR WARRANT ARRESTS:** A person who was arrested on a misdemeanor warrant may be cited and released, except as follows:

- It was reasonably likely that the offense would otherwise continue, or that the safety of others would be endangered if the arrestee was not taken into custody.<sup>2</sup>
- Arrestee was under the influence of alcohol or drugs and, as a result, was a danger to himself or others.<sup>3</sup>
- Arrestee was unable to care for his safety.<sup>4</sup>
- Arrestee refused to sign a promise to appear.<sup>5</sup>
- Arrestee failed to provide satisfactory identification.<sup>6</sup>
- Warrant stated that arrestee was not to be cited and released.<sup>7</sup>
- Suspect was arrested for a crime of violence, possession of a firearm, resisting arrest, or giving false information to an officer.<sup>8</sup>
- Arrestee required a medical examination.<sup>9</sup>
- Arrestee was charged with another crime for which he was not eligible for release.<sup>10</sup>

**WARRANTLESS MISDEMEANOR ARRESTS:** A person who was arrested for a misdemeanor without a warrant may be cited and released,<sup>11</sup> except as follows:

- Arrest for DUI.<sup>12</sup>
- Arrest for domestic violence or violation of a protective court order involving domestic violence, and the arrest was made pursuant to a departmental policy requiring custodial arrests for such crimes, except that the sus-

pect may be released if the officer determines “that there is not a reasonable likelihood that the offense will continue or resume or that the safety of persons or property would be imminently endangered by release of the person arrested.”<sup>13</sup>

- It was reasonably likely that the offense would continue.<sup>14</sup>
- It is reasonably likely the safety of persons or property would be jeopardized by immediate release.<sup>15</sup>
- Arrestee unable to provide satisfactory ID.<sup>16</sup>
- Arrestee was so intoxicated he could have been a danger to himself or others.<sup>17</sup>
- Arrestee needed medical care or was unable to care for his safety.<sup>18</sup>
- Arrestee refused to sign the promise to appear.<sup>19</sup>
- Arrestee had outstanding warrants.<sup>20</sup>
- Release might jeopardize prosecution.<sup>21</sup>
- There was reason to believe the arrestee would not appear in court.<sup>22</sup>

**INFRACTION ARRESTS:** A person who was arrested for an infraction must be cited and released except as follows:

- Arrestee refused to sign a promise to appear.<sup>23</sup>
- Arrestee was unable to provide satisfactory identification.<sup>24</sup>

**OUTRIGHT RELEASE:** Pursuant to Penal Code § 849(b), officers may release an arrestee from custody without obtaining a promise to appear in any of the following situations:

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

<sup>1</sup> See *Virginia v. Moore* (2008) \_\_ U.S. \_\_ [2008 WL 1805745]; *Atwater v. Lago Vista* (2001) 532 U.S. 318; 354; *People v. McKay* (2002) 27 Cal.4th 601, 607, 618. <sup>2</sup> Pen. Code § 827.1(h). <sup>3</sup> Pen. Code § 827.1(e). <sup>4</sup> Pen. Code § 827.1(f). <sup>5</sup> Pen. Code § 827.1(i).

<sup>6</sup> Pen. Code § 827.1(j). <sup>7</sup> Pen. Code § 827.1(k). <sup>8</sup> Pen. Code §§ 827.1(a)-(d). <sup>9</sup> Pen. Code § 827.1(f). <sup>10</sup> Pen. Code § 827.1(g).

<sup>11</sup> See Veh. Code § 40303(a). <sup>12</sup> Veh. Code § 40302(d). <sup>13</sup> Pen. Code §§ 853.6, 13701. <sup>14</sup> Pen. Code § 853.6(7). <sup>15</sup> Pen. Code § 853.6(7). <sup>16</sup> Pen. Code § 853.6(i)(5); Veh. Code § 40302(a). <sup>17</sup> Pen. Code § 853.6(i)(1). <sup>18</sup> Pen. Code § 853.6(i)(2). <sup>19</sup> Pen. Code § 853.6(i)(8). <sup>20</sup> Pen. Code § 853.6(i)(4). <sup>21</sup> Pen. Code § 853.6(i)(6). <sup>22</sup> Pen. Code § 853.6(i)(9). <sup>23</sup> Veh. Code § 40302(b).

<sup>24</sup> Pen. Code § 853.5; Veh. Code § 40302(a).

# Recent Cases

## Herring v. United States

(2009) \_\_ U.S. \_\_ [2009 WL 77886]

### Issue

Should evidence be suppressed as the result of an isolated incidence of marginal negligence?

### Facts

A sheriff's deputy in Coffee County, Alabama, learned that Bennie Herring was now at the department's impound yard, retrieving something from his impounded truck. Because Herring was "no stranger" to local law enforcement, the deputy asked his dispatcher to run a warrant check. The dispatcher found nothing, so she checked with neighboring Dale County and was told there was a warrant in their database for failure to appear on a felony. The deputy then arrested Herring and, during a search incident to the arrest, he found methamphetamine and a handgun.

Meanwhile, the Dale County dispatcher started looking for the hard copy of the warrant to fax to Coffee County. But she couldn't find it. So she checked with the court clerk who said the warrant had been recalled five months earlier. She immediately notified the Coffee County dispatcher, but it was too late—Herring had already been searched.

Herring was indicted for possession of methamphetamine and being a felon in possession of a firearm. The trial court denied his motion to suppress the evidence on grounds that the deputy had relied in good faith on the information from Dale County. The Court of Appeals agreed, and Herring appealed to the United States Supreme Court.

### Discussion

It was undisputed that Herring's arrest was unlawful because there was no warrant. Thus, the only

issue was whether the evidence in his possession should have been suppressed. As noted, the lower courts had ruled the evidence was admissible under the good faith rule.<sup>1</sup>

Although the Supreme Court seemed to agree, it went further and ruled that evidence can no longer be suppressed unless the "deterrence benefits" of suppression (i.e., curbing police misconduct) outweigh the "substantial social costs" of suppression. What are those costs? The principle one, said the Court, is "letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system."

The court then concluded that the deterrence of police misconduct cannot outweigh these substantial costs unless the officers' actions amounted to something more than an isolated incident of mere negligence. As the Court explained:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.<sup>2</sup>

In applying these criteria to the facts, the Court ruled that the evidence in Herring's possession was not subject to suppression because the misconduct attributable to the police was insufficiently blameworthy. Said the Court, "[T]here is no evidence that errors in Dale County's system are routine or widespread. [The deputy] testified that he had never had reason to question information about a Dale County warrant, and [both dispatchers] testified that they could remember no similar miscommunication ever happening on their watch."

