POINT of VIEW

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This edition of Point of View
is dedicated to the memory of
Officer Ryan Bonaminio
of the Riverside Police Department
who was killed in the line of duty
on November 7, 2010

Contents

Searches Incident to Arrest

Every arrest must be presumed to present a risk of danger to the arresting officer.[1]

Taking a suspect into custody is an extremely "tense and risky undertaking."[2] This is especially true when the crime is a felony because many of today's felons are not only violent and well armed, they are often desperate. After all, they know they may be facing a lengthy prison term thanks to the various sentencing enhancements for felonies in California, including the three strikes law.

But even when the crime was not a high-stakes felony, there is always a threat of violence because people who are about to lose their freedom—even for a short time—may act impulsively and "attempt actions which are unlikely to succeed."[3] Taking note of this, the United States Supreme Court pointed out that "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."[4] Or, as the Ninth Circuit aptly observed, "It is a difficult exercise at best to predict a criminal suspect's next move."[5]

To help reduce these dangers, and also to make it harder for arrestees to destroy evidence, the U.S. Supreme Court ruled that officers who have made a custodial arrest may, as a matter of routine, conduct a type of search known as a search incident to arrest. Said the Court:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search.[6]

Writing on this subject a few years ago, we happily mentioned in passing that this was an area of the law in which the courts had provided officers and prosecutors with rules that were easy to understand and apply. We had no idea that a sudden and dramatic upheaval was looming.

From Clarity To Perplexity

Because the circumstances surrounding most arrests are fluid, unpredictable, and dangerous, the courts have long understood that the rules pertaining to searches incident to arrest needed to be "easily applied and predictably enforced."[7] And so, in 1969 the United States Supreme Court ruled in the landmark case of *Chimel* v. *California* that officers who have made a custodial arrest may, as a matter of routine, search those places and things over which the suspect had "immediate control."[8]

The Court also broadly defined the term "immediate control" to encompass "the area from within which [the arrestee] might gain possession of a

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[1] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7.
[2] *State* v. *Murdock* (Wis. 1990) 155 Wis.2d 217, 231.
[3] *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[4] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7.
[5] *U.S.* v. *Reilly* (9th Cir. 2000) 224 F.3d 986, 993.
[6] *United States* v. *Robinson* (1973) 414 U.S. 218, 235. Edited. ALSO SEE *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7 ["an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation"]; *United States* v. *Chadwick* (1977) 433 U.S. 1, 15 [officers are not required "to calculate the probability that weapons or destructible evidence may be involved"]; *U.S.* v. *Osife* (9th Cir. 2004) 398 F.3d 1143, 1145 ["[C]ourts are *not* to decide on a case-by-case basis whether the arresting officers' safety is in jeopardy or whether evidence is in danger of destruction."]. **NOTE**: In some older California cases the courts ruled that officers could conduct a search incident to arrest only if they had probable cause to believe they would find a weapon or evidence. See, for example, *People* v. *Flores* (1979) 100 Cal.App.3d 221, 229. Those rulings were abrogated by Proposition 8. See *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1247.
[7] *New York* v. *Belton* (1981) 453 U.S. 454, 459. ALSO SEE *Dunaway* v. *New York* (1979) 442 U.S. 200, 213-14 [officers need "[a] single, familiar standard"].
[8] (1969) 395 U.S. 752, 763. ALSO SEE *Michigan* v. *Long* (1983) 463 U.S. 1032, 1049, fn.14 ["[P]art of the reason to allow area searches incident to an arrest is that the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity."].

weapon or destructible evidence."[9] (Today, this searchable area has become popularly known as "grabbing space" or "grabbing radius."[10]) In explaining why it decided not to restrict these searches to explorations of the arrestee's person, the Court pointed out that "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested."

In the following years, many of the lower courts reached the conclusion that it would be unwise to strictly interpret the terms "immediate control" and "grabbing" space to cover only those places and things to which the arrestee had actual control at the time of the search. This was because such an interpretation would produce two troublesome situations.

First, an arrestee who did not want officers to search a place or thing in his immediate control when officers sought to arrest him would be given a powerful incentive to break away from the officers and separate himself from it, even a short distance. Second, officers who have arrested a suspect will often have significant safety reasons for restraining the arrestee or moving him a short distance away before searching those things that were under his control when he was arrested. For this reason, the courts would consistently rule that it would be imprudent to require that officers choose between conducting a search and taking reasonable safety precautions. Thus, comments such as the following would regularly appear in the cases:

- "[I]t does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures."[11]
- "[I]t makes no sense to condition a search incident to arrest upon the willingness of police to remain in harms way while conducting it."[12]
- "[I]f the police could lawfully have searched the defendant's grabbing radius at the moment of arrest, he has no legitimate complaint if, the better to protect themselves from him, they first put him outside that radius."[13]

But one type of arrest situation remained problematic: searches of vehicles incident to the arrest of the driver or other occupant. The problem was that these arrestees were almost always restrained in some manner outside the vehicle before the search began; e.g., handcuffed, surrounded by officers, locked in a patrol car. Consequently, some courts would rule that officers could not search the passenger compartment in these situations, while others would rule they could because, again, if something could have been searched legally one minute, it seems irrational to rule it could not be searched a few seconds later because the officers had taken reasonable safety precautions.

This dilemma was finally resolved by the United States Supreme Court in 1981. In its landmark decision in the case of *New York* v. *Belton,*[14] the Court noted that these vehicle-search cases had become "problematic" because the lower courts had failed to provide officers with "a set of rules which, in most instances, makes it possible to reach a correct determination" of what places and things they may search. So, after noting that weapons and evidence inside "the relatively narrow compass of the passenger compartment" of an automobile are "in fact generally, even if not inevitably" within the arrestee's

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[9] (1969) 395 U.S. 752, 763.

[10] See *U.S.* v. *Tejada* (7th Cir. 2008) 524 F.3d 809, 811 [officers can search "the area within grabbing distance"]; *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1420 ["grab area"]; *U.S.* v. *Goodwin-Bey* (8th Cir. 2009) 584 F.3d 1117, 1119 ["reaching area"]. ALSO SEE *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."].

[11] *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607. ALSO SEE *People* v. *Pressley* (1966) 242 Cal.App.2d 555, 560 [although "the arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away," the process of arrest "had begun at the door"]; *People* v. *Williams* (1967) 67 Cal.2d 226, 229 ["Of no legal significance is the fact that defendant, through his efforts to escape, succeeded in separating himself from the car by a distance of about one block."]; *U.S.* v. *Nohara* (9th Cir. 1993) 3 F.3d 1239, 1243 ["the officers here did not make the search unreasonable by handcuffing Nohara, seating him in the hallway, and searching the black bag within two to three minutes of his arrest"].

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

[13] *U.S.* v. *Tejada* (7th Cir. 2008) 524 F.3d 809, 812.

[14] (1981) 453 U.S. 454.

reach at some point, the Court announced the following "bright line" rule: Officers who have made a custodial arrest of an occupant of a vehicle may search the passenger compartment—regardless of whether the arrestee had physical access to the vehicle when the search occurred.

Consequently, it soon became standard police procedure throughout the country that if officers could conduct the search immediately after the arrest, they should do so. But if there were matters that needed their attention beforehand, they could address them so long as there was no unnecessary delay. Here are two examples of circumstances that were found to justify searches of places and things that were not within the arrestee's immediate control at the time of the search:

- Officers delayed searching the arrestee's car until it had been towed from the scene of the arrest because "gunfire and subsequent crash of [their] car had attracted a crowd so large that extra policemen had to be summoned [to control] the mob that was forming."[15]
- Officers delayed searching the arrestee's car because they were dispatched to a priority auto accident.[16]

In contrast, a search would not be deemed contemporaneous with an arrest if the delay was not reasonably necessary; e.g., officers delayed the search for 30-45 minutes in order to question the arrestee.[17]

Arizona v. *Gant*: Back to uncertainty

For almost 30 years, *Chimel* and *Belton* provided officers and the courts with a coherent set of rules that clearly defined the parameters of these searches. But that changed in 2009 when a bare majority of the Supreme Court announced its opinion in the case of *Arizona* v. *Gant*. (Although *Gant* technically upended only those rules pertaining to vehicle searches, as we will discuss shortly, it effectively dismantled the entire structure of this area of the law and left it in a "confused and unstable" state.[18]) Stripped of all its verbiage and dissembling (and there was a lot of both), the Court's decision in *Gant* prohibited all vehicle searches unless they occurred at a time when the arrestee was both unrestrained and sufficiently close to the vehicle that he might have been able to reach inside.

Because the *Gant* justices were presumably aware that officers never turn their backs on unrestrained arrestees—and not under any circumstances while preoccupied with a search—they must also have been aware that their decision would effectively abolish *Belton* searches and render *Belton* a nullity. And yet, for some curious reason they felt compelled to engage in blatant subterfuge and claim they had no intention of overturning *Belton*, even though they must have known that no one would believe them.[19] As Justice Alito observed in his dissenting opinion: "Although the Court refuses to acknowledge that it is overruling *Belton*," there "can be no doubt that it does so."

While there is much to criticize about *Gant*, there is no escaping the fact that *Belton* and *Chimel* were occasionally producing strange results that were taxing the credibility of the courts. For instance, judges would sometimes uphold searches of places and things that were nowhere near the arrestee when the search occurred, so long as there was a theoretical—sometimes fanciful—possibility that he might have been able to reach it. In one such case, *United States* v. *Tejada*, the court ruled that although the arrestee was "[h]andcuffed, lying face down on the floor and surrounded by police," and although it was unlikely that he would be able to make a "successful lunge" at anything, a search of the room in which he was arrested was warranted because the officers "did not know how strong he was, and he seemed desperate."[20]

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[15] *People* v. *Webb* (1967) 66 Cal.2d 107, 125.
[16] *People* v. *McBride* (1969) 268 Cal.App.2d 824, 829.
[17] *U.S.* v. *Vasey* (9th Cir. 1987) 834 F.2d 782, 787.
[18] *Arizona* v. *Gant* (2009) __ U.S. __ [129 S.Ct. 1710, 1731 (dis. opn. of Alito, J.).
[19] **NOTE**: The *Gant* majority also claimed that its decision was necessary because the lower courts had been grossly misinterpreting *Chimel* and *Belton*. This, too, was disingenuous, especially considering these two opinions were broadly interpreted for almost 30 years without even a hint of reproval from the Supreme Court.
[20] (7th Cir. 2008) 524 F.3d 809, 812. ALSO SEE *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 769 [search of upstairs bedroom was permissible even though the suspect was "at the bottom of the stairs at the time of the search" and was being held by other officers].

As a result of such rulings, some courts started to express concern that this area of the law had become untethered. One of them pointed out that "where there is no threat to the officers because the suspect has been immobilized, removed, and no one else is present, it makes no sense that the place he was removed from remains subject to search merely because he was previously there."[21] Another observed that, "[a]s with most other legal doctrines, that of *Chimel* can be reduced to logical absurdity if one is so disposed."[22]

True enough. But instead of fixing this particular problem, the Court in *Gant* effectively overturned or at least cast into doubt a wealth of thoughtful legal analysis—spanning nearly three decades—in which the lower courts had sought to balance the safety needs of officers and the privacy rights of arrestees.

Gant's unresolved issues

Before we discuss the law as it exists today in the wake of *Gant*, it is necessary to address three issues that the Court neglected to address, issues that cannot be ignored in this article because they will be critical in determining the lawfulness of all four types of searches incident to arrest.

IS *GANT* LIMITED TO VEHICLE SEARCHES? Although *Gant* technically restricts only vehicle searches incident to the arrest of an occupant, it is hard to avoid the conclusion that it will be interpreted as restricting all of the other types of searches incident to arrest, such as containers near the arrestee and homes in which the arrest occurred.[23] That is because the privacy expectations in homes and many closed containers are significantly greater than those in the passenger compartments of cars.[24] To put it another way, if something in a car cannot be searched because it was inaccessible to the arrestee, it is difficult to imagine a court ruling that a similarly inaccessible item could be searched if it were located in the arrestee's home.[25] Again quoting Justice Alito, "[T]here is no logical reason why the same rule [that applied to the arrests of vehicle occupants] should not apply to all arrestees."

Furthermore, the Court in *Gant* phrased its ruling in sweeping terms that are flatly inconsistent with such a restricted interpretation. Here is an example: *If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, [the] justifications for the search-incident-to-arrest exception are absent and the rule does not apply*. In fact, there is already a California case—*People* v. *Leal*—in which the California Attorney General conceded that *Gant* applies equally to searches of homes.[26] (In another case, it was argued that *Gant* even applied to pat searches; i.e., that officers should not be permitted to pat down any part of the suspect's body unless they could prove it was immediately accessible to the arrestee. This silly argument was, however, rejected.[27])

HOW MUCH ACCESS IS REQUIRED? Because officers need to have some idea of how much access is necessary before they can search an item near the

[21] *People* v. *Summers* (1999) 73 Cal.App.4th 288, 290-91. ALSO SEE *U.S.* v. *Weaver* (9th Cir. 2006) 433 F.3d 1104, 1107 ["Here, where the arrestee was handcuffed and secured in a patrol car before police conducted the search, the rational underpinnings of *Belton*—officer safety and preservation of evidence—are not implicated. We are hardly the first to make this observation. We respectfully suggest that the Supreme Court may wish to re-examine this issue."]; *U.S.* v. *Queen* (7th Cir. 1988) 847 F.2d 346, 3545 ["Indeed, the Supreme Court—as well as several courts of appeal, including our own—have upheld searches incident to arrest where the possibility of an arrestee's grabbing a weapon or accessing evidence was at least as remote as in the situation before us."].

[22] *People* v. *Mendoza* (1986) 176 Cal.App.3d 1127, 1132.