<sup>1</sup> **NOTE:** These rulings constituted an expansion of the good faith rule because, to date, it has been applied almost exclusively to situations in which the person who made the error was someone other than an officer or an adjunct to law enforcement. In fact, with few exceptions, the courts have applied the good faith rule only when the mistake was made by a judge who issued a search or arrest warrant based on information that a higher court ruled did not constitute probable cause.

<sup>2</sup> ALSO SEE *United States v. Leon* (1984) 468 U.S. 897, 911 ["[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus [of applying the exclusionary rule]."].

Consequently, the Court ruled that the drugs and firearm in Herring's possession were admissible at his trial even though his arrest was unlawful. In the words of the Court, "[W]hen police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.'"

### Comment

The Court's ruling in *Herring* represents a significant shift in the rules pertaining to search and seizure. Although it's too early to tell how broadly the lower courts will interpret it,<sup>3</sup> *Herring* should result in an immediate reduction in the number of cases in which evidence is suppressed for relatively minor Fourth Amendment infractions.

There is, however, some uncertainty as to whether *Herring* can be applied if the misconduct was attributable to the same officer who arrested the suspect or conducted the search. This is because the error in *Herring* was made by a civilian employee of sheriff's department, not the arresting officer.<sup>4</sup> And the Court took note of this, referring to the negligence in the case as "attenuated."

Nevertheless, there is reason to believe that attenuation is not an absolute requirement. This is because the Court repeatedly emphasized that the propriety of suppressing evidence depends on the blameworthiness of the transgression, not the identity of the transgressor. For example, the Court pointed out that it has "never applied the [exclusionary] rule to exclude evidence obtained in violation of the Fourth Amendment where the police conduct was no more intentional or culpable than this." Moreover, in its most expressive clarification of the new rule, the Court focused entirely on the officers' culpability and did not mention attenuation. "To trigger the exclusionary rule," said the Court, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>5</sup>

## Arizona v. Johnson

(2008) \_\_ U.S. \_\_ [2009 WL 160434]

### Issue

During a traffic stop, if officers have grounds to pat search a passenger, are they prohibited from doing so because they lacked independent grounds to detain him?

### Facts

At about 9 P.M., three gang task force officers in Tucson, Arizona stopped a vehicle for suspended registration. There were three men in the car. One of the officers ordered the driver to step out; the other two officers spoke with the passengers. The officer who spoke with the back-seat passenger, Johnson, asked him to step outside.

As he did so, she decided to pat search him because there were several things that, in combination, caused her to suspect "he might have a weapon on him." Those circumstances were as follows: (1) as she approached the car, Johnson "looked back and kept his eyes on the officers"; (2) Johnson was carrying a police scanner, which was "cause for concern" because it was an indication that he was "going to be involved in some kind of criminal activity" or was "going to try to evade the police by listening to the scanner"; (3) Johnson said he lived in Eloy, Arizona, which was "home" to a Crips gang, and he was wearing a blue bandana, which is something often worn by members of the Crips; and, (4) Johnson said he had been released from prison about a year earlier after serving time for burglary.

The officer's concern was confirmed when, during the pat search, she felt a handgun at Johnson's waist. Johnson was subsequently found guilty of possession of a firearm by a convicted felon. But the Arizona Court of Appeals reversed the conviction, ruling that, even though the officer might have had sufficient grounds to believe that Johnson was armed or dangerous, the pat search was unlawful because she did not have independent grounds to detain him. The State of Arizona appealed to the Supreme Court.

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<sup>3</sup> See *US v. Farias-Gonzalez* (11C 2009) \_\_ F3 \_\_ [2009 WL 232328] ["[As the result of *Herring* [w]e now apply the cost-benefit balancing test to the case before us."].

<sup>4</sup> **NOTE:** The Court assumed the arrest resulted from a "negligent bookkeeping error" by a Dale County sheriff's employee.

<sup>5</sup> **ALSO SEE** *United States v. Knights* (2001) 534 U.S. 112, 117 [Court noted that when it upholds a particular type of search it does not necessarily mean that any search that is "not like it" is unlawful].

## Discussion

It is basic Fourth Amendment law that officers may pat search a detainee who is reasonably believed to be armed or dangerous.<sup>6</sup> It would appear, therefore, that the pat search of Johnson was lawful because, (1) he was being lawfully detained at the time because the Supreme Court recently ruled in *Brendlin v. California*<sup>7</sup> that all passengers in a lawfully-stopped vehicle are automatically detained pending completion of the stop; and (2) based on Johnson's nervousness, scanner, apparent membership in a violent street gang, and at least one felony conviction, the officer reasonably believed that he was armed or dangerous.

But the Arizona Court of Appeals ruled that a passenger-detention under *Brendlin* is somehow transformed into a consensual encounter whenever an officer questions the passenger about matters unrelated to the purpose of the stop. And thus the court thought that, because Johnson was no longer being detained when the search occurred, the gun should have been suppressed.

In a unanimous opinion, the United States Supreme Court disagreed with the court's analysis, ruling that a passenger in a stopped car remains detained—*lawfully* detained—until the stop is terminated. It is, therefore, immaterial that officers briefly questioned the passenger about matters unrelated to traffic infraction. Said the Court:

An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.

Accordingly, the Court ruled that, because a passenger remains lawfully detained until the stop is terminated, officers may pat search him if they reasonably believe he is armed or dangerous. The Court did not, however, decide whether the circumstances warranted the pat search. Instead, it remanded the case back to Arizona for that purpose.

## People v. Galland

(2008) 45 Cal.4<sup>th</sup> 354

### Issue

What is the required procedure when a judge orders that all or part of a search warrant affidavit be sealed? In particular, how should the courts ensure that the information in sealed affidavits remains confidential?

### Facts

An officer in Buena Park obtained a warrant to search Galland's mobile home for drugs and sales paraphernalia. In the course of the search, officers found methamphetamine, firearms, and evidence of drug sales.

Eight days later, the officer filed an inventory and return with the court, and also requested that the judge seal a large portion of the affidavit containing information that would disclose or tend to disclose the identity of a confidential informant. The judge granted the request, and also permitted the officer to keep the original sealed affidavit in the department's property room.

Galland filed a motion to suppress the evidence on grounds that, among other things, the sealed affidavit should have been filed with the court, not kept at the police department. The motion was denied, and Galland appealed to the California Court of Appeal.

In the course of the appeals process it was discovered that the sealed affidavit had been destroyed when the police department purged its files. Although prosecutors were able to provide a "substitute" affidavit that the superior court ruled was identical to the original, the Court of Appeal ruled that the record was inadequate. For that reason, it granted Galland's motion. The prosecutors appealed to the California Supreme Court.

### Discussion

In this case, the Supreme Court addressed a question that has troubled officers and prosecutors for

<sup>6</sup> See *Terry v. Ohio* (1968) 392 U.S. 1, 27-28. **NOTE:** Although the courts sometimes used the term "armed *and* dangerous," either is sufficient because a suspect who is armed with a weapon is necessarily "dangerous" to any officer who is detaining him, even if he exhibited no hostility. Similarly, a pat search is justified if the detainee constituted an immediate threat, even if there was no reason to believe he was armed. See *Pennsylvania v. Mimms* (1977) 434 U.S. 106, 112 ["The bulge in the jacket permitted the officer to conclude that Mimms was armed *and thus* posed a serious and present danger to the safety of the officer." Emphasis added].

<sup>7</sup> (2007) 551 U.S. 249.



some time: How can they be sure that information in a search warrant affidavit that has been sealed by a judge is not inadvertently disclosed to the defendant or made public? The question has arisen because, although these documents are ordinarily kept by the courts, there is no standardized procedure for ensuring confidentiality.

While the court in *Galland* did not mandate a particular security procedure, as we will discuss, it set the wheels in motion. It also made some rulings that should resolve the problem in the interim.

First, it ruled that sealed search warrant affidavits must ordinarily be retained by the issuing court—not the law enforcement agency that obtained the warrant. Said the court:

In our view, a sealed search warrant affidavit, like search warrant affidavits generally, should ordinarily be part of the court record that is maintained at the court. Such a rule minimizes the potential for tampering with the record and eliminates the need for time-consuming and cumbersome record-authentication procedures.

The court acknowledged, however, that security measures in some courts may be inadequate, at least until they find a way to resolve the problem. Consequently, it ruled that, for the time being, a judge may permit the investigating law enforcement agency to retain custody of a sealed search warrant affidavit if the judge determines that all of the following circumstances existed:

- (1) **Inadequate court security:** The security procedures at the court or court clerk's office were inadequate to protect against unauthorized disclosure of information in the affidavit.<sup>8</sup>
- (2) **Adequate police security:** The affidavit security procedures at the investigating law enforcement agency were sufficient to ensure confidentiality.
- (3) **Retention procedure:** The investigating agency has a procedure in place that adequately ensures that affidavits are retained for 10 years after final disposition of non-capital cases, and permanently for capital cases.

- (4) **Record of reviewed documents:** The judge who issued the search warrant made “a sufficient record of the documents that were reviewed [for determining the existence of probable cause], including the sealed materials, so as to permit identification of the original sealed affidavit in future proceedings or to permit reconstructions of the affidavit if necessary.”

As noted, the court also took steps to solve the problem. Specifically, it ruled that California's superior courts “should endeavor to promptly address and resolve security concerns identified by the People so that those confidential records may be maintained securely at the court. This problem may merit consideration as a statewide policy matter, and we suggest to the Judicial Council that it establish a task force for that purpose.” [The Superior Court in Alameda County has established a security procedure, which it has disseminated to all local law enforcement agencies.]

Back to the case at hand: The court ruled that the judge should not have allowed the Buena Park police to retain custody of the sealed affidavit because there was no showing that such a precaution was necessary. But it also ruled that suppression of the evidence was not required for two reasons. First, prosecutors had provided the superior court with an identical copy of the sealed affidavit, which meant that the Court of Appeal could have ruled on the propriety of superior court's denial of the motion to suppress. Second, it turned out that the sealed affidavit was not, in fact, destroyed—it had been located in the files of the Orange County Superior Court. Consequently, the Supreme Court remanded the case back to the Court of Appeal for a ruling on *Galland's* motion to suppress.

## People v. Bradford

(2008) 169 Cal.App.4<sup>th</sup> 843

### Issue

Should a murder defendant's confession have been suppressed because the officer who questioned him neglected to advise him that anything he said could be used against him in court?

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<sup>8</sup> **NOTE:** The court ruled there is one other requirement: a showing that “disclosure of the information would impair further investigation of criminal conduct or endanger the safety of the confidential informant or the informant's family.” But this does not appear to be a separate requirement, as one of these circumstances would have had to exist to obtain a sealing order in the first place.

## Facts

Bradford shot and killed Dale Jones during an argument in Jones' home in Richmond. Later that day, Bradford was arrested and interrogated. The officer who questioned him did not, however, furnish him with a standard *Miranda* warning. Instead, the following excerpts indicate that he tried to avoid doing this by having Jones acknowledge that he understood his rights:

**Officer:** Well, you've been arrested before. You know how this game works, right?

**Suspect:** Never like this before, though.

**Officer:** I want to talk to you about [the shooting]. Before I do—you watch television right? You watch cop shows?

**Suspect:** Yes, sir.

**Officer:** What happens when people get arrested on cop shows?

**Suspect:** It seem like this a halfway trick question. They interview them.

**Officer:** Sure, but I mean what happens before they get interviewed? They go, you got the right, right?

**Suspect:** To remain silent. They gives you your rights?

**Officer:** Right. Have you ever had that done to you before?

**Suspect:** My rights read to me? Of course.

**Officer:** And you understand those rights?

**Suspect:** Yes, I do.

**Officer:** Didn't have any problem understanding what that meant when they said you have the right to remain silent?

**Suspect:** No.

**Officer:** Didn't have any problem understanding what that meant when they said you have the right to an attorney?

**Suspect:** All that, I know.

**Officer:** And didn't have a problem understanding what they meant when they said you have the right to have an attorney present with you before and during any questioning?

**Suspect:** Un-huh.

**Officer:** But if you so desired but could not afford one, an attorney would be appointed to represent you at no charge?

**Suspect:** Uh-huh.

The interrogation then proceeded, and Bradford eventually confessed. At trial, his confession was used against him, and he was convicted of second-degree murder.

## Discussion

On appeal, Bradford argued that his confession should have been suppressed because the officer neglected to inform him that anything he said could be used against him. The court agreed.