[23] See *U.S.* v. *Perdoma* (8th Cir. 2010) __ F.3d __ [2010 WL 3528579] ["the explanation in *Gant* of the rationale for searches incident to arrest may prove to be instructive outside the vehicle-search context in some cases"].

[24] See *Wyoming* v. *Houghton* (1999) 526 U.S. 295, 303 ["Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars"]; *Cardwell* v. *Lewis* (1974) 417 U.S. 583, 590 ["One has a lesser expectation of privacy in [car] because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."].

[25] **NOTE**: It is especially unlikely that searches of homes would be exempt from *Gant* because, as we discuss in the accompanying article, officers who reasonably believe there is someone on the premises who poses a threat to them can conduct a protective sweep.

[26] (2009) 178 Cal.App.4th 1051, 1064 ["For their part, the People acknowledge that the search in this case would have violated the Fourth Amendment if it had taken place after the decision in *Gant*."]. ALSO SEE *U.S.* v. *Perdoma* (8th Cir. 2010) __ F.3d __ [2010 WL 3528579] [*Gant* applied to search of suitcase in a bus depot]; *U.S.* v. *Shakir* (3d Cir. 2010) __ F.3d __ [2010 WL 3122808] [*Gant* applied to search of gym bag at a hotel].

[27] *U.S.* v. *Vinton* (D.C. Cir. 2010) 594 F.3d 14, 24, fn.3 ["We decline to read *Gant* so expansively."]

arrestee, it might be assumed that the *Gant* Court would have provided some guidance. Instead, in the span of just a few pages it announced a test that was subsequently rendered unintelligible by a second test. And then it propounded a third test that differed somewhat from the first two. Specifically, at one point it said the test is *access*; i.e., a search is permitted if the arrestee had "access" to his car. Then it changed its mind and announced a more restrictive test: a search is permitted only if the arrestee was within actual "reaching distance" of the passenger compartment. And then it proclaimed that access and reaching distance were not enough—that the arrestee must also have been *unsecured*, which presumably meant that he must not have been handcuffed and otherwise restrained.

One of the first courts that tried to make sense of this gibberish was the Third Circuit which, having given up in its attempt to discern the correct test from the Court's words, was forced to resort to a "close reading" of the text. And after having done so, it formulated the following hypothesis:

> [T]he Court's reference to a suspect being "unsecured" and being "within reaching distance" of a vehicle are two ways of describing a single standard rather than independent prongs of a two-part test. In later formulations of its holding, the *Gant* Court omitted any reference to whether Gant was secured or unsecured, and looked instead simply to Gant's ability to access his vehicle.[28]

Thus, the court interpreted *Gant* as prohibiting searches of places and things if there was "no reasonable possibility" the arrestee might access it.

HOW STRICTLY WILL *GANT* BE INTERPRETED? The last—and most uncertain—question is whether the courts will engage in "an aggressive reading of *Gant*"[29] and ignore the large body of law—some of it from the Supreme Court itself—in which searches were upheld when they were "roughly" or "substantially" contemporaneous with the arrest.[30]

A related question is whether the courts will invalidate searches because there was some uncertainty as to whether the arrestee did, in fact, have access. In addressing this issue, it is hoped that the courts will take into account the D.C. Circuit's observation that, because custodial arrests are dangerous, "the police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[31] It should be noted that three courts have already refused to apply *Gant* in a hypertechnical manner, having ruled that it did not prohibit a vehicle search when, although the arrestee had been restrained, there were other suspects who had immediate access to the vehicle.[32]

One last thing: On November 1, 2010, the Supreme Court decided to review the case of *Davis* v. *U.S.* in which it is expected to determine whether *Gant* must be applied retroactively.

Requirements

Having reviewed the state of the law, we will now examine the requirements for conducting these types of searches. Although there are four distinct searches incident to arrest, they all have the same basic requirements, as follows:

(1) **Lawful arrest**: The suspect must have been lawfully arrested.
(2) **Custodial arrest**: The arrest must have been custodial in nature.
(3) **Contemporaneous search**: The search must have been contemporaneous with the arrest.

It should be noted that the first two requirements were not affected by *Gant,* which means they are fairly easy to understand. It was the third requirement—contemporaneousness—that is uncertain.

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[28] See *U.S.* v. *Shakir* (3d Cir. 2010) __ F.3d __ [2010 WL 3122808] ["[W]e understand *Gant* to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it."].
[29] *U.S.* v. *Shakir* (3rd Cir. 2010) __ F3 __ [2010 WL 3122808].
[30] See *Shipley* v. *California* (1969) 395 U.S. 818, 820 ["substantially contemporaneous"]; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33 ["substantially contemporaneous"]; *People* v. *Adams* (1985) 175 Cal.App.3d 855, 861 ["substantially contemporaneous"]; *U.S.* v. *Smith* (9th Cir. 2004) 389 F.3d 944. 951 ["roughly contemporaneous"].
[31] *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 330.
[32] See *U.S.* v. *Davis* (8th Cir. 2009) 569 F.3d 813, 817; *U.S.* v. *Goodwin-Bey* (8th Cir. 2009) 584 F.3d 1117; *U.S.* v. *Shakir* (3rd Cir. 2010) __F3 __ [2010 WL 3122808] [court noted that the officers "had reason to believe that one or more of Shakir's accomplices was nearby"].

Lawful arrest

In the context of searches incident to arrest, an arrest is deemed "lawful" if officers had probable cause to arrest the suspect.[33] This rule has several practical consequences.

SEARCH BEFORE ARREST: If officers had probable cause, some searches (especially pat downs) may be deemed incident to an arrest even though the suspsect had not yet been arrested.[34] As the Court of Appeal explained, "Once there is probable cause for an arrest it is immaterial that the search preceded the arrest."[35]

OFFICERS UNSURE ABOUT PROBABLE CAUSE: If a court determines that the officers had probable cause, the "lawful arrest" requirement is satisfied even if they were unsure that it existed. "It is not essential," said the court in *People* v. *Le*, "that the arresting officer at the time of the arrest or search have a subjective belief that the arrestee is guilty of a particular crime . . . so long as the objective facts, when fully determined, afford probable cause."[36]

For example, in *People* v. *Loudermilk*[37] two Sonoma County sheriff's deputies detained a hitchhiker at about 4 A.M. because he matched the description of a man who had shot another man about an hour earlier in nearby Healdsburg. When the hitchhiker, Loudermilk, claimed he had no ID, one of the deputies started searching his wallet and, just as he found some, Loudermilk spontaneously exclaimed, "I shot him. Something went wrong in my head." Loudermilk contended that his admission should have been suppressed because it was prompted by the search of his wallet which, he contended, did not qualify as a search incident to arrest because one of the deputies testified he didn't think he had probable cause to arrest Loudermilk for the shooting. The court said it didn't matter what the deputy thought—what counts is what the court thought. And it thought the deputy had it.

ARREST FOR "WRONG" CRIME: If a court rules that officers arrested the suspect for a crime that was not supported by probable cause, the arrest will nevertheless be deemed "lawful" if there was probable cause to arrest him for some other crime.[38] As the Tenth Circuit put it, "[T]he probable cause inquiry is not restricted to a particular offense, but rather requires merely that officers had reason to believe that a crime—any crime—occurred."[39]

For example, in *In re Donald L.*[40] a Martinez police officer detained a minor, Donald, at about 9 P.M. because he resembled a person who was suspected of having just cased a house for a burglary. The

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[33] See *Virginia* v. *Moore* (2008) 553 U.S. 164, 177 ["we have equated a lawful arrest with an arrest based on probable cause"].

[34] See *Rawlings* v. *Kentucky* (1980) 448 U.S. 98, 111 ["Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."]; *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538 ["An officer with probable cause to arrest can search incident to the arrest before making the arrest."]; *People* v. *Mims* (1992) 9 Cal.App.4th 1244, 1251 ["[T]he fact that the search preceded the formal arrest is of no consequence."]; *People* v. *Avila* (1997) 58 Cal.App.4th 1069, 1076 ["[I]t is unimportant whether a search incident to an arrest precedes the arrest or vice versa"]. **NOTES**: This rule is especially important to prosecutors when a consent search, pre-arrest pat down, or other warrantless search is ruled unlawful as the search may be upheld as a search incident to arrest if there was probable cause. Also note that in *People* v. *Superior Court (Hawkins)* (1972) 6 Cal.3d 757 the California Supreme Court ruled that probable cause to arrest was not enough, that officers must actually inform the suspect he is under arrest before they may conduct a search incident to arrest. This rule was nullified by California's Proposition 8. See *People* v. *Trotman* (1989) 214 Cal.App.3d 430.

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

[36] (1985) 169 Cal.App.3d 186, 193.

[37] (1987) 195 Cal.App.3d 996.

[38] See *People* v. *White* (2003) 107 Cal.App.4th 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."]; *In re Justin K.* (2002) 98 Cal.App.4th 695, 699 ["[The officer's] subjective understanding of the statutory scheme respecting stoplamps is not dispositive [s]o long as his conduct was objectively reasonable"]; *People* v. *Clark* (1973) 30 Cal.Ap.3d 549, 557-58 [arrest for burglary was made without probable cause, but there was probable cause to arrest for prowling]; *U.S.* v. *Wallace* (9th Cir. 2000) 213 F.3d 1216 ["That [the officer] had the mistaken impression that all front-window tint is illegal is beside the point. [The officer] was not taking the bar exam. The issue is… whether he had objective, probable cause to believe that these windows were, in fact, in violation."]; *U.S.* v. *Eckhart* (10th Cir. 2009) 569 F.3d 1263, 1272 ["An officer need not be able to quote statutes, chapter and verse. Some confusion about the details of the law may be excused"].

[39] *U.S.* v. *Turner* (10th Cir. 2009) 553 F.3d 1337, 1345.

[40] (1978) 81 Cal.App.3d 770.

officer also noticed that Donald was carrying a "club type" instrument, so he patted him down and discovered rings, watches, and necklaces. Thinking it was loot from a recent break-in, the officer arrested him for burglary. Although it was later determined that the jewelry had, in fact, just been stolen from a nearby home, Donald contended that the search could not be upheld as incident to his arrest because the officer did not have probable cause to arrest him for burglary, at least before the jewelry was discovered. Even if that were true, said the court, it wouldn't matter because the officer "had probable cause to arrest [Donald] for unlawful possession of a 'billy' or 'blackjack.'"

Custodial arrest

The second requirement—that the arrest must have been "custodial"—means that the officers must have decided to transport the arrestee to jail, a police station, or other place of confinement or treatment; i.e., he will not be cited and released. This requirement was imposed because the main justification for these searches is the increased danger that necessarily results from the "extended exposure which follows the taking of a suspect into custody" and the "attendant proximity, stress and uncertainty."[41]

For these reasons, an arrest will be deemed custodial regardless of whether the crime was "minor,"[42] or that officers were aware that the suspect would immediately post bail or would otherwise be released after a short stay.[43] For example, in *People* v. *Sanchez*[44] the defendant argued that a search of his pocket was unlawful because he had been arrested for merely being drunk in public. In summarily rejecting the argument, the court pointed out that "the officer testified he fully intended to book appellant into jail; he did not plan to release appellant."

Because an arrest becomes "custodial" when officers decide to transport the arrestee, a search will also be permitted if officers had decided to take him to a detox facility, mental health facility, or hospital.[45] Similarly, the arrest of a minor is custodial if he will be taken to school, home, a curfew center; or if he will be taken into protective custody.[46]

On the other hand, an arrest will not be deemed custodial if officers had decided not to transport the suspect or if they had not yet decided what to do. For example, in *U.S.* v. *Parr*[47] an officer in Portland, Oregon searched Parr after learning he was driving on a suspended license. Although the officer found stolen mail in the course of the search, and although he also had probable cause to arrest Parr for driving on a suspended license, he released him, having decided to submit the case to prosecutors. After Parr was charged with possessing stolen mail, he argued the search could not be upheld as a search incident to arrest because the officer did not take him into custody and, moreover, there was no evidence to suggest that he ever intended to do so. The court agreed, saying "it is not clear that the police action taken here is the type of 'custodial arrest' necessary to support a search incident to arrest."

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[41] *United States* v. *Robinson* (1973) 414 U.S. 218, 234 (fn.5), 235.

[42] See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318 [seatbelt violation]; *Washington* v. *Chrisman* (1982) 455 U.S. 1 [minor in possession of alcohol]; *Gustafson* v. *Florida* (1973) 414 US 260 [unlicensed driver]; *U.S.* v. *Robinson* (1973) 414 U.S. 218 [revoked driver's license]; *People* v. *Hamilton* (2002) 102 Cal.App.4th 1311, 1317 [displaying false registration tags]; *People* v. *Sanchez* (1985) 174 Cal.App.,3d 343, 349 [drunk in public]; *People* v. *McKay* (2002) 27 Cal.4th 601, 619-25 [riding bicycle in wrong direction].

[43] See *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228 ["Whether the offense is bailable is not determinative."].

[44] (1985) 174 Cal.App.3d 343. ALSO SEE *People* v. *Humberto O.* (2000) 80 Cal.App.4th 237, 244 [the officer "planned to" transport the minor]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 650 [the reasonableness of a search incident to arrest "depends on what actually happens rather than what could have happened."].
People v. *Hunt* (1990) 225 Cal.App.3d 498, 507 ["No evidence supports defendant's speculation that the officer would not have bothered completing the booking process [for Pen. Code § 148.9] had no contraband been found."].

[45] See Pen. Code § 647(g) [person arrested for plain drunk "shall be taken" into civil protective custody]; *People* v. *Boren* (1987) 188 Cal.App.3d 1171, 1177 [drunk in public]. **NOTE**: Proposition 8 nullified the rule of *People* v. *Longwill* (1975) 14 Cal.3d 943 that a person arrested for public drunkenness cannot be searched incident to arrest until it was determined that he would not be released after sobering up. See *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228-29.