Although Bradford had said he understood his rights, and although some of the things he said during the interview indicated that he knew he might be incriminating himself, the court noted that the United States Supreme Court in *Miranda* ruled that each of the four warnings was an "absolute prerequisite" to the admission of an incriminating statement, and that "[n]o amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead."<sup>9</sup>

The court in *Bradford* acknowledged that the courts "have permitted officers some latitude in the manner in which the *Miranda* warnings are delivered." But it added that "we are unaware of any post-*Miranda* decision that has permitted the admission of a defendant's statements in the absence of a showing that a recognizable version of each of the four warnings was provided to the suspect."

Consequently, the court ruled that Bradford's confession should have been suppressed because "it was not even hinted to defendant that his statements might later be used against him; the issue was not mentioned at all."

## U.S. v. SDI Future Health, Inc.

(9<sup>th</sup> Cir. 2009) 553 F.3d 1246

## Issues

(1) Did the managers of a corporation have standing to challenge a search of their headquarters for business records? (2) Was a warrant to search the premises fatally overbroad?

## Facts

Following a two-year investigation, IRS investigators developed probable cause to believe that SDI Future Health, Inc. was engaged in widespread Medi-

<sup>9</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 469, 471-2, 476.

care fraud, and that two of its top executives—Kaplan and Brunk—had committed extensive tax fraud. Consequently, the investigators obtained a warrant to search SDI's corporate headquarters in Nevada for a large number of records.

Based in part on the seized documents, a federal grand jury in Nevada indicted the corporation and the two executives on, among other things, 124 counts of health care fraud, conspiracy to provide illegal kickback payments, conspiracy to commit money laundering, and tax evasion.

The defendants filed a motion in the district court to suppress the documents on grounds that the warrant's descriptions of the documents to be seized was overbroad. The court granted the motion, also ruling that SDI and the executives had standing to challenge the search. The Government appealed.

## Discussion

The court began its discussion by addressing the standing issue. While it was apparent that a corporation has standing to challenge a search of its headquarters, the standing of Kaplan and Brunk was not so clear. In fact, the court noted that the case “presents the novel issue of the extent to which a business employee may have standing to challenge a search of business premises generally.”

By way of background, it explained that a defendant will not be permitted to challenge a search unless he has standing, meaning he must have had a reasonable expectation of privacy in the place or thing that was searched. In most cases, people will have standing to challenge searches of places and things they owned, lawfully possessed, or lawfully controlled.<sup>10</sup> That's why the district court ruled that Kaplan and Brunk had standing; i.e., because they “had significant ownership interests in SDI, [and] exercised a high level of authority over the operations of the company including the authority to set and control policy regarding access to SDI's business records and computer systems.”

But the Ninth Circuit pointed out that when the place searched is a business, an employee's control of work-related documents and other things would not automatically result in standing.<sup>11</sup> Said the court, “[I]t does not suffice for Fourth Amendment standing merely to own a business, to work in a building, or to manage an office.” Thus, while people can almost always reasonably expect privacy in every nook and cranny in their homes, the situation is much different in business offices because of the “great variety of work environments.”

The court pointed out, however, that there are two situations in which employees will almost always have standing. First, they can usually expect privacy in their personal property and in offices that have been “given over to [their] exclusive use.”<sup>12</sup> Second, the privacy expectations of the people who own and control “small, family-run” businesses will often extend throughout the premises.<sup>13</sup>

In other situations, such as the case at hand, the court ruled it is necessary to analyze the circumstances of the search, especially the nature of the places that were searched and the property that was seized. Of particular importance are the following:

- (1) **Personal property?** Did the defendant own the evidence, and did he keep it in a private place that was separate from his other work-related material?
- (2) **Custody or control?** Did the defendant have custody or immediate control of the evidence when officers seized it?
- (3) **Security precautions?** In addition to the security precautions taken by the company, did the defendant take precautions “on his own behalf to secure the place searched or things seized from any interference without his authorization?” [Even if the defendant took such precautions, he might not have standing if he “was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes.”<sup>14</sup>]

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<sup>10</sup> See *Rakas v. Illinois* (1978) 439 U.S. 128, 143, fn.12 [“[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude.”].

<sup>11</sup> See *Minnesota v. Carter* (1998) 525 U.S. 83, 90 [“Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property.”].

<sup>12</sup> See *Schowengerdt v. General Dynamics Corp.* (9<sup>th</sup> Cir. 1987) 823 F.2d 1328, 1335.

<sup>13</sup> See *U.S. v. Gonzalez* (9<sup>th</sup> Cir. 2005) 412 F.3d 1102, 1117.

<sup>14</sup> *Schowengerdt v. General Dynamics Corp.* (9<sup>th</sup> Cir. 1987) 823 F.2d 1328, 1335.

Although the court noted that it appeared that none of the seized documents were the personal property of Kaplan or Brunk, and it appeared that none of the items were in their custody, it remanded the case to the district court to make the determination on standing.

But even if the district court concluded that Kaplan and Brunk did not have standing to challenge the search, it was clear that the corporation did. Consequently, it was necessary for the Ninth Circuit to determine whether the warrant was overbroad.

At the outset, it noted that the terms “overbroad” and “particularity” are sometimes misunderstood or confused, so it clarified the matter. It explained that a warrant is deemed “overbroad” if the affidavit fails to establish probable cause to search for one or more of the listed items. In contrast, the term “particularity” refers to the requirement that “the warrant must clearly state what is sought.” In discussing the misuse of these terms, the court acknowledged that “[t]he error is quite understandable, given that some of our own opinions have been unclear on the difference between particularity and overbreadth. However, we now insist that particularity and overbreadth remain two distinct parts of the evaluation of a warrant for Fourth Amendment purposes.”

The court then ruled that while the SDI warrant was sufficiently particular, it was overbroad because it authorized a search for several things that were not supported by probable cause. After noting that there was no reason to believe that the entire SDI operation was “a sham” or otherwise “permeated with fraud,” the court pointed out that the warrant instructed officers to seize all documents relating to bank accounts, brokerage accounts, trusts, and money market accounts. But, as it pointed out, this description was impermissibly broad because it authorized a search for all such documents, regardless of whether they pertained to the matters under investigation. Said the court, “[B]y failing to describe the crimes and individuals under investigation, the warrant provided the search team with discretion to seize records wholly unrelated to the finances of SDI or Kaplan.”