[46] See *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1248 [curfew violator transported home]; *In re Charles C.* (1999) 76 Cal.App.4th 420, 424 [curfew violator transported home]; *People* v. *Humberto O.* (2000) 80 Cal.App.4th 237 [truant transported to school]; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860 [transport to curfew center]; *People* v. *Breault* (1990) 223 Cal.App.3d 125, 132 [protective custody].

[47] (9th Cir. 1988) 843 F.2d 1228.

It should be noted that several California statutes require or authorize a custodial arrest depending on the nature of the crime and other circumstances. For example, the law requires that officers book every person who was arrested for a felony or certain misdemeanors such as DUI, and misdemeanors that were reasonably likely to continue.[48]

What if officers transported the arrestee even though they were not authorized to do so by statute? In the case of *Atwater* v. *City of Lago Vista* the U.S. Supreme Court ruled that such an arrest is nevertheless "custodial" because it is the decision to transport the arrestee—not the statutory authority to do so—that justifies the search.[49]

For example, in *People* v. *McKay*[50] a Los Angeles County sheriff's deputy stopped McKay for riding a bicycle in the wrong direction on a street. Although McKay had verbally identified himself and also provided his date of birth, he had no ID in his possession so the deputy decided to take him into custody. He then conducted a search incident to the arrest and found a baggie of methamphetamine in one of McKay's socks. On appeal to the California Supreme Court, McKay argued that the search could not qualify as a search incident to arrest because he had, in fact, satisfactorily identified himself and, therefore, the officer was required by state law to cite and release him. But the court ruled the search was lawful, saying, "[S]o long as the officer has probable cause to believe that an individual committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."

This should not be interpreted to mean that the courts are encouraging officers to transport arrestees in violation of California state law. On the contrary, the California Supreme Court has said "we in no way countenance violations of state arrest procedure,"[51] and the United States Supreme Court noted that such conduct may demonstrate "extremely poor judgment."[52]

Contemporaneous Search

The third requirement for a search incident to arrest is that the arrest and search must have been contemporaneous. Although the word "contemporaneous" in common usage refers to situations in which two acts occur at about the same time, the courts have consistently ruled that the circumstances surrounding most arrests are much too erratic and unpredictable to require a strict succession of events. Instead, the United States Supreme Court ruled on two occasions that the arrest and search need only be "substantially" contemporaneous.[53]

And yet, as noted earlier, the Court in *Gant* seemed to downplay the importance of temporal proximity as it looked mainly to the physical proximity between the unrestrained arrestee and the place or thing that was searched. So the question arises: How will the lower courts resolve the apparent inconsistency between the established and somewhat-flexible requirement of "substantial" contemporaneousness and the seemingly rigid test imposed in *Gant*? Here are some thoughts.

SUBSTANTIAL PHYSICAL PROXIMITY: In determining whether an arrestee had sufficient access to the place or thing that was searched, it seems likely that the courts will continue to apply the following rules which, apart from making good sense, are consistent with the Court's "substantiality" principle:

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[48] See Pen. Code §§ 849, 853.6(i)(7); Veh. Code § 40302(d).

[49] (2001) 532 U.S. 318, 354. ALSO SEE *Virginia* v. *Moore* (2008) 553 U.S. 164, 174 ["A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional."]; *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 539 [because the officer had probable cause to cite for a seatbelt] violation, "[h]e thus had probable cause to arrest defendant on that basis"]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 650 ["police may make full custodial arrests for fine-only offenses"].

[50] (2002) 27 Cal.4th 601.

[51] *People* v. *McKay* (2002) 27 Cal.4th 601, 618.

[52] *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318, 347.

[53] See *Shipley* v. *California* (1969) 395 U.S. 818, 820 ["substantially contemporaneous"]; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33 ["substantially contemporaneous"]. ALSO SEE *U.S.* v. *McLaughlin* (9th Cir. 1999) 170 F.3d 889, 892 ["roughly contemporaneous"]; *US* v. *Smith* (9C 2004) 389 F3 944. 951 ["roughly contemporaneous"]; *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607 ["absolute" contemporaneousness is not required].

- LUNGING DISTANCE VS. GRABBING DISTANCE: While the area that is accessible to an arrestee is sometimes called "grabbing distance,"[54] it should not be limited to places and things that were literally within his "wingspan."[55] Instead, it appears likely that the courts will continue to permit officers to search places and things that were within the arrestee's "lunging" distance.[56]
- EXPECT IRRATIONALITY, NOT ACROBATICS: In determining whether something was within lunging distance, officers should be permitted to consider that arrestees may act irrationally—that their fear of incarceration may motivate them to attempt to reach places some distance away.[57] As the D.C. Circuit observed, "A willful and apparently violent arrestee, faced with the prospect of long-term incarceration, could be expected to exploit every available opportunity."[58] Still, the place or thing "must be conceivably accessible to the arrestee—assuming that he was neither an acrobat nor a Houdini."[59]

UNCERTAINTY AS TO ARRESTEE'S ACCESS: In the wake of *Gant*, it seems likely that one of the the most hotly contested issues will be whether a search should be invalidated because there was some uncertainty as to whether the arrestee did, in fact, have unfettered access to the place or thing that was searched. We hope, however, that the courts which face this issue will take into account that arrests are inherently dangerous and, to repeat the words of the D.C. Circuit, officers in the midst of making an arrest "cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[60]

For example, in the post-*Gant* case of *United States* v. *Shakir*[61] officers arrested Shakir on a warrant for bank robbery when he arrived in the lobby of a casino in Atlantic City. After handcuffing him, they searched a gym bag at his feet and found money that he had taken in another of his bank robberies. Shakir argued that the money should have been suppressed because he did not have actual access to the bag when it was searched. But the Third Circuit ruled the search was lawful, saying, "Although it would have been more difficult for Shakir to open the bag and retrieve a weapon while handcuffed, we do not regard this possibility as remote enough to render unconstitutional the search incident to arrest."

IF THE ARRESTEE FLED: Before *Gant*, if the arrestee fled when officers tried to arrest him, most courts would rule that the officers could search places and things that were under his immediate control when they attempted to arrest him, plus places and things under his immediate control when he was taken into custody. They reasoned that it was not in the public interest to provide arrestees with a way to impede or prevent the discovery of incriminating evidence by defying or fighting with officers and thereby forcibly distancing themselves from it. Altlhough it appears these searches would not be permitted under a strict interpretation of *Gant,* the courts might find that *Gant* did not repudiate the

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[54] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."]; *U.S.* v. *Tejada* (7th Cir. 2008) 524 F.3d 809, 811 [officers can search "the area within grabbing distance"].

[55] See *U.S.* v. *Ingram* (N.D.N.Y. 2001) 164 F.Supp.2d 310, 314 ["The scope of the search is not limited to the suspect's person, but extends to the suspect's 'wingspan,' or "the area from within which the arrestee might gain possession of a weapon or destructible evidence."].

[56] See *Thornton* v. *United States* (2004) 541 U.S. 615, 621 ["nor is an arrestee less likely to attempt to lunge for a weapon"].

[57] *U.S.* v. *Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 670.

[58] See *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7 ["There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."]; *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207 ["*Chimel* does not require the police to presume that an arrestee is wholly rational."]; ; *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 542 ["Since *Chimel*, the Supreme Court has interpreted broadly both the area under "immediate control' and the likelihood of danger or destruction of evidence."]; *US* v. *Palumbo* (8C 1984) 735 F2 1095, 1097 ["[A]ccessibility, as a practical matter is not the benchmark. The question is whether the cocaine was in the area within the immediate control of the arrestee"]; *State* v. *Murdock* (Wis. 1990) 455 N.W.2d 618, 626 ["[W]e cannot require an officer to weigh the arrestee's probability of success in obtaining a weapon or destructible evidence hidden within his or her immediate control."].

[59] *U.S.* v. *Queen* (7th Cir. 1988) 847 F.2d 346, 353.

[60] See *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 330.

[61] (3rd Cir. 2010) __ F.3d __ [2010 WL 3122808].

conventional wisdom upon which the earlier opinions were based.[62]

EMERGENCIES: As noted earlier, before *Gant* was decided the courts would usually uphold a search that was not contemporaneous with an arrest if officers needed to delay the search because of exigent circumstances. To date, the courts in three post-*Gant* cases have applied a variation of this principle and ruled that, although the arrestee did not have immediate access to the thing that was searched, the search was lawful because there were other unrestrained suspects who did.[63] But this, too, has become a murky area of the law as the result of *Gant*.

Types of Searches

Officers who have made a lawful custodial arrest may, depending on the circumstances, conduct one or more of the following types of searches incident to arrest: (1) a search of the arrestee's person, (2) a search of things within the arrestee's immediate control, and (3) a limited search of the home in which the arrest occurred. Furthermore, if the arrest occurred inside a home, they may conduct a hybrid search that consists of a protective sweep of the area immediately adjoining the place of arrest. Finally, they may (albeit rarely) search the vehicle in which the arrestee was an occupant.

Searching the arrestee

When officers make an arrest, the first thing they will normally do is search the arrestee. This type of search should not be affected by *Gant* because the arrestee will necessarily have immediate control over everything on his person. While it might be argued that *Gant* would not permit a search if the arrestee had been handcuffed, such an argument would be fallacious because the handcuffs will necessarily be removed at some point. Furthermore, as the Fifth Circuit observed, "Albeit difficult, it is by no means impossible for a handcuffed person to obtain and use a weapon concealed on his person or within lunge reach."[64]

Although the United States Supreme Court vaguely described the scope of these intrusions as "full" searches,[65] the courts have interpreted the term as encompassing the following:

PAT SEARCH: Officers may, of course, pat search the arrestee, a procedure which the Supreme Court described as follows: "The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."[66]

SEARCHES OF CLOTHING: The Court also ruled that officers may conduct a "relatively extensive exploration" of the arrestee's clothing, including his pockets.[67] And because of the threat resulting from syringes, the Court of Apeal ruled that, before conducting the search, officers may ask the arrestee whether there are any needles or other sharp objects in his pockets or anywhere else on his person.[68]

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[62] See, for example, *People* v. *Pressley* (1966) 242 Cal.App.2d 555, 559-60 ["[T]he actual arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away. But we do not think that this is controlling. The process of arrest had begun at the door"]; *People* v. *Williams* (1967) 67 Cal.2d 226, 229 ["Of no legal significance is the fact that defendant, through his efforts to escape, succeeded in separating himself from the car by a distance of about one block."].

[63] See *U.S.* v. *Davis* (8th Cir. 2009) 569 F.3d 813, 817 ["Although Davis had been detained, three unsecured and intoxicated passengers were standing around a vehicle redolent of recently smoked marijuana."]; *U.S.* v. *Goodwin-Bey* (8th Cir. 2009) 584 F.3d 1117 [officers had reasonable suspicion to believe that one of the occupants had recently displayed a firearm]; *U.S.* v. *Shakir* (3rd Cir. 2010) __ F3 __ [2010 WL 3122808] [court noted that the officers "had reason to believe that one or more of Shakir's accomplices was nearby"].

[64] *U.S.* v. *Sanders* (5th Cir. 1993) 994 F.2d 200, 209. ALSO SEE *U.S.* v. *Shakir* (3d Cir. 2010) __ F.3d __ [2010 WL 3122808] ["handcuffs are not fail-safe"].

[65] *Gustafson* v. *Florida* (1973) 414 U.S. 260, 264 [officers may "conduct a full search of the arrestee incident to a lawful custodial arrest"]; *People* v. *Dennis* (1985) 172 Cal.App.3d 287, 290 [a "full" search "is a greater intrusion than [a] pat-down"].

[66] *Terry* v. *Ohio* (1968) 392 U.S. 1, 17, fn. 13.

[67] *United States* v. *Robinson* (1973) 414 U.S. 218, 227. ALSO SEE *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["it is reasonable for the arresting officer to search the person arrested" for weapons and evidence]; *U.S.* v. *Brewer* (8th Cir. 2010) __ F.3d __ [2010 WL 4117368] [search of pants pocket].

[68] See *People* v. *Cressy* (1996) 47 Cal.App.4th 981, 988 ["Officers are sometimes required to do dangerous things. They should not, however, be required to do the foolhardy."].

SEARCHING CONTAINERS: Officers may search containers that the arrestee was carrying when the search occurred, such as a wallet, purse, backpack, pockets, cigarette box, pillbox, envelope.[69]

NO EXTREME SEARCHES: Officers may not conduct strip searches or any other exploration that is "extreme or patently abusive."[70] Furthermore, in the unlikely event that it becomes necessary to remove some of the arrestee's clothing in order to conduct a full search, officers must do so with due regard for the arrestee's legitimate privacy interests.[71]

Searching things nearby

In the past, officers could search all containers and other things that were within grabbing distance of the arrestee *when the arrest occurred*.[72] Although *Gant* still permits officers to search things near the arrestee, these searches must now be limited to items that were reasonably accessible to him *when the search occurred*. That was the situation in *U.S.* v. *Shakir*, noted earlier, in which the court ruled that officers did not violate *Gant* when they searched a gym bag at the feet of the defendant because, "[a]lthough he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor."[73]

In determiing whether a place or thing was reasonably accessible to the arrestee at the time of the search, the following pre-*Gant* law is consistent with *Gant* and should still be valid:

CONTAINERS UNDER OFFICERS' CONTROL: Because an arrestee has no control over a container at the moment that officers are searching it, it might be argued that all searches of containers are prohibited as the result of *Gant*. But the Supreme Court flatly rejected this "fallacious" theory in *New York* v. *Belton*[74] (which, as noted earlier, it did not overturn) and there is nothing in *Gant* to suggest that it intended to impose such an extreme rule.

CONTAINERS "IMMEDIATELY ASSOCIATED": Nor is there anything in *Gant* to suggest that the Court was overturning another of its longstanding rules: that officers may search a container that was not under the arrestee's immediate control if it was the type of property that is "immediately associated with the person of the arrestee"; e.g., purses.[75]

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[69] See *US* v. *Robinson* (1973) 414 U.S. 218, 223 [cigarette package]; *Gustafson* v. *Florida* (1973) 414 U.S. 260, 262 [cigarette package]; *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538 ["hide-a-key" box]; *People* v. *Methey* (1991) 227 Cal.App.3d 349, 358-59 [wallet]; *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1005-6 [wallet]; *People* v. *Baker* (1970) 12 Cal.App.3d 826, 841 [handbag]; *People* v. *Ingham* (1992) 5 Cal.App.4th 326, 331 [purse]; *People* v. *Brocks* (1981) 124 Cal.App.3d 959, 964 [change purse]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 230 [shoulder bag]; *Northrop* v. *Trippett* (6th Cir. 2001) 265 F.3d 372, 379 [duffle bag that the arrestee removed from his shoulder when officers approached]; *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243-44 [backpack]; *People* v. *Sims* (1993) 5 Cal.4th 405, 451 [bank bag]; *People* v. *Gutierrez* (1984) 163 Cal.App.3d 332, 335 [small cardboard box]; *People* v. *Gonzales* (1989) 216 Cal.App.3d 1185 ["cylindrical rolled up clear plastic baggy"]; *People* v. *Brown* (1989) 213 Cal.App.3d 187, 192 [pill bottle]; *U.S.* v. *Nohara* (9th Cir. 1993) 3 F.3d 1239, 1243 [bag]; *U.S.* v. *Holzman* (9th Cir. 1989) 871 F.2d 1496, 1504 [address book]; *U.S.* v. *Porter* (4th Cir. 1983) 738 F.2d 622, 627 [carry-on bag]; *U.S.* v. *Stephenson* (8th Cir. 1986) 785 F.2d 214, 225 [briefcase].

[70] *United States* v. *Robinson* (1973) 414 U.S. 218, 236. ALSO SEE *People* v. *Laiwa* (1983) 34 Cal.3d 711, 726 ["When, as often occurs, the arrest takes place on the street or in some other public setting, it is plainly wrong to say that a thorough search of the booking type performed at that location is not a grater invasion of personal privacy than the same search held in the relatively sequestered milieu of the property room of a police station."]; *Schmidt* v. *City of Lockport* (N.D. Ill. 1999) 67 F.Supp.2d 938, 944 [the search "went beyond the full search authorized by the Court in *Robinson*"]; *U.S.* v. *Ford* (E.D. Va. 2002) 232 F.Supp.2d 625, 631 [officer violated the Fourth Amendment when he "shoved his gloved hand into defendant's buttocks"].

[71] 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"]; *U.S.* v. *Williams* (7th Cir. 2000) 209 F.3d 940, 944 ["Williams was never disrobed or exposed to the public. The search occurred at night, away from traffic and neither officer saw anyone in the vicinity."]; *U.S.* v. *McKissick* (10th Cir. 2000) 204 F.3d 1282, 1297, fn.6 ["Officer Patten testified he did not remove Mr. Zeigler's clothes during the search, but he might have unzipped Mr. Zeigler's pants after discovering a lump in Mr. Zeigler's crotch area that was inconsistent with his genitals."]; *U.S.* v. *Dorlouis* (4th Cir. 1997) 107 F.3d 248, 256 [the search "took place in the privacy of the police van"].

[72] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 [the dangerousness of an item does not depend on who owns it].

[73] (3rd Cir. 2010) __ F.3d __ [2010 WL 3122808].

[74] (1981) 453 U.S. 454, 462, fn.5 ["But under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'"].

[75] See *United States* v. *Edwards* (1974) 415 U.S. 800, 805; *United States* v. *Chadwick* (1977) 433 U.S. 1, 15; *People* v. *Belvin* (1969) 275 Cal.App.2d 955, 959.

CONTAINERS TO GO: If the arrestee wants to take an item with him (e.g., a jacket), and if officers permit it, *Gant* would not restrict their ability to search it even if it was not under the arrestee's immediate control when he was arrested or when the search occurred. This is because the item would presumably be returned to him at some point.[76] Officers may not, however, compel an arrestee to take a certain item, then search it on the theory the search was incident to the arrest or was necessary for officer safety.[77]

SEARCHING PAGERS, CELL PHONES: Because so many arrestees carry pagers and cell phones nowadays, the question has frequently arisen: Can these searches be upheld as an incident to an arrest? Although it is questionable in light of *Gant* (mainly because there is no officer-safety justification[78]) the California Supreme Court ruled on January 3, 2011 that cell phone searches fall under the Supreme Court's warrant exception for containers that are "immediately associated with the person of the arrestee."[79] This means cell phones may be searched incident to an arrest even if the search occurred hours after the arrest occurred, and even though there was no threat that the information stored on the cell phone could be destroyed. The case is *People* v. *Diaz*[80] and we have posted a report on Point of View Online. Second, a search of cell phones and such things might be upheld under an exigent circumstances theory if (1) officers had probable cause to believe that telephone numbers, text messages, or other data stored in the device are evidence of a crime; and (2) officers reasonably believed that the data might be lost unless a search was conducted immediately; e.g., digitally-stored data might be automatically deleted as new calls are received.[81]

Searching vehicles

As discussed earlier, the Supreme Court in *Gant* ruled that officers may not search the passenger compartment of a vehicle incident to the arrest of an occupant unless there was a reasonable possibility that the arrestee had access to the passenger compartment when the search occurred.[82] In those rare cases in which these types of searches are permitted, it appears that officers may search the entire passenger compartment, including all containers (regardless of whether the container was open or closed);[83] and all storage areas, such as the glove box, console, and map holder.[84] Officers may not, however, search the trunk or damage the car in the course of the search.[85]

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[76] See *People* v. *Topp* (1974) 40 Cal.App.3d 372, 378 [ok to search "the jacket that defendant indicated he wished to take with him to jail."]: *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 331 [ok to search jacket "for weapons before giving it to him"].

[77] See *People* v. *Ingham* (1992) 5 Cal.App.4th 326, 331-33.

[78] See *U.S.* v. *Quintana* (M.D. Fla. 2009) 594 F.Supp.2d 1291, 1300 ["The search of the contents of Defendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest."]. BUT ALSO SEE *U.S.* v. *Finley* (5th Cir. 2007) 477 F.3d 250, 260 [officers were "therefore permitted to search Finley's cell phone pursuant to his arrest"]; *U.S.* v. *Thomas* (3d Cir. 1997) 114 F.3d 404, 404, fn.2 [search of pager in arrestee's possession "falls within an exception to the warrant requirement as a lawful search incident to arrest"]; *U.S.* v. *Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["[T]he general requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest. The search conducted by activating the pager's memory is therefore valid."].

[79] See *United States* v. *Edwards* (1974) 415 U.S. 800; *U.S.* v. *Murphy* (4th Cir. 2009) 552 F.3d 405, 412 [under *Edwards*, "once the cell phone was held for evidence, other officers and investigators were entitled to conduct a further review of its contents"].

[80] (2011) __ Cal.4th __ [2011 WL 6158].

[81] See *People* v. *Bullock* (1990) 226 Cal.App.3d 380, 388 ["danger existed that the incoming telephone numbers would be lost unless quickly retrieved by the officer"].

[82] (2009) __ U.S. __ [129 S.Ct. 1710, 1719]. ALSO SEE *U.S.* v. *Maddox* (9th Cir. 2010) __ F.3d __ [2010 WL 3169397] [search of vial in arrestee's car was unlawful because the arrestee had been "handcuffed in the backseat of the patrol car"]; *U.S.* v. *Gonzalez* (9th Cir. 2009) 578 F.3d 1130, 1132 [search unlawful "because Gonzalez was handcuffed and secured in a patrol vehicle at the time of the search"]; *U.S.* v. *Caseres* (9th Cir. 2008) 533 F.3d 1064, 1072 [Caseres was handcuffed and arrested a full block and a half away from his car"]; *U.S.* v. *Vinton* (D.C. Cir. 2010) 594 F.3d 14, 25 [search unlawful "because Vinton was handcuffed at the time"]; *U.S.* v. *McCane* (10th Cir. 2009) 573 F.3d 1037 [search unlawful because arrestee was handcuffed and restrained in a patrol car].

[83] See *New York* v. *Belton* (1981) 453 U.S. 454, 461.

[84] See *New York* v. *Belton* (1981) 453 U.S. 454, 460, fn.4.

[85] See *New York* v. *Belton* (1981) 453 U.S. 454, 460, fn.4.

Searching homes (*Chimel* searches)

The term "*Chimel* search" refers to a search of a place or thing inside a residence that was within the grabbing or lunging area of the arrestee. Prior to *Gant*, the courts ordinarily interpreted this to mean that officers could search places and things that were within this area at the time of the search. But, as we will now discus, that is likely to change.

POST-*GANT* LAW: For reasons discussed earlier, it is likely that the courts will rule that, pursuant to *Gant*, the search must be limited to places and things that were within the arrestee's grabbing distance when the search occurred. For example, officers would be permitted to search under a bed on which the arrestee was lying,[86] inside a duffel bag at the foot of a bed on which the arrestee was lying,[87] under a sofa cushion that was two feet away from the unhandcuffed arrestee when the search occurred.[88]

Although there is authority for permitting a search of a place or thing that was not within the arrestee's immediate control when there was good reason to move him away before starting the search,[89] this authority appears to have been undermined by *Gant*.[90]

PRE-*GANT* LAW CONSISTENT WITH *GANT*: While the following rules predate *Gant,* they are probably still good law:

ARRESTS OUTSIDE THE RESIDENCE: A *Chimel* search will not be permitted if the arrest occurred outside the premises.[91] As the United States Supreme Court observed, "If a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, not somewhere outside—whether two blocks away, twenty feet away, or on the sidewalk near the front steps."[92]

SEARCHING OTHER ROOMS: Even before *Gant* was decided, the courts would rule that officers may not routinely search beyond the room in which the arrest occurred.[93] There is, however, an exception to this rule that will probably not be affected by *Gant*: if the arrestee requests permission to go into another room to, for example, obtain clothing or identification, officers may, in the words of the Supreme Court, stay "literally at [his] elbow at all times."[94] Furthermore, if officers have permitted the arrestee to enter another room, they may search places and things in that room that are within his grabbing area. This is because, as the California Supreme Court pointed out, an

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[86] See *People* v. *King* (1971) 5 Cal.3d 458, 463; *People* v. *Spencer* (1972) 22 Cal.App.3d 786, 797.
[87] See *People* v. *Arvizu* (1970) 12 Cal.App.3d 726, 729.
[88] *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[89] See *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767 ["critical time for analysis is the time of the arrest and not the time of the search"].
[90] See *People* v. *Leal* (2009) 178 Cal.App.4th 1051, 1061-62 [search under clothing near place of arrest was unlawful because the arrestee had been handcuffed and removed from the premises].
[91] See *Shipley* v. *California* (1969) 395 U.S. 818, 819 [search of home not justified by arrest that occurred as the arrestee was exiting his car]; *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 742 ["The search of the house cannot be justified as incident to the arrest of Martinez, as he was arrested outside the house."].
[92] *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33-34.
[93] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs"]; *Dillon* v. *Superior Court* (1972) 7 Cal.3d 305, 314 [the "mere possibility of additional persons in the house" will not warrant a search of other rooms]; *People* v. *Jordan* (1976) 55 Cal.App.3d 965, 967 ["Routine searches cannot extend beyond the room in which the suspect is arrested, but the facts and circumstances of the case may nevertheless permit entry of other parts of the house."]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 7 [kitchen was not within arrestee's immediate control when he was arrested in the living room]; *People* v. *Block* (1971) 6 Cal.3d 239, 243 [cannot search upstairs when arrest occurred downstairs].
[94] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 6. ALSO SEE: *People* v. *Breault* (1990) 223 Cal.App.3d 125, 133 ["*Chrisman* does not require a showing of exigent circumstances."]; *Curry* v. *Superior Court* (1970) 7 Cal.App.3d 836, 849 [search permitted because arrestee was given permission to enter the room to obtain a dress]; *U.S.* v. *Nascimento* (1st Cir. 2007) 491 F.3d 25, 50 ["[I]t was not inappropriate for the police to escort Nascimento to his bedroom in order that he might get dressed."]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 651 ["It would have been folly for the police to let [the arrestee] enter the home and root about [for identification] unobserved."]. ALSO SEE: *U.S.* v. *Scroggins* (5th Cir. 2010) 599 F.3d 433, 442 ["it would be strange indeed to hold that the Constitution *requires* police to deny a citizen's reasonable request to enter her residence and put on less revealing clothing before being taken into custody"].

arrestee's request to move to another room might be "a ruse to permit him to get within reach of a weapon or destructible evidence."[95] But such a search would not be permitted if officers compelled the arrestee to enter the room without good cause.[96]

Vicinity sweeps of homes

A vicinity sweep is a type of search incident to arrest that is limited to a cursory inspection of spaces "immediately adjoining the place of arrest from which an attack could be immediately launched."[97] It is apparent that vicinity sweeps will not be affected by *Gant* because the threat presented by hidden friends or associates in the vicinity will exist regardless of whether the arrestee had been handcuffed or removed from the immediate area.[98] To put it another way, an officer's act of moving the arrestee from the arrest site will not reduce the threat caused by any lurking companions

Vicinity sweeps are similar to *Chimel* searches in that both may be conducted as a matter of routine, meaning that officers will not be required to prove there was reason to believe that any dangerous people were nearby.[99] There are, however, two important differences. First, the sole objective of a vicinity sweep is to locate people, not weapons or evidence. Consequently, officers may search only those places and things in which "unseen third parties" might be hidden;[100] e.g., officers are not permitted to open drawers or look under rugs.