The court also ruled, however, that the district court should not have ordered the suppression of *all* the evidence seized pursuant to the warrant. This

was because, under the “severance doctrine,” when some evidence is supported by probable cause and some is not, only the latter evidence should be suppressed unless the warrant was so overbroad that it effectively constituted an unrestricted general warrant. And that was not the case here because, as the court noted, “the violative categories concerned only a specific subset of items,” and that “the lion’s share of the categories did not violate the Fourth Amendment.”

## People v. Hernandez

(2008) 45 Cal.4<sup>th</sup> 295

### Issue

May officers stop a vehicle to inspect a temporary operating permit in the rear window on grounds that temporary permits are often forged or attached to unregistered vehicles?

### Facts

A Sacramento County sheriff’s deputy stopped a pickup truck without license plates in order to inspect the temporary operating permit in the rear window. Although there was nothing about the permit that would indicate it was invalid, the deputy testified that temporary operating permits are “very often” forged or issued to different vehicles.

During the stop, the deputy asked the driver, Hernandez, if he was on probation. He said yes, but would not specify the underlying offense. When he repeatedly refused to exit the truck, the deputy and a backup officer forcibly pulled him out. Hernandez was subsequently convicted of resisting arrest, obstructing an officer in the performance of his duties, and driving under the influence of drugs.

### Discussion

Hernandez argued that all of the evidence (presumably the deputy’s observations and drug test results) should have been suppressed because the deputy did not have sufficient grounds to make the traffic stop. The California Supreme Court agreed.

The court explained that officers may make traffic stops only if they were aware of specific facts that reasonably indicated that either the driver or the vehicle were in violation of the Vehicle Code. Al-



though officers may consider their training and experience in making this determination, it pointed out that a stop cannot be upheld in the absence of facts that reasonably indicated that this particular driver or vehicle were citable. For example, a stop to inspect a temporary operating permit would probably be upheld if the permit appeared to be so old (e.g., faded, ratty) that the officer reasonably believed that it was not being used on a temporary basis.

The court said that a stop would also have been permitted if the vehicle had only one license plate, as this would indicate the owner had not complied with the procedure for obtaining replacement plates by surrendering or sending all remaining plates to the DMV.<sup>15</sup>

But because there were no plates on Hernandez's vehicle, the court ruled there was no justification for the stop because it reasonably appeared that Hernandez had, in fact, surrendered all missing or damaged plates as required by the DMV. Summarizing its ruling, the court said, "The failure here is that, although [the deputy] knew that some people driving with a temporary permit may be violating the law, he could point to no articulable facts supporting a reasonable suspicion that Mr. Hernandez, in particular, may have been acting illegally." Thus, the court ruled the stop was unlawful.

## Comment

In a related case, *In re Raymond C.*,<sup>16</sup> the court ruled that an officer may stop a new vehicle with no plates to confirm the issuance of a temporary operating permit if, (1) the officer could not see the permit because it was not displayed on the rear window; and (2), from behind the vehicle, the officer was unable to determine whether a permit was attached to the windshield.<sup>17</sup>

In so ruling, the court rejected the argument that, before stopping the vehicle, officers should be required to pass it and get into position to see if a sticker was attached. Among other things, it pointed out that

if the officer who stopped Raymond had been required to engage in such a maneuver, he "would have lost control of the situation. Raymond could have turned into a side street and driven away before the officer could turn around and follow."

## People v. Watkins

(2009) \_\_ Cal.App.4th \_\_ [2009 WL 296160]

### Issue

Are there circumstances in which a search can be upheld as a probation search even though the officers were unaware that the suspect was on searchable probation?

### Facts

At about 2:30 A.M., an Elk Grove police officer stopped a car for faulty brake lights. The driver, Stephon Watkins, falsely identified himself as his brother, Marques. Stephon said he was not carrying his driver's license and he admitted that he was on probation, although he didn't say whether it was searchable probation. When the officer ran a records check on Marques Watkins he learned that Marques was not on probation, but that his license had been suspended or revoked.

The officer figured the conflict between the driver saying he was on probation and the computer saying he wasn't was probably the result of a computer error. (After all, why would anyone lie that he was on probation?) So the officer conducted a probation search of the car and found drugs. After Stephon was arrested, he gave his true name, at which point the officer learned that he was on searchable probation.

### Discussion

It is settled that a search can qualify as a parole or probation search only if officers were aware that the suspect was on parole or searchable probation.<sup>18</sup> Citing this rule, Stephon argued that the search of his car was unlawful because, even though he admitted

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<sup>15</sup> See *People v. Saunders* (2006) 38 Cal.4th 1129; DMV, Obtain Duplicate or Substitute License Plates and Stickers <<http://www.dmv.ca.gov/pubs/brochures/howto/htvr 11.htm>> [as of June 29, 2006].

<sup>16</sup> (2008) 45 Cal.4th 303.

<sup>17</sup> **NOTE:** The court noted that "[a] temporary permit is to be placed in the lower rear window. However, if it would be obscured there, it may be placed in the lower right corner of either the windshield or a side window." Citing DMV Handbook.

<sup>18</sup> See *People v. Sanders* (2003) 31 Cal.4th 318, 332; *In re Jaime P.* (2006) 40 Cal.4th 128; *People v. Medina* (2007) 158 Cal.App.4th 1571, 1577.

that he was on probation, the search was unlawful because he did not say he was on *searchable* probation.

At the outset, it should be noted that the search might have been upheld as a search incident to arrest based on, (1) Stephon's saying he was Marques, and (2) the officer's discovery that the license issued to Marques had been suspended or revoked. The court did not, however, address the issue.

Instead, it ruled that even though the officer was unaware that Watkins was on searchable probation, there should be—and now there *is*—an exception to the rule requiring actual notice of the search condition. Citing the equitable principle that “no one can take advantage of his own wrong,”<sup>19</sup> the court ruled that a search can be upheld as a probation search even though the officer was unaware that the suspect was on searchable probation if both of the following circumstances existed:

- (1) **Suspect lied:** The reason the officer didn't know the suspect was on probation was that he had lied about his identity.
- (2) **Records check on false name:** The officer ran a records check on the false name, which meant it was reasonably likely that, if the suspect had given his true name, the officer would have run it and would have been informed that he was on searchable probation.

Summarizing its ruling, the court said, “[D]efendant's wrongdoing in concealing his search condition from the officer by misrepresenting his identity estops him from contesting the search's validity as a probation search.”