Second, there is a difference in scope between grabbing area and spaces "immediately adjoining the place of arrest." Although both cover a fairly small amount of territory, the area "immediately adjoining" the place of arrest will usually extend well beyond the arrestee's grabbing distance. This is because an arrestee can only grab so far; while a friend, relative, or accomplice might be able to launch a sneak attack from any hidden space in the immediate vicinity.[101] (In reality, an accomplice could launch an attack from virtually anywhere on the premises. But, like many types of warrantless searches, vicinity sweeps represent an imperfect compromise between the safety interests of officers and the privacy interests of others.)

For example, in *U.S.* v. *Curtis*[102] officers in Washington, D.C. lawfully arrested Curtis and Melvin in the living room of their two-bedroom apartment. While two officers guarded the arrestees, two other officers looked inside a living room closet, the adjoining kitchen, and two bedrooms located "down the hall." In the course of the sweep, they found drugs in the bedrooms. While the court had no problem with the officers looking into the closet and the kitchen, it ruled that the search of the bedrooms was unlawful because "[t]here was no justification for a sweep of such remote areas." POV

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[95] *Mestas* v. *Superior Court* (1972) 7 Cal.3d 537, 541, fn.2.

[96] See *Shipley* v. *California* (1969) 395 U.S. 818, 820 [the area that can be searched cannot be expanded "without reasonable justification."]; *People* v. *Mendoza* (1986) 176 Cal.App.3d 1127, 1132 ["Mendoza was taken from the bathroom into the presence of the shoulder bag. If the *Chimel* rule could be so easily satisfied, the officers would only have to force the defendant to accompany them while they proceeded to examine the entire contents of the premises."]; *Eiseman* v. *Superior Court* (1971) 21 Cal.App.3d 342, 350 ["The police should not be allowed to extend the scope of [the search] by having a person under arrest move around the room at their request."].

[97] *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.

[98] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 336 ["the justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house"].

[99] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334 [as "an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion [conduct a vicinity sweep]"]; *US* v. *Ford* (D.C. Cir. 1995) 56 F.3d 265, 269 ["[The vicinity sweep] requires no probable cause or reasonable suspicion"]; *U.S.* v. *Archibald* (6th Cir. 2009) 589 F.3d 289 [sweep inside residence not permitted when arrest occurred at the threshold].

[100] *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 262 ["[A] 'protective sweep' seems clearly to refer to a search that focuses not on the threat posed by the arrestee, but the safety threat posed by the house, or more properly by unseen third parties in the house."]; *U.S.* v. *Ford* (D.C. Cir. 1995) 56 F.3d 265 [under a mattress and behind a window shade were not places in which a person might be hiding].

[101] See *U.S.* v. *Lemus* (9th Cir. 2009) 582 F.3d 958, 963 [search of living room was lawful because the suspect "was only partially outside the living room when he was arrested"]; *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767 ["The defendant was arrested while standing next to a chair in the bedroom. The drugs were found on that chair, and the gun was found beside it."].

[102] (D.C. Cir. 2002) 239 F.Supp.2d 1.

Protective Sweeps

Protective sweeps are a necessary fact of life in the violent society in which our law enforcement officers must perform the duties of their office.[1]

While homes are places in which people ordinarily feel safe, they can be dangerous places for officers who have entered to make an arrest. "[A]n in-home arrest," said the Supreme Court, "puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings."[2] For this reason, the Court ruled that officers who have entered a residence may, under certain circumstances, conduct a type of search commonly known as a "protective sweep" or "walk through."

It should be noted that protective sweeps are only one of five types of protective searches that officers may be permitted to conduct in the course of detaining or arresting suspects. The other four are:

- **Pat searches**: Outside-the-clothing searches to locate weapons in the possession of a suspect who is believed to be armed or dangerous.
- **Protective vehicle searches**: Searches of a detainee's vehicle when officers have reason to believe there is a weapon inside.
- ***Chimel* searches**: Searches of a residence incident to the arrest of an occupant. (This subject is covered in the article on searches incident to arrest beginning on page one.)
- **Vicinity sweeps**: A search of areas in a home that are "immediately adjoining" the place in which an arrest occurred. (This subject is also covered in the article on searches incident to arrest.)

There is one other type of sweep that should be noted. Officers who have lawfully entered a home to arrest an occupant may, if necessary, search the premises for the arrestee.[3] While these searches are not "protective" in nature (because their objective is apprehension, not protection), they constitute "sweeps" because they are limited to a cursory inspection of places in which the arrestee might be hiding. Consequently, they must be conducted in accordance with the scope and intensity rules applicable to protective sweeps.

One other thing: The United States Supreme Court's decision in *Arizona* v. *Gant*, which we discussed in the previous article, will not result in additional limitations on protective sweeps. That is because the restrictions on protective searches imposed by *Gant* were intended to limit them to situations in which there existed a demonstrable threat. But, as we will discuss in this article, protective sweeps are already subject to this restriction.[4]

Requirements

The following are the requirements for conducting a protective sweep of a residence, business, or other structure:

(1) **Lawful entry**: Officers must have had a legal right to enter; e.g., arrest warrant, consent, hot or fresh pursuit.

(2) **Person on premises**: Officers must have had reason to believe there was a person on the premises (other than the arrestee) who was hiding or had otherwise not made himself known.

(3) **Danger**: Officers must have had reason to believe that that person posed a threat to them.

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[1] *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017.

[2] *Maryland* v. *Buie* (1990) 494 U.S. 325, 333. ALSO SEE *State* v. *Murdock* (Wisc. 1990) 455 N.W.2d 618, 624 ["[T]he danger to police may be heightened when the arrest is made in the arrestee's home because the police officer will rarely be familiar with the home he or she is entering. The arrestee, however, knows where items such as weapons and evidence are secreted."].

[3] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 330 ["[U]ntil the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found"]; *U.S.* v. *Harper* (9th Cir. 1991) 928 F.2d 894, 897 ["Once the police possessed an arrest warrant and probable cause to believe David was in his home, the officers were entitled to search anywhere in the house in which he might be found."].

[4] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 336 ["[T]he justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house."

Proof requirements

Because suppression motions pertaining to sweeps are often lost because officers or prosecutors failed to satisfy the various proof requirements, we will begin by discussing this subject.

LEVEL OF PROOF: The United States Supreme Court has ruled that officers who have lawfully entered a residence to make an arrest must have reasonable suspicion to believe that a dangerous person is on the premises.[5] "In order to justify the protective sweep," said the Sixth Circuit, "the government bore the burden of providing sufficient facts to support a reasonable belief that a third party was present who posed a danger to those on the arrest scene."[6]

SPECIFIC FACTS: While reasonable suspicion is a lower level of proof than probable cause, it can exist only if officers were able to articulate one or more circumstances that reasonably indicated there was, in fact, someone on the premises who posed a threat.[7] Thus, in *U.S.* v. *Moran Vargas* the Second Circuit ruled that a sweep of a bathroom was unlawful because "the DEA agents' testimony did not provide sufficient articulable facts that would warrant a reasonably prudent officer to believe that an individual posing a danger to the agents was hiding [there]."[8] Similarly, a sweep will not be upheld merely because a threat was theoretically possible,[9] although it may be based on an officer's reasonable inferences from the surrounding circumstances.[10]

SWEEP BASED ON NO INFORMATION: A sweep cannot be justified on grounds that officers did not know whether a threat existed and, therefore, could not rule out the possibility.[11] As the California Supreme Court pointed out, while "[t]here is always the possibility that some additional person may be found," such a "mere possibility" is "not enough."[12] For example, in *U.S.* v. *Ford* the court ruled that a sweep was unlawful because its only justification was the following testimony from an officer: "I did not know if there was anybody back there. I wanted to make sure there was no one there to harm us."[13]

"ROUTINE" SWEEPS: Because articulable facts are required, a sweep will not be upheld on grounds that it was conducted as a matter of routine or departmental policy. For example, in *U.S.* v. *Hauk* the following occurred during cross-examination of a police detective in Kansas City, Kansas:

> DEFENSE ATTORNEY: So I take it then it is just a matter of routine when you are executing arrest warrants at a particular residence, that a protective sweep then is done, because in your experience there is at least some likelihood that some other person might be present, correct?
>
> DETECTIVE: Absolutely.

The court responded by pointing out that "[t]he Fourth Amendment does not sanction automatic searches of an arrestee's home, nor does the fact-intensive question of reasonable suspicion accommodate a policy of automatic protective sweeps."[14]

In another case in which an officer testified that sweeps are "standard procedure," the Ninth Circuit reminded readers that "the fourth amendment was adopted for the very purpose of protecting us from 'routine' intrusions by governmental agents into the privacy of our homes." The court added, "It is dismaying that any trained police officer in the United States would believe otherwise."[15]

Lawful entry

Having covered the proof requirements imposed on officers and prosecutors, we will now examine the prerequisites for conducting protective sweeps, the first of which is that the officers must have had a legal right to enter the premises. Although this requirement is typically satisfied when the entry was based on a valid search or arrest warrant, as mentioned

[5] *Maryland* v. *Buie* (1990) 494 U.S. 325, 327, 334. ALSO SEE *People* v. *Celis* (2004) 33 Cal.4th 667, 678.
[6] *U.S.* v. *Archibald* (6th Cir. 2009) 589 F.3d 289, 299. Edited.
[7] See *People* v. *Celis* (2004) 33 Cal.4th 667, 678 ["mere inchoate and unparticularized suspicion or hunch" is insufficient].
[8] (2nd Cir. 2004) 376 F.3d 112, 116.
[9] See *People* v. *Ledesma* (2003) 106 Cal.Ap.4th 857, 866 ["mere abstract theoretical possibility" of danger is insufficient].
[10] See *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 863; *U.S.* v. *Hauk* (10th Cir. 2005) 412 F.3d 1179, 1187-88.
[11] See *U.S.* v. *Archibald* (6th Cir. 2009) 589 F.3d 289, 300]; *U.S.* v. *Moran Vargas* (2nd Cir. 2004) 376 F.3d 112, 117"].
[12] *Dillon* v. *Superior Court* (1972) 7 Cal.3d 305, 314. Edited.
[13] (D.C. Cir. 1995) 56 F.3d 265, 270, fn.7.
[14] (10th Cir. 2005) 412 F.3d 1179, 1186.
[15] *U.S.* v. *Castillo* (9th Cir. 1988) 866 F.2d 1071, 1079.

earlier it may also be based on an exception to the warrant requirement, such as hot pursuit.[6]

CONSENSUAL ENTRIES: Officers may conduct a sweep if the threat materialized after they had made a consensual entry. But problems may arise if they knew of the threat before they entered, and if they intended to conduct a sweep if consent was granted. In such a situation a court might rule that the consent was not "knowing and intelligent" if the officers did not inform the consenting person that his consent to enter would automatically result in a sweep.[17]

THREAT DEVELOPS WHILE OFFICERS WERE OUTSIDE: While most protective sweeps occur when the threat developed after officers had entered, sweeps are also permitted if the officers were outside the premises and suddenly became aware that a person in the residence constituted an immediate threat to them.[18] In such cases, however, the entry will be deemed lawful only if officers had *probable cause* to believe that such a threat existed.[19]

Person on premises

The second requirement is that officers must have had reasonable suspicion to believe there was someone on the premises who had not made himself known.[20] In some cases, this requirement may be established through direct evidence, as when officers see someone inside;[21] or when they hear a voice;[22] or when an accomplice, neighbor, or other person says there is someone inside.[23]

This requirement may also be met by means of reasonable inference, which is typically based on one or more of the following circumstances:

WARNING TO OTHERS: A person who was contacted or detained suddenly shouted a warning apparently to unseen occupants of the premises.[24]

SOUNDS: Officers heard a sound that could have been made by a person; e.g., "scuffling noises from inside,"[25] "footsteps."[26]

MOVEMENT: Officers saw something move (e.g., a curtain or door) if the cause was not reasonably attributable to other factors, such as wind.[27]

CAR PARKED IN DRIVEWAY: Officers saw a car in the driveway, and they knew it belonged to someone who was unaccounted for; e.g., "[t]hree vehicles, not one, were parked in the driveway";[28] a "red Camaro pulled into [the suspect's] driveway. The driver disappeared, perhaps into the house."[29]

CAR PARKED NEARBY: A car parked nearby may also help create suspicion; e.g., officer saw "two cars parked sufficiently close to the residence to create a reasonable possibility that former occupants of the vehicles might be inside."[30]

MULTIPLE OCCUPANTS: Officers had reason to believe that two or more people were in or about the premises when they arrived; and although some of these people had been contacted or detained, others were unaccounted for.[31] In determining whether these circumstances justified a sweep, the courts have noted the following:

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[16] See *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 864 [probation search]; *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 262.
[17] See *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 262; *U.S.* v. *Gould* (5th Cir. 2004) 364 F.3d 578, 589.
[18] See *People* v. *Maier* (1991) 226 CA3 1670, 1675; *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 766.
[19] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334, fn.1; *People* v. *Celis* (2004) 33 C.4th 667, 680.
[20] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 327.
[21] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 659; *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 312.
[22] See *People* v. *Mack* (1980) 27 Cal.3d 145, 149 ["multiple voices"]; *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514.
[23] See *Guevara* v. *Superior Court* (1970) 7 Cal.App.3d 531, 535; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 5.
[24] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648 ["It's the fucking pigs"]; *U.S.* v. *Junkman* (8th Cir. 1998) 160 F.3d 1191 ["Cops!"].
[25] *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514. ALSO SEE *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 9.
[26] *U.S.* v. *Lopez* (1st Cir. 1993) 989 F.2d 24, 26, fn.1.
[27] *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1013. ALSO SEE *People* v. *Schmel* (1975) 54 Cal.App.3d 46, 49.
[28] *U.S.* v. *Whitten* (9th Cir. 1983) 706 F2 1000, 1014. ALSO SEE *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396; *U.S.* v. *Tapia* (7C 2010) 610 F.3d 505, 511 [car belonging to possible gang associate parked outside].
[29] *U.S.* v. *Hauk* (10th Cir. 2005) 412 F.3d 1179, 1191.
[30] *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 866.
[31] See *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 743 [officers discovered unexpected occupant]; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396 ["there were at least five men including Hoyos who were not in custody"]; *U.S.* v. *James* (7th Cir. 1994) 40 F.3d 850, 863 [the officer "did not know if all of the suspects in the duplex had been subdued"]; *U.S.* v. *Mendoza-Burciaga* (5th Cir. 1992) 981 F.2d 192, 197 ["the officers did not know whether other suspects were in the house"].

- "[N]umerous cars and individuals entered and exited, which meant that at any given time the officers might have lacked an accurate count of suspects present."[32]
- Officers saw an "undetermined number of participants" in a pot partly in a residence.[33]
- Officers "did not know whether the five men who had come out of the garage included all five of the accused burglars."[34]
- Officers saw " additional occupants in the darkened living room" and "a person other than [the suspect] exiting and reentering the apartment."[35]
- Because five suspects entered and four exited, the officers had "very good reason" to believe that "at least one" suspect was hiding in the warehouse.[36]

MULTIPLE PERPETRATORS: The arrestee was wanted for a crime committed by two or more people, some of whom had not yet been apprehended. As the Third Circuit observed in *Sharrar* v. *Felsing*, "The reasonable possibility that an associate of the arrestees remains at large" is a "salient" concern "for which a warrantless protective sweep is justified."[37] For example, the following circumstances were deemed relevant:

- The officers "had yet to encounter Paopao's suspected confederate."[38]
- "Prior to the entry, the officers reasonably believed that at least six men were involved in distribution of cocaine."[39]
- The officers knew that the occupants "served as enforcers for the drug trafficking operation."[40]
- "[T]he officers knew that the day prior [to his arrest], Richards had been seen with Moore, a suspect in the murder investigation. When Richards met them at the door, the officers did not know whether Moore was inside."[41]
- The suspect "habitually pursued his criminal activities with accomplices."[42]

SITE OF CRIMINAL ACTIVITY: It is relevant that the house was the center of operations for a criminal conspiracy or other ongoing criminal enterprise (such as buying or selling stolen property, organized crime, terrorism) and that officers conducting surveillance had previously seen people entering and exiting; e.g., "the residence was the site of ongoing narcotics activity,"[43] "the house was sometimes used as a place for gang members to gather and conduct illegal activities,"[44] "over the years, [the officer] had routinely observed individuals coming and going from the house,"[45] other people were commonly present when the arrestees sold drugs to undercover officers in their homes.[46]

EVASIVE ARRESTEE: Finally, it is highly suspicious that officers had contacted or detained a person who, when asked if anyone else was on the premises, did not respond or was evasive.[47] Although officers must take into account the arrestee's assertion that no one else was on the premises, they are not required to believe him.[48]

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[32] *U.S.* v. *Mata* (5th Cir. 2008) 517 F.3d 279, 289.
[33] *People* v. *Block* (1971) 6 Cal.3d 239, 245.
[34] *People* v. *Mack* (1980) 27 Cal.3d 145, 151.
[35] *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 312.
[36] *U.S.* v. *Delgado* (11th Cir. 1990) 903 F.2d 1495, 1502.
[37] (3d Cir. 1997) 128 F.3d 810, 824.
[38] *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 767.
[39] *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396.
[40] *U.S.* v. *Cisneros-Gutierrez* (8th Cir. 2010) 598 F.3d 997, 1007.
[41] *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291.
[42] *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675.
[43] *People* v. *Ledesma* (2003) 106 Cal.App.3d 857, 865.
[44] *U.S.* v. *Tapia* (7th Cir. 2010) 610 F.3d 505, 511.
[45] *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42.
[46] *U.S.* v. *Barker* (7th Cir. 1994) 27 F.3d 1287, 1291.
[47] See *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["Richards twice failed to answer [the officer's] question about whether anyone else was in the house"].
[48] See *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 264 ["Of course, the police officers were not required to take Gandia at his word when he told them that he lived alone"]; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 ["The police had no way of knowing whether she was telling the truth"].

A threat

In addition to having reasonable suspicion that an unaccounted for person was on the premises, officers must have had reason to believe that that person posed a threat to them. In the words of the Supreme Court, officers must be aware of "articulable facts" which "would warrant a reasonably prudent officer" in believing that the person posed "a danger to those on the arrest scene."[49]

The existence of such a threat may be based on direct or circumstantial evidence. A common example of direct evidence is a tip from a reliable informant who had reason to believe the occupants were armed or that they would resist arrest.[50]

As for circumstantial evidence, it appears to be sufficient that (1) the officers had identified themselves in such a manner that anyone on the premises would have known who they were, and (2) they reasonably believed that one or more of the people on the premises were involved in crimes involving weapons or violence.[51] Other circumstances that are often noted include the following:

- FIREARM ON PREMISES: Officers saw a firearm or ammunition inside the house.[52]
- EVASIVE ANSWER ABOUT WEAPONS: An occupant gave an evasive answer when asked if there were any weapons on the premises.[53]
- DANGEROUS ASSOCIATES: The arrestee associated with people who were known to be armed or dangerous; e.g., drug dealers, gang members.[54]
- REFUSAL TO ADMIT: The occupants refused to admit the officers.[55]

Sweep Procedure

Because the only lawful objective of a sweep is to locate and secure "unseen third parties who may be lurking on the premises,"[56] officers must limit their search to a "quick" and "cursory" inspection of places in which a person might be hiding.[57] Said the Fifth Circuit, "The protective sweep must cover no more than those spaces where police reasonably suspect a person posing danger could be found, and must last no longer than the police are otherwise constitutionally justified in remaining on the premises."[58]

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[49] *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.

[50] See *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 312; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284.

[51] See *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675 ["Mr. Maier habitually pursued his criminal activities with accomplices in a most dangerous manner."]; *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 865-67 [officer reasonably believed that "drug users and those who associate with them are apt to have weapons in the house"]; *People* v. *Mack* (1980) 27 Cal.3d 145, 151 ["robbery in which shots had been fired"]; *U.S.* v. *Taylor* (6th Cir. 2001) 248 F.3d 506, 514 [drugs and murder]; *U.S.* v. *Castillo* (9th Cir. 1988) 866 F.2d 1071, 1081 [drug conspiracy]; *U.S.* v. *Hoyos* (9th Cir. 1989) 892 F.2d 1387, 1396 [drug sales; "any person hidden within could have heard Deputy Love's shouted commands"]; *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017 ["Mr. Burrows and Mr. Lin were suspected of committing a violent crime involving a firearm"]; *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42 [drug sales]; *U.S.* v. *Gould* (5th Cir. 2004) 364 F.3d 578, 591 [plot to kill judges]; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1284 ["the fact that the door was open could cause the officer to believe that anyone inside would be aware that Henry had been taken into custody"].

[52] See *People* v. *Dyke* (1990) 224 Cal.App.3d 648, 654 [officers saw "a large caliber handgun within arm's reach of Dyke that appeared to be loaded"]; *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42 [spent shotgun shells outside]; *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 309 [officer "could see a pistol magazine and several loose rounds of ammunition in plain view"]; *U.S.* v. *Richards* (7th Cir. 1991) 937 F.2d 1287, 1291 ["Richards opened the door with a gun"]; *U.S.* v. *Miller* (2nd Cir. 2005) 430 F.3d 93, 102 [officer "caught sight of a firearm in plain view"]; *U.S.* v. *Atchley* (6th Cir. 2007) 474 F.3d 840, 850 [officers saw a handgun lying on the bed].

[53] See *U.S.* v. *Lawlor* (1st Cir. 2005) 406 F.3d 37, 42 [occupant "shrugged his shoulders" when asked about the location of a weapon].

[54] See *People* v. *Maier* (1991) 226 Cal.App.3d 1670, 1675 ["the police knew that Mr. Maier habitually pursued his criminal activities with accomplices in a most dangerous manner"]; *People* v. *Ledesma* (2003) 106 Cal.App.4th 857, 865 ["the residence was the site of ongoing narcotics activity. Firearms are, of course, one of the tools of the trade of the narcotics business."]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 9 ["The value of the contraband reasonably believed present by [the arresting officer] was surely not so de minimis as to make remote the possibility of violent and desperate efforts to resist the arrests and defend the contraband."]; *People* v. *Mack* (1980) 27 Cal.3d 145, 151 [officers knew that one of the occupants "had been arrested for an armed robbery in which shots had been fired," and that weapons taken in a recent burglary might be inside]; *U.S.* v. *Castillo* (9th Cir. 1989) 866 F.2d 1071, 1081 ["one of De La Renta's co-conspirators had hired an assassin to kill a DEA Agent"].

[55] See *U.S.* v. *Burrows* (7th Cir. 1995) 48 F.3d 1011, 1017 ["[A]lthough the officers repeatedly announced their presence, those in the apartment had refused them entry, yet could be heard moving about inside."].

[56] *U.S.* v. *Nascimento* (1st Cir. 2007) 491 F.3d 25, 49.

[57] *Maryland* v. *Buie* (1990) 494 US 325, 327.

[58] *U.S.* v. *Scroggins* (5th Cir. 2010) 599 F.3d 433, 441.

For example, while officers may look inside closets, behind large furniture, under beds, and under piles of clothing, they may not look under rugs, inside desk drawers or in small cabinets.[59] Thus, in *U.S.* v. *Ford* [60] the court ruled that a sweep conducted by an FBI agent was excessive because he had lifted a mattress (finding cocaine) and had looked behind a window shade (finding a gun). In contrast, the court in *U.S.* v. *Arch* ruled the sweep was sufficiently limited because "[t]he evidence indicates that the officers did not dawdle in each room looking for clues, but proceeded quickly through the motel room and adjoining bathroom, leaving once they had determined that no one was present."[61]

PLAIN VIEW SEIZURES: If officers see evidence in plain view while conducting the sweep, they may seize it if they have probable cause to believe it is, in fact, evidence of a crime.[62] They may also temporarily seize any weapons in plain view.[63]

MULTIPLE SWEEPS: Officers may sometimes need to make more than one pass through the premises. For example, they might initially look only in obvious places, such as closets, under beds, and behind doors. If no one is found, they might conduct a second pass, looking in less obvious places; e.g., behind furniture, behind curtains, in crawl spaces.

The courts have permitted multiple sweeps, but only when officers were able to explain why more than one pass was necessary. For example, in *U.S.* v. *Paradis* officers discovered a gun after they had arrested the suspect and after they had thoroughly swept the premises twice. In ruling that the third pass was unnecessary, the court said:

> There was no reason to think that there was another person besides Paradis in the small apartment. At the time the gun was found, the police had already been through the entire apartment. They had been through the living room at least twice (and one or two officers remained there doing paperwork). And they had been through the only bedroom of the unit twice, finding Paradis on the second hunt. Furthermore, by their own testimony the police established that the only logical place someone could hide in the bedroom was under the bed, where they had found Paradis.[64]

On the other hand, the court in *United States* v. *Boyd* upheld a second sweep based largely on testimony from a U.S. Marshal who said that he thought that a second sweep was necessary because, during the first one, his "primary attention was divided between keeping an eye on the two individuals downstairs on the floor and covering [another marshal]."[65]

NO "LEAST INTRUSIVE MEANS" REQUIREMENT: A protective sweep will not be invalidated on grounds that officers might have been able to eliminate the threat by some less intrusive means, such as quickly leaving the premises after making the arrest, or guarding the door to a room in which a person was reasonably believed to be hiding.[66] Nor will a sweep be deemed unlawful on grounds that officers could have avoided the necessity of a search by waiting to make the arrest outside the premises.[67]

TERMINATING THE SWEEP: Officers must terminate the sweep after checking all the places in which a person might reasonably be found.[68] POV

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[59] See *People* v. *Maier* (1991) 226 Cal.App.3d 1670 [under pile of clothing]; *U.S.* v. *Nascimento* (1st Cir. 2007) 491 F.3d 25, 51 [inside a closet]; *U.S.* v. *Lauter* (2nd Cir. 1995) 57 F.3d 212, 217 [the "space between the bed and the wall"]; *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 767 [behind sofa]; *U.S.* v. *Pruneda* (8th Cir. 2008) 518 F.3d 597, 603 ["the officer did not move any objects"].

[60] (D.C. Cir. 1995) 56 F.3d 265, 270.

[61] (7th Cir. 1995) 7 F.3d 1300, 1304.

[62] See *Arizona* v. *Hicks* (1987) 480 U.S. 321, 326; *Warden* v. *Hayden* (1967) 387 U.S. 294, 299.

[63] See *U.S.* v. *Roberts* (5th Cir. 2010) 612 F.3d 306, 314.

[64] (1st Cir. 2003) 351 F.3d 32. Edited. ALSO SEE *U.S.* v. *Oguns* (2nd Cir. 1990) 921 F.2d 442, 447 ["The agents no longer had authority to remain in Oguns' apartment after they determined that no one else was there."].

[65] (8th Cir. 1999) 180 F.3d 967, 975. ALSO SEE *U.S.* v. *Paopao* (9th Cir. 2006) 469 F.3d 760, 767 [second sweep permitted when, after the first sweep, the officer "was not secure in the notion that no one was left in the apartment"].