## U.S. v. Rivera

(1<sup>st</sup> Cir. 2009) \_\_ F.3d \_\_ [2009 WL 294798]

### Issue

Following a robbery, did officers permit the victim to see the suspects under circumstances that would have resulted in an unreliable in-court ID?

### Facts

Shortly after 8 A.M., two men armed with handguns walked into a mall in Puerto Rico that had not yet opened for business. The men approached the

manager of a gallery, pulled out their guns and warned him “not to act like some tough guy, that they would shoot him.” An optometrist who had just arrived at her store saw what was happening and called 911. The optometrist also notified a maintenance worker who went outside and alerted a municipal police officer. The officer called for backup after locking both the front and rear exits to the mall.

Meanwhile, the two robbers had taken the manager to a lottery office on the second floor where they forced him to open the safe containing over \$8,000. They then tied him up and headed downstairs where they encountered officers with the Puerto Rico Police Department. The robbers tried to escape, but they were unable to get outside because the doors to the mall were locked. So they went into a restroom where they ditched their guns and the loot. They were arrested as they exited.

At about this time the victim happened to see the robbers in handcuffs as they were being escorted out of the building, and he testified that he “immediately recognized them.” Later that day, he also saw them in a holding cell at the police station and, at some point after that, he saw them in a police car and in a holding cell near the district attorney's office. During the trial, the manager positively identified the men as the robbers, and they were convicted.

### Discussion

On appeal, the defendants argued that the manager should not have been permitted to identify them in court because his viewing of them after the robbery was so suggestive that it rendered his in-court ID unreliable. The court disagreed.

A court may suppress an in-court ID by a witness if officers previously exposed the defendant to the witness under circumstances that would have resulted in a substantial likelihood of irreparable misidentification.<sup>20</sup> To make this determination, the courts utilize a two-step procedure: (1) they decide whether the identification procedure was, in fact, impermissibly suggestive; and (2), if so, they look to see whether the witness's identification of the defendant was nevertheless reliable.

Applying the first part of the test, the court ruled that the manager's viewing of the defendants at the

<sup>19</sup> Civil Code § 3517.

<sup>20</sup> See *Simmons v. United States* (1968) 390 U.S. 377, 384; *People v. Arias* (1996) 13 Cal.4<sup>th</sup> 492, 168.

mall was not suggestive because it was nothing more than a showup; i.e., “a quick confirmation at the scene of the crime that the officers had detained the correct individuals.” Although the court acknowledged that the manager’s subsequent viewings of the defendants “undoubtedly reinforced his original impression,” it added that “they were chance encounters that had marginal significance.”

Moreover, the court ruled that even if the pretrial IDs were suggestive, the in-court ID could not have been suppressed because, under the second part of the test, there was sufficient reason to believe that the in-court ID was reliable. Among other things, the court noted that the manager “initially observed the defendants face-to-face, at a close distance, as they approached him.” In addition, the manager testified that, during the robbery, he looked at the defendants “every time he had the chance and did so four or five times.”

Consequently, the court ruled that the manager’s pretrial encounters with the defendants “had little, if any, impact on the level of certainty of his in-court identification,” and that the in-court ID was admissible. The defendants’ convictions were affirmed.

## U.S. v. Gonzalez

(7<sup>th</sup> Cir. 2009) \_\_ F.3d \_\_ [2009 WL 290776]

### Issue

Was the issuance of a search warrant independent of an earlier illegal search?

### Facts

After arresting Gonzalez for selling drugs, Milwaukee police officers learned that he lived at his mother’s home, and that he was not paying rent. So they went there and obtained his mother’s consent to search his bedroom. Standing at the door to the bedroom, they saw some crack cocaine, several packages of marijuana, and two scales. They also saw a closed shoebox next to the marijuana. After entering the room, one of the officers opened the box and found more crack cocaine and marijuana.

At that point, the officers conferred for about 15 minutes, trying to figure out if the mother’s consent was effective. There was no consensus, so they decided to seek a warrant to be “safe.” In his application for the warrant, the affiant included all of the above except for the information about the search of the shoebox. The warrant was issued and, during the search, the officers seized the drugs and found four loaded firearms. When Gonzalez’s motion to suppress the evidence was denied, he pled guilty to, among other things, possessing firearms in furtherance of drug-trafficking.

### Discussion

Although Gonzalez’s mother had the authority to open the door to the bedroom, Gonzalez argued that the evidence seized under the warrant should have been suppressed because, (1) the warrantless search of the shoebox was plainly illegal, and (2) the officers would not have sought the warrant if they hadn’t conducted the illegal search of the shoebox. The court disagreed.

Under the independent source rule, if officers obtain a warrant to search a place or thing after conducting an illegal search of that place or thing, a court may deny a motion to suppress the evidence seized during the warranted search if, (1) the information discovered during the illegal search was unnecessary to establish probable cause for the warrant, and (2) the decision to seek the warrant was not prompted by the illegal search.<sup>21</sup>

Because it was apparent that Gonzalez’s mother did not have the authority to consent to a search of the shoebox, the issue was whether the officers would have sought the warrant if they had been unaware that the box contained drugs. Although it was a close call, the court ruled they would because, (1) they had already seen drugs and a scale in the room; and (2) one of the officers testified that they decided to apply for the warrant because they were unsure whether Gonzalez’s mother had the authority to permit them to enter and search the bedroom. Thus, Gonzalez’s conviction was affirmed. POV

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<sup>21</sup> See *Murray v. United States* (1988) 487 U.S. 533, 543 [the issue was whether “the agents would have sought a warrant if they had not earlier entered the warehouse”]; *People v. Neely* (1999) 70 Cal.App.4<sup>th</sup> 767, 785 [“A ‘fruit’ may be admitted if there was an independent source for it; it would have been found anyway”]; *US v. Smith* (9C 1998) 155 F3 1051, 1060, fn.16 [“The independent source exception operates to admit evidence that is actually found by legal means through sources unrelated to the illegal search.”].

# The Changing Times

## ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE

Two retired prosecutors died. **Don Ingraham** passed away on December 12, 2008 after a long battle with Alzheimers. Don joined the office in 1968 and retired in 2000. **Karl Payne** died on December 29, 2008. Karl joined the office in 1971 and retired in 1989. Insp.

Insp. **Eric Nenneman** retired after 19 years with the office. He was formerly a Berkeley PD officer.

## ALBANY POLICE DEPARTMENT

New officers: **Michael Gibson** and **Lucas McClafin**.