[66] See *U.S.* v. *Tapia* (7th Cir. 2010) 610 F.3d 505, 511; *U.S.* v. *Henry* (D.C. Cir. 1995) 48 F.3d 1282, 1285 [officers are not required to flee the premises once the arrest is made].

[67] See *U.S.* v. *Gould* (5th Cir. 2004) 364 F.3d 578, 590.

[68] See *U.S.* v. *Oguns* (2nd Cir. 1990) 921 F.2d 442, 447 ["The agents no longer had authority to remain in Oguns' apartment after they determined that no one else was there."]; *Sharrar* v. *Felsing* (3d Cir. 1997) 128 F.3d 810, 825 ["Once all four men were out of the house and in custody, the arresting officers had no basis to conclude that others remained inside."].

Recent Cases

People v. Camino

(2010) 188 Cal.App.4th 1359

Issue

While questioning a murder suspect, did officers attempt to undermine *Miranda* by utilizing the prohibited "two step" procedure?

Facts

At about 3 A.M., Camino and two other gang members, Martinez and Palacios, were hanging out in the parking lot of a 7-Eleven store in Santa Ana, They were drinking and looking to fight some members of a rival gang known as BST. Palacios was armed with a .40 caliber handgun. When they saw three BST gangbangers emerge from an alley, Camino and Martinez walked up to them and, as Martinez threw his hands up "in a 'what's up' kind of deal," Palacios fired two shots at them, but missed.

The BST members retreated into the alley, so Camino, Palacios, and Martinez jumped into their car and started looking around for them. But because they had turned off their headlights, they couldn't see anything. So Palacios stepped outside the car and started firing shots at random. The BST members returned fire, at which point Camino and Martinez sped off, leaving Palacios in the alley.

A few minutes later, having circled the block a few times looking for Palacios, Camino and Martinez found him lying in a driveway—he had been shot and was bleeding to death. As they got out of their car, they heard approaching sirens, so they got back inside and were about to take off when they saw a police car turn the corner.

The officer in the car testified that, as he turned the corner, he noticed a vehicle parked in the middle of the street with its lights off, so he initiated a "high risk" car stop. Although the record is unclear as to exactly what happened next, Camino and Martinez were arrested and driven to the police station for questioning.[1]

When homicide investigators began their interview with Camino, they were not sure whether he was the shooter, a victim, or a witness. In fact, they only knew the following: (1) he had been arrested as he was about to leave the crime scene, (2) he appeared to have been with Palacio when he was shot, (3) the shooting appeared to have been gang related, and (4) Camino "had prior gang involvement."

Because of this uncertainty, the investigators did not seek a *Miranda* waiver at the outset. Instead, they began by asking some general questions about local gangs, Camino's tattoos, and so forth. Later, after Camino denied that he even knew Palacio, one of the investigators told him that that was "weird" because Martinez was telling them that Palacio "was with you guys all night." The investigator added that "we talked to enough people [so] we pretty much know what happened." Camino then gave a "complete account" of what he, Palacio, and Martinez had done before, during, and after the shooting. At that point, there was a 30-minute break.

When the interview resumed, the investigators began by obtaining a *Miranda* waiver, after which they essentially asked Camino the same questions they had asked earlier; and Camino essentially "repeated the same information" he had given earlier. They did, however, ask one question that, as it turned out, was highly incriminating because it demonstrated Camino's awareness that his actions constituted a "provocative act" for which he would be charged with murder:

> INVESTIGATOR: If two gangs come together to fight and you're walking over there saying let's fight and one of your homeboys has a gun, would you expect that gun to get used?
>
> CAMINO: Oh, yeah.

At trial, the statement Camino gave during the first part of the interview was suppressed because the investigators had not obtained a waiver. But the statement he gave during the second part was admitted. Camino was convicted of second-degree murder.

[1] **NOTE**: While the record did not indicate that Camino and Martinez were told they were under arrest, they were effectively arrested because they were transported from the scene without their consent. See *Kaupp* v. *Texas* (2003) 538 U.S. 626, 630.

Discussion

Camino argued that his second statement should have been suppressed because, although he had waived his rights beforehand, the waiver was obtained by means of the prohibited "two step" procedure. The court disagreed, but it acknowledged that this was a "close case."

Before going further, it is necessary to review some law. In *Oregon* v. *Elstad*,[2] the United States Supreme Court ruled that if officers violated *Miranda* in obtaining a statement from a suspect, but later obtained a second statement in full compliance with *Miranda*, the second statement may be admissible if the *Miranda* violation was "technical" in nature.

The Court made two other significant rulings: First, a *Miranda* violation that resulted from an officer's failure to obtain a waiver (which was what happened in *Camino*) will be deemed a technical violation if the interview was not coercive. Second, the suspect's post-waiver statement may be admissible even though he had admitted the crime or otherwise "let the cat out of the bag" when he made the pre-waiver statement.

Camino did not argue that the investigators had utilized coercion at any point, so his statement would be admissible under *Elstad*. Instead, he contended the statement should have been suppressed because the investigators' decision not to seek a waiver at the start of the interview was a tactical ploy known as the "two step"—a ploy that has been outlawed by the United States Supreme Court.

The two step is a tactic in which officers decide not to seek a *Miranda* waiver before questioning a suspect who is in custody. Instead, they seek one only if he makes an incriminating statement. And then, if he waives, they will try to get him to re-incriminate himself. The two-step (also known as a "midstream" waiver) works on the theory that a suspect who is *Mirandized* after he has made an damaging admission will usually waive his rights and repeat his admission because he will think (erroneously) that it can be used against him and, therefore, he has nothing to lose by doing so.

Although the officers who questioned Camino had divided their interview into two parts, prosecutors argued it was not a tactical decision. Rather, it resulted from their uncertainty as to whether Camino was a victim, witness, or suspect. It is, of course, often difficult for the courts to determine whether a delay in seeking a waiver was an attempt to undermine *Miranda,* or whether it was inadvertent or otherwise not blameworthy. So they attempt to determine the officers' intent by asking the following questions (to which an affirmative response indicates a ploy):

(1) **Detailed statement**: Did the officers obtain a detailed and highly incriminating statement from the suspect before seeking a waiver?

(2) **Interrogation tactics**: During the pre-waiver part of the interview, did the officers utilize interrogation tactics that were designed to produce an admission; e.g., "good cop/bad cop"?

(3) **Utilized admission during post-waiver part**: During the post-waiver part of the interview, did the officers refer to the suspect's earlier admission or otherwise remind him that he had already "let the cat out of the bag."

(4) **Time lapse**: Was there only a short time lapse between the pre- and post-waiver parts?

(5) **Same officers**: Were the two parts conducted by the same officers?

(6) **No advisement that the first statement was inadmissible**: Before starting the post-waiver part, did the officers neglect to inform the suspect that anything he said during the pre-waiver part could not be used against him?

While the second and third circumstances did not seem to apply, the others were troubling to the court, especially the "completeness of the first interview which left little, if anything, of incriminating potential left unsaid." The court was also concerned that the officers did not seek a waiver when it became apparent that Camino was, in fact, a suspect.

Nevertheless, it decided to give the investigators the "benefit of the doubt," mainly because Camino's role in the incident was murky at the start. As the court pointed out, they "did not know under what circumstances defendant had been with Palacios at the time of his murder (or even, definitively, whether defendant had been with Palacios at all)." Thus, the court affirmed Camino's conviction.

[2] (1985) 470 U.S. 298, 318. **NOTE**: On December 1, 2010 the Second Circuit issued an opinion in *U.S.* v. *Capers* in which it provided a comprehensive analysis of the "two step" issue.

In re D.C.

(2010) 188 Cal.App.4th 978

Issues

(1) Did the mother of a minor have the authority to consent to a search of her son's bedroom? (2) If so, was the search rendered unlawful when the minor objected to it?

Facts

While investigating a report of drug activity outside an apartment building, Oakland Housing Authority police officers detained a resident who they learned was on probation with a search condition. They were escorting him to his apartment to conduct a probation search when they encountered his mother who, when informed of the circumstances, consented to a search of the premises. When the officers arrived at the apartment, however, the man's younger brother, a minor identified herein as D.C., "barred their way" and told them, "You're not going to enter the apartment." But when D.C.'s mother told him to "get out of the way," he complied and the officers entered.

There were three bedrooms in the apartment, one of which was used exclusively by D.C. While searching D.C.'s bedroom, the officers found property that had been stolen in a recent burglary in the complex. As a result, D.C. was charged in juvenile court with possessing stolen property. After the court denied his petition to suppress the evidence, it found the allegation to be true and adjudged him a ward of the court. D.C. appealed.

Discussion

D.C. argued that the search was unlawful for two reasons: (1) there was insufficient proof that his mother had a right to consent to the search of his bedroom; and (2) even if she had such a right, his objection to the search overrode it. The court disagreed with both contentions.

WHO CAN CONSENT? A suspect's spouse, roommate, or parent may consent to a search of a place or thing owned or controlled by the suspect if it reasonably appeared that the consenting person had a right to joint access or control; i.e., "common authority."[3] Consequently, the parents of a suspect who lives in the family home—whether the suspect is a minor or an adult[4]—may ordinarily consent to a search of the suspect's bedroom because parents will ordinarily have a right to access and control the entire family home.

Nevertheless, D.C. argued that it is unreasonable for officers to assume that the parent possesses common authority and, therefore, they should be required to ask questions and confirm it. Although an inquiry might be required if the suspect was an adult and there were indications that he and his parents had a landlord-tenant relationship (e.g., the suspect paid rent), the court ruled that an inquiry is unnecessary when the suspect was a minor because "the parents of minor children have legal rights and obligations that both permit and, in essence, require them to exercise common authority over their child's bedroom." Thus, the court ruled that, "[g]iven the legal rights and obligations of parents toward their minor children, common authority over the child's bedroom is inherent in the parental role."[5] (The court also pointed out that D.C. acknowledged his mother's superior authority when she told him to let the officers enter and he "moved aside.")

D.C.'S OBJECTION TO THE SEARCH: D.C. also argued that, even if his mother had the authority to consent to the search, her authority terminated when he expressly objected. This argument was based on the United States Supreme Court's decision in *Georgia* v. *Randolph*[6] in which the Court ruled that a spouse's consent may be invalidated if the other spouse had notified officers beforehand that he objected. But the court in *D.C.* ruled that *Randolph* did not apply here because it "governs only a disagreement between joint adult occupants having apparently equal authority over a residence."

For these reasons, the court ruled that the search of D.C.'s bedroom was lawful.

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[3] See *United States* v. *Matlock* (1974) 415 U.S. 164, 171, fn.7; *Illinois* v. *Rodriguez* (1990) 497 U.S. 177, 179.

[4] See *People* v. *Daniels* (1971) 16 Cal.App.3d 36, 43.

[5] **NOTE**: The search of D.C.'s bedroom could not be based on his brother's probation search condition. See *People* v. *Woods* (1999) 21 Cal.4th 668, 682.

[6] (2006) 547 U.S. 103.

Millender v. Los Angeles County

(9th Cir. 2010) 620 F.3d 1016

Issue

Was a search warrant invalid on grounds that it was overbroad?

Facts

In the course of a domestic dispute, Jerry Bowen pointed a shotgun at Shelly Kelly and shouted, "If you try to leave, I'll kill you, bitch." Kelly was able to get into her car but, as she sped off, Bowen fired five shots at her. She was not hit, although one of the shots blew out a tire.

Kelly immediately reported the crime to the Los Angeles County Sheriff's Department, and she described Bowen's weapon as a "black sawed-off shotgun with a pistol grip." She also said that Bowen had ties to the Mona Park Crips, and a deputy confirmed this through the CALGANG database.

Based on this information, deputies applied for a warrant to search Bowen's home in Los Angeles for, among other things:

- "All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition."
- "[E]vidence showing street gang membership."

The warrant, for which night service was authorized, was executed at 5 A.M. by members of LASD's SWAT team. After making a forcible entry, the deputies conducted a protective sweep and located ten people who were ordered to exit the premises. Two of those people were Augusta and Brenda Millender. A search for Bowen and his shotgun was unproductive. The deputies did, however, find another shotgun which they seized, although the court said it "did not resemble the firearm described by Kelly." Bowen was arrested two weeks later.

The Millenders later filed a federal civil rights lawsuit against LASD and certain deputies claiming the search warrant was invalid and, therefore, they were subjected to an unreasonable search in violation of the Fourth Amendment. When the federal district court rejected the deputies' contention that they were entitled to qualified immunity, they appealed to the Ninth Circuit.

Discussion

When officers are executing a search warrant, they are carrying out an order of the court and, thus, they will ordinarily not be subject to liability if it turns out the warrant was invalid for one reason or another. There is, however, an exception to this rule: Officers may be liable if they execute a warrant that was invalid "on its face," meaning that any reasonable officer would have known that the affidavit or the warrant contained a fatal flaw.

In *Millender*, it was apparent that the affidavit had established probable cause to search the house for the shotgun that Bowen fired at Kelly. But, as noted, the warrant authorized a search for every firearm on the premises. Thus, the issue was whether this rendered the warrant invalid on its face.

Before going further, it is necessary to distinguish two terms that are used (and often confused) in the context of search warrants: "particularity" and "breadth."[7] The term "particularity" refers to the requirement that the warrant clearly describe the things that may be seized.

The other term—"breadth"—refers to the requirement that the affidavit demonstrate probable cause to seize each of the listed items of evidence. To put it another way, there must have been a "fair probability" that every described item (1) was evidence of a crime, and (2) was now located on the premises to be searched.[8] And here there was a problem; actually, two problems.

First, while the warrant authorized the deputies to search for "[a]ll handguns, rifles, or shotguns" on the premises, the affidavit did not establish probable cause to believe that all handguns, rifles, or shotguns on the premises were evidence of the assault on Kelly. In fact, the only weapon that had any evidentiary value was a black sawed-off shotgun with a pistol grip. Consequently, the warrant was overbroad and invalid, at least the part that authorized a search for all firearms. As the court explained:

> [T]he deputies had probable cause to search for a single, identified weapon, whether assembled or disassembled. They had no probable cause to search for the broad class of firearms and firearm-related materials described in the warrant.