## BART POLICE DEPARTMENT

The following officers retired: Lt. **Cindy Cleveland** (28 years), Lt. **Joe Hahner** (27 years), and **Dennis Larsen** (17 years).

Sergeants **Aaron Ledford** and **Tyrone Forte** were promoted to lieutenant. Officer **Aaron Togonon** was promoted to sergeant. Lateral appointments: **Anthony Gouvaia** (Contra Costa SO) and **Patrick Kelly** (Stanislaus SO). Officer **Andrew Rodrigues** was selected for the Special Problems Unit.

The department mourned the passing of retired sergeant **Charles Johnson**, 66, who retired in 1999 after 26 years of service. Before joining BART PD, he was an Oakland PD officer.

## CALIFORNIA HIGHWAY PATROL

OAKLAND AREA: Officer **Maurice Kane** was promoted to sergeant and transferred to Oakland from the Auburn Area. Officer **John Johnson, Jr.** was promoted to sergeant and transferred to Oakland from the Fresno Area. New academy grads assigned to Oakland: **Eric Anderson**, **Thomas Adams**, and **Jacobia Dove**.

## FREMONT POLICE DEPARTMENT

Officer **Glenn Miller** retired after 26 years of service. New officers: **Brent Butcher**, **Anthony Diehm**, **Thomas Edwards**, **Tyler Nelson**, **James Taylor**, **Jason Valdes**, and **Ken Yan**.

## NEWARK POLICE DEPARTMENT

Sgt. **Dave Parks** and Officer **David Higbee** transferred from Patrol to Investigations. Former New York City PD officer **Michael Harrington** has joined the department.

The department reports that all lieutenants have been reclassified as commanders.

## OAKLAND POLICE DEPARTMENT

Chief of Police **Wayne Tucker** retired after four years of service. Chief Tucker began his law enforcement career 42-years ago when he joined the Alameda County Sheriff's Department. When he retired in 2005, he was Assistant Sheriff. OPD Assistant Chief **Howard Jordan** will serve as acting chief.

Capt. **Jeffrey Loman** was promoted to Deputy Chief. Lieutenants **Edward Poulson** and **David Downing** were promoted to captain.

The following sergeants were promoted to lieutenant: **Donna Hoppenhauer**, **Peter Lau**, **Richard Hassna**, **Ronald Lighten**, **Christopher Shannon**, **Ronald Yelder**, **Drennon Lindsey**, and **Michael Poirier**.

The following officers were promoted to sergeant: **Michelle Allison**, **James Bassett**, **Christopher Bolton**, **Jacob Floyd**, **Steven Glover**, **Roland Holgrem**, **Randy Pope**, **Michael Weisenberg**, **Garrett Smit**, **Robert Endow**, **Scott Wong**, **Steven Chavez**, **Erin Mausz**, and **Gregg Dutton**.

Officers **Jeffrey Morgheim** and **Larry Robertson** retired, as did **Frank Alliger**, manager of the Bureau of Investigation's ID Division.

**Henry Hunter**, **Edward Pressnell**, and **Luis Silva** have taken disability retirements.

Retired officer **James Iwahashi** passed away on December 5, 2008. He retired in 2003 after 24 years of service.

## OAKLAND UNIFIED SCHOOL DISTRICT POLICE DEPARTMENT

Sgt. **Jonathan Bellusa** was appointed acting chief. New hires assigned to patrol: **Jon Chapman**, **Holly Matthews**, and **Gene Lombadri**. Officer **Kent Kenery**



transferred to Traffic. Officer **Jesse Velez** is on loan to ACSO SAFE Task Force. Officer **Gregory Hom** was assigned to background investigations and to Patrol as an FTO.

#### **PIEDMONT POLICE DEPARTMENT**

Chief of Police **Lisa Ravazza** retired after 27 years with the department, including three years as chief. Capt. **John Hunt** was appointed interim chief. Officer **John Florance** joined the department after serving for four years with Pittsburg PD.

#### **PLEASANTON POLICE DEPARTMENT**

Sgt. **Mike Dunn** retired after 25 years of service. Before joining the department, Mike was an officer with the Los Angeles PD. **Ryan Lehw** resigned to lateral back to the East Bay Regional Park District PD. Lateral appointments: **Jonathan Chin** (ACSO), **Kyle Henricksen** (ACSO) and **Rudy Granados** (Rio Vista PD). New appointments: **Barry Boccasile** and **Josh Davis**.

#### **SAN LEANDRO POLICE DEPARTMENT**

Capt. **Ian Willis** was appointed as interim chief following the retirement of Chief **Dale Attarian** last year. Ian has been with the department for 24 years. Lt. **Tom Overton** was promoted to captain. Lt. **Stephen Pricco** was promoted to interim captain. Transfers: Lt. **Pete Ballew** to CID, Lt. **Jim Lemmon** to Patrol, Officer **Mike Cauraugh** to Patrol, Officers **Ted Henderson**, **Nick Corti**, and **Gary Moore** to Traffic.

The department is saddened to report the sudden death of former officer **Michael Plotts** who had left the department to join the United States Marshals Service.

#### **UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT**

**Marc DeColoude** joined the department as a lieutenant after serving with the San Leandro PD. Former Chicago PD officer **Lisa Campbell** joined the department. New records technician: **Cris Gomez Jr.** New security specialist: **Paul Silk**.

Former Chief of Police **William Peterson Beall Jr.** died on January 11, 2009. Before joining the department, he was Chief of Berkeley PD, which he joined

in 1941. Chief Beall was the first coordinator of police services for the then-nine UC campuses, and he began the process that resulted in POST certification for the department. He was considered by many to be the “father” of the University of California Police Department. He retired in 1982.

Former officer **Dennis M. Hendrickson** passed away on December 11, 2009. Dennis served the department from 1969 to 1980, then accepted a position as sergeant with the UCSF PD.

POV

# War Stories

## Lie on

One evening, two CHP officers were traveling on I-580 near Castro Valley when a car sped by. In the course of the subsequent pursuit, the driver repeatedly switched lanes, drove on the shoulder and, after exiting the freeway, ran several traffic lights. The officers eventually stopped him using the PIT maneuver. But it was all a big mistake, as the driver had a good reason for running: he said that a mountain lion happened to jump into his car shortly before he sped by the officers. When informed that there were currently no mountain lions in his car, the man explained that the beast jumped out the window at the conclusion of the pursuit because “the lights and sirens scared him.”

## Bank robbery blues

Not everybody can be a successful bank robber. Take Barrett Roberts and his accomplice, for instance. Barrett weighs over 300 pounds, which was a disadvantage when, after robbing the Wells Fargo bank on Piedmont Avenue in Oakland, he and his buddy got involved in a foot chase with an OPD officer. The officer quickly caught the gasping gargantuan, but his agile accomplice got away, for a few minutes. Here’s what happened to him:

As he was running down the street, decided to toss the bank bag full of money under a parked car, intending to retrieve it when things cooled down. But when he returned about 30 minutes later, he saw that some guy had picked up the bank bag and, with a big grin on his face, was busily counting the money. “Hey, dude, that’s my money,” yelled the accomplice. “Finders keepers,” replied the dude. The two men were fighting when OPD officers pulled up and arrested them both.

## If only . . .

The following is the entire opinion by the Michigan Court of Appeals in the case of *Denny v. Radar Industries*: “The appellant has attempted to distinguish the factual situation in this case from that in another case. He didn’t. We couldn’t. Affirmed.”

## Watching for shoeless shoplifters

The owner of a liquor store in Colorado was fed up with shoplifters—they were stealing about \$1,000 worth of his booze each month. He was also unhappy with the local criminal justice system because many of the shoplifters he turned over to the police would be back a few hours later, trying again. So he came up with a plan: When he apprehended shoplifters, he gave them a choice: hand over one of their shoes or get arrested. He figured that if he took a shoe, they would be too humiliated to return. And the plan worked—his storeroom was filled with shoes. But then officers explained to him that, by demanding a shoe in lieu of arrest he was technically committing robbery. So now the owner calls the police on everyone. “It’s not worth jeopardizing my business,” he said.

## A good reason to shoplift

A man and a woman were caught shoplifting in the Lucky’s store in Union City. But as security guards were taking them into custody, the man started fighting. So the woman pulled out her cell phone and tried to call 911 and report the fight. However, the call was delayed because the woman’s cell phone had been mysteriously rerouting calls all over the country—and it rerouted this call to a 911 operator in Phoenix, Arizona. After the couple was arrested, the woman explained why she and her friend had become shoplifters: “We have been spending all our money on these outrageous cell phone bills.”

## Another cell phone caper

A man in Sarasota, Florida figured (correctly) that the police officer who was following him was going to stop him for speeding. So he pulled out his cell phone, dialed 911, and yelled that an armed robbery had just occurred in a store a few blocks away. As expected, the officer sped off in the direction of the store. A few minutes later, the man was driving along, grinning and thinking how he had just invented a sure-fire method of avoiding traffic tick-

ets forever, when he was surrounded by patrol cars and hauled off to jail. What went wrong? When the officers figured out what the man had done, the entire force, including some off-duty officers, started looking for him. As one officer explained to a reporter, "We were highly motivated."

## Accident reports

Here are some statements from people who had been involved in traffic accidents:

- "An invisible car came out of nowhere, struck my car and vanished."
- "I told the cop I wasn't hurt, but on removing my hat I found that I had a fractured skull."
- "The indirect cause of this accident was a little guy in a small car with a big mouth."
- "The telephone pole was approaching and I was attempting to swerve out of the way when it struck my front end."
- "I was thrown from my car as it left the road. I was later found in a ditch by some stray cows."

## Rotten luck

A man was walking out of his apartment building on Lakeshore Avenue in Oakland when a robber walked up, knocked him unconscious, and ran off with the man's wallet. Figuring that the credit cards would be reported stolen within an hour or so, the robber started driving around town, buying a lot of stuff. After buying a TV at K-Mart, he was speeding to a Walgreen's down the street when he crashed into a telephone pole and was knocked unconscious. When he arrived by ambulance at Highland Hospital, a nurse started inventorying his property and noticed that the name on all his credit cards was the same as the name of the unconscious man in the next room—the guy whose credit cards had been snatched in a robbery. The robber was arrested when he regained consciousness.

## A wannabe cop gets lucky

At about 3 A.M., an officer in Palos Verdes Estates saw some flashing red and blue lights about a block behind him. Figuring it was another officer making a traffic stop, he pulled to the curb just in case the officer needed assistance. As he watched in his rear-

view mirror, he noticed that the car with the light bar was an old Ford Pinto station wagon, and the "officer" who was talking to the driver appeared to be wearing a Boy Scout uniform. So he decided to investigate, and quickly determined that the man in the Boy Scout uniform was a frustrated wannabe cop who couldn't get a job in law enforcement because he was a head case.

After arresting the man, the officer contacted the driver of the car who'd been pulled over and, while explaining the situation, noticed that the man was evasive and real nervous. So the officer ran his license plate, and it turned out the car was stolen. When the officer told the phony cop that he had stopped a stolen car, the man asked, "So, do you think your department will hire me now?"

### Thought for the day

The only thing more dangerous  
than a stupid criminal is a stupid  
criminal with a plan.

### The War Stories Archives

Email: [POV@acgov.org](mailto:POV@acgov.org)  
Voicemail: (510) 272-6251  
Fax: (510) 271-5157  
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Oakland, CA 94612

# California Criminal Investigation is going online!

By popular request, we have developed a version of CCI for the internet. It's a beta version, which means we are testing it. So we need your help.

If you purchased CCI in 2007, 2008, or 2009, and if you would like to use CCI ONLINE, let us know in an email. We will then send you a password which you can use free of charge during the test period. All we ask is that you notify us if you have any problems, that you send us your comments and suggestions, that you complete a questionnaire that we will send you later, and that you don't let anyone else use your password.

CCI ONLINE will look about the same as the hard copy, but with the following features:

- **Daily updates:** All significant opinions from federal and California appellate courts will be added daily. Published opinions of less importance will be added within 72 hours.
- **Viewing endnotes:** There are over 3,300 endnotes. But you won't have to go to the end of the document to see them. Instead, they will scroll down the right side of each page as you are reading text.
- **Word search:** You will eventually be able to conduct a global search through all 700+ pages for key words and case names.
- **Cut-and-paste:** Text and endnotes can be cut-and-pasted.

As noted, passwords will be assigned to people who purchased a copy of CCI in 2007, 2008, or 2009. To obtain a password, send an email with the words "CCI Beta" in the subject line. Be sure to include the edition you purchased and your name. The email address is: [CCI@acgov.org](mailto:CCI@acgov.org). For information on CCI, go to [www.le.alcoda.org](http://www.le.alcoda.org) and click on "Publications."