[7] See *U.S.* v. *SDI Future Health, Inc* (9th Cir. 2009) 568 F.3d 684, 702.
[8] See *Illinois* v. *Gates* (1983) 462 U.S. 213, 238.

The second problem was that the warrant authorized a search for "evidence showing street gang membership." This part of the warrant was also overbroad because, as the court pointed out, the deputies "failed to establish any link between gang-related materials and a crime."

Finally, the deputies argued that, even if the warrant was overbroad, they should not be held accountable because a deputy district attorney had approved it and a judge had signed it. It is true that a civil rights lawsuit based on an invalid search warrant cannot stand if "a reasonably well-trained officer" would not have been aware of the defect.[9] But in this case the court concluded that the defects were so "glaring" that any reasonable officer would have spotted them. Accordingly, it affirmed the ruling that the deputies were not entitled to qualified immunity, which means the case may go to trial.

Comment

Although the warrant in *Millender* was invalid when it was issued in 2003, in 2009 the California Legislature amended the Penal Code to permit the issuance of a search warrant for any firearm that is under the control of a person who has been arrested "in connection with a domestic violence incident involving a threat to human life or a physical assault."[10] Thus, the search warrant in *Millender* would probably be upheld today if the affiant had sought the warrant for the purpose of removing all firearms from the suspect's home.

United States v. Comprehensive Drug Testing, Inc.

(9th Cir. En Banc 2010) 621 F.3d. 1162

Issue

While executing a warrant to search a legitimate business for computer data pertaining to certain of its clients, did federal agents follow a court-ordered procedure designed to prevent the inspection and seizure of data pertaining to other clients?

Facts

In the course of an investigation into steroid use by Major League Baseball players, federal agents learned that, pursuant to a collective bargaining agreement, all players were required to submit urine samples that were tested for steroids. The program was administered by Comprehensive Drug Testing, Inc. (CDT), and the test results were stored on CDT's computers in Long Beach.

When agents learned that ten players had tested positive, they sought a warrant to search CDT's computers for test data pertaining to the those players. The affidavit also contained an explanation of the difficulties in searching computers:

> [C]omputer files can be disguised in any number of ingenious ways, the simplest of which is to give files a misleading name (pesto.recipe in lieu of blackmail.photos) or a false extension (.doc in lieu of .jpg or .gz). In addition the data might be erased or hidden; there might be booby traps that destroy or alter data if certain procedures are not scrupulously followed.

Because of these problems and the difficulty in searching an untold (but probably huge) number of computer files at the site, the affiant requested authorization to, in the words of the court, remove "pretty much any computer equipment found at CDT's Long Beach facility, along with any data storage devices, manuals, logs or related materials."[11]

A federal magistrate issued the warrant but refused to authorize such a broad seizure of computer data and equipment unless the agents complied with a procedure that was "designed to ensure that data beyond the scope of the warrant would not fall into the hands of the investigating agents."[12] Specifically, the warrant required that it be executed in the following manner:

1. The agents who execute the warrant must be accompanied by "computer personnel," a term defined as "law enforcement personnel trained in searching and seizing computer data," (hereinafter, "computer specialist").

[9] See *Malley* v. *Briggs* (1986) 475 U.S. 335, 345.
[10] Pen. Code § 1524(a)(9).
[11] **NOTE**: The court pointed out that, while the affidavit "made a strong generic case that the data in question could not be thoroughly examined or segregated on the spot," it pointed out that the affiant's fears that files may be hidden or booby trapped was misplaced because CDT "is after all a legitimate business not suspected of any wrongdoing."
[12] **NOTE**: This procedure was based on the Ninth Circuit's decision in *U.S.* v. *Tamura* (9th Cir. 1982) 694 F.2d 592.

2. The computer specialist must begin by inspecting the computer files to determine if the drug test results of the ten named players could be obtained on-site "in a reasonable amount of time and without jeopardizing the ability to preserve the data."
3. If the computer specialist finds that an on-site search was impractical, the computer specialist—"not the case agents"—was authorized "to examine all the data on location to determine how much had to be seized to ensure the integrity of the search."
4. After that occurred, the agents were instructed to remove the necessary data to a "controlled environment, such as a law enforcement laboratory" where the computer specialist was authorized to do the following: (a) take steps to "recover or restore hidden or erased data," (b) separate the computer data into two groups: (1) data pertaining to the ten players listed in the warrant, and (2) all other data.
5. The data pertaining to the ten players was to be given to the case agent, while the other data would remain quarantined.
6. The case agent was then permitted to search the data for information that was relevant to the criminal investigation.

When the warrant was executed, the computer specialist determined that it would be unnecessary to seize all files because the relevant data had apparently been stored in files located in one directory—the "Tracey" directory. But because the Tracey directory also included "information and test results involving hundreds of other baseball players and athletes engaged in other professional sports," the specialist determined that it could not be searched and segregated on-site. So he copied the directory and took it to a secure facility pursuant to the magistrate's instructions. But, contrary to those instructions, the copy of the directory was then "turned over to the case agent, and the specialist did nothing further to segregate the target data from that which was swept up simply because it was nearby or commingled."

When CDT and the MLB Players Association learned what had happened, they filed a motion for the return of the non-quarantined data on grounds that the government had failed to comply with the procedural requirements set forth in the warrant. At the conclusion of the hearing on the motion, the court ruled that the government "completely ignored" the requirements and, moreover, had "demonstrated a callous disregard for the rights of those persons whose records were seized and searched outside the warrant." Consequently, it granted the motion, and the government appealed to the Ninth Circuit.

Discussion

The government argued that the motions should have been denied because, although the agents had inspected a lot of data pertaining to players and others who were not listed in the warrant, this data was properly seized under the plain view rule. Among other things, this rule provides that officers who are executing a search warrant may seize any unlisted evidence they happen to discover if (1) they viewed the evidence while conducting a lawful search for listed evidence; (2) they had probable cause to believe it was, in fact, evidence of a crime; and (3) such probable cause existed at the time they first viewed the evidence; i.e., they did not conduct a further search for the purpose of developing probable cause.

The court ruled, however, the agents were not conducting a lawful search when they first saw the unlisted data because, contrary to the magistrate's instructions, there had been "no effort by a dedicated computer specialist to separate data for which the government had probable cause from everything else in the Tracey Directory." Furthermore, the person who initially inspected all the files at the CDT offices was the case agent, and he immediately "rooted out" the testing records for "hundreds of players in Major League Baseball (and a great many other people)."

Consequently, because the unlisted records were not legally seized under the plain view rule, the court ruled that the district court judges properly ordered the government to return the unlisted data to CDT.

Comments

Three things should be noted. First, there is always a risk that computer files may be mislabeled, encrypted, erased, or booby trapped. But these concerns are usually present only when they are searching computers that belong to suspects or others who may have a motive to undermine the investigation. But where, as here, the computer is owned and operated by a legitimate business that is not suspected of any wrongdoing, a court may find that

wholesale seizures of computer files or equipment are unwarranted, at least unless officers can point to specific facts indicating that a threat to the data is a reasonable possibility. The court probably had this in mind when it observed that, when the agents arrived at the facility, CDT personnel offered "to provide all information pertaining to the ten identified baseball players," but their offer was "brushed aside." (While the affiant explained that it was necessary to analyze the data off-site to help ensure that all the listed evidence was seized, the court noted that "[t]he record reflects no forensic lab analysis.")

Second, the court acknowledged that it is often necessary for officers to search every computer file they seize pursuant to a warrant because "[t]here is no way to be sure exactly what an electronic file contains without somehow examining its contents." But it added that such "over-seizing" makes it difficult to ensure that computer searches are carefully circumscribed because "[a]uthorization to search *some* computer files therefore automatically becomes authorization to search all files in the same subdirectory, and all files in an enveloping directory, a neighboring hard drive, a nearby computer or nearby storage media"—and maybe even networked computer files. For these reasons, the court encouraged officers and judges to institute procedures, such as those set forth by the magistrate in this case (that is why we listed the instructions in detail), so as to "avoid turning a limited search for particular information into a general search of office file systems and computer databases."

Third, this was the second *en banc* decision in this case. The first one was filed in 2009—and it stirred up a lot of controversy because, as we reported in the Fall 2009 edition, the court purported to "impose sweeping restrictions on the manner in which *all* warrants to search computers are executed." For example, it ruled that the search must be conducted by disinterested observers; and it instructed the lower courts to "insist that the government waive reliance upon the plain view doctrine in digital evidence cases," thus ensuring that all unlisted evidence will be suppressed even though it was obtained inadvertently during a lawful search. Those requirements were eliminated in the second decision.

People v. Torres

(2010) 188 Cal.App.4th 775

Issue

In the course of a pretext traffic stop, did an officer conduct a lawful inventory search of the vehicle?

Facts

A narcotics officer asked an Orange County sheriff's deputy to try to "develop some basis" for making a traffic stop on Torres and try to find a way to search his truck for drugs. Having observed Torres make an unsafe lane change, the deputy signaled him to stop and Torres complied by pulling into a stall at a public parking lot. When the deputy learned that Torres did not have a driver's license, he decided to tow the truck and conduct an inventory search of its contents. In court, he candidly admitted that he made the decision to tow the truck "in order to facilitate an inventory search" for "whatever narcotics-related evidence might be in the [truck]." In the course of the search, he found twelve ounces of methamphetamine and a pay/owe sheet.

Based on the this evidence, narcotics officers obtained a warrant to search Torres' home for drugs. The search netted almost three pounds of methamphetamine, over $133,000 in cash, and a rifle. When Torres' motion to suppress the evidence was denied, he pled guilty to various drug-related charges, possession of a firearm by a felon, and driving without a license.

Discussion

Torres argued that the search of his truck was unlawful and, thus, the evidence found inside it should have been suppressed. He also argued the evidence in his home should have been suppressed because it was the fruit of the vehicle search.

At the outset, the court ruled that the traffic stop was lawful because, even though it was a pretext stop, the United States Supreme Court has ruled that pretext stops are lawful if based on reasonable suspicion or probable cause to believe the driver had committed a traffic infraction.[13] Thus, because it was apparently undisputed that the deputy had grounds for the stop, the only issue on appeal was whether the inventory search was lawful.

[13] *Whren* v. *United States* (1996) 517 U.S. 806.

Unlike investigative vehicle searches whose objective is to find evidence of a crime, vehicle inventory searches are classified as "community caretaking" searches because they are conducted for the limited purpose of (1) providing a record of the property inside an impounded vehicle; and (2) protecting officers and their departments from false claims that property in the vehicle was lost, stolen, or damaged.[14]

Because these are the only justifications for inventory searches, they are permitted only if the following circumstances existed:

(1) **Towing was reasonably necessary**: It must have been reasonably necessary to tow the vehicle under the circumstances.[15]

(2) **Community caretaking motivation**: The decision to impound and search the vehicle must not have been based *solely* on the desire to find evidence of a crime.[16]

(3) **Standard search procedures**: The search must have been conducted in accordance with departmental policy or standard procedure.[17] (This was not a disputed issue in *Torres*.)

As for the need to tow Torres' truck, the court ruled this requirement was not satisfied because, as it pointed out, "The prosecution failed to show the truck was illegally parked, at an enhanced risk of vandalism, impeding traffic or pedestrians, or could not be driven away by someone other than defendant."[18] It also ruled the third requirement was not met because the deputy admitted that his decision to impound and search the truck was based solely on the request from the narcotics officer. Consequently, the court ruled the search was unlawful, and that the evidence should have been suppressed.

Comment

The traffic stop in this case is commonly known as a "wall stop" which is loosely defined as a pretext traffic stop that, although based on an observed traffic infraction, was initiated for the purpose of investigating a criminal matter for which grounds to detain or arrest did not exist. Although wall stops are lawful, there are two serious legal problems that may surface if evidence is discovered in the course of one.

First, the officer who conducts the search will ordinarily omit all references to the underlying criminal investigation in his arrest or crime report because the investigation would be compromised if the arrestee or his associates learned about it. As the court in *Torres* pointed out, the deputy testified that he "omitted any reference to the narcotics officer in his police report because he 'believed at that time that [he] could write [his] police report to make it look like this was just a traffic stop and that nobody would ever find out that the narcotics officer had actually given [him] some kind of suggestion.'" But, as demonstrated in *Torres*, this puts the arresting officer in a thorny position because his report, while technically accurate, is incomplete and misleading.

Second, officers who make a wall stop may eventually find themselves in court, swearing to tell "the whole truth" but knowing they cannot do so without undermining an ongoing investigation.[19] This was the situation facing the officer in *Torres* who, to his credit, candidly admitted why he stopped Torres and why he decided to search his truck.

For these reasons, the decision to initiate a wall stop should, when possible, be made with due regard for the legal problems that may result.

Supreme Court to Review Camreta v. Greene

On October 12, 2010 the United States Supreme Court announced it would review the 9th Circuit's decision in *Camreta* v. *Greene*. As we reported in the Spring 2010 edition, the panel in *Greene* ruled, among other things, that officers are prohibited from interviewing a child in school without a court order, even though the purpose of the interview was to determine whether the child had been sexually abused by a parent. POV

[14] See *Whren* v. *United States* (1996) 517 U.S. 806, 811, fn.1; *Colorado* v. *Bertine* (1987) 479 U.S. 367, 373.
[15] See *People* v. *Shafrir* (2010) 183 Cal.App.4th 1238, 1247.
[16] See *Colorado* v. *Bertine* (1987) 479 U.S. 367, 372.
[17] See *Florida* v. *Wells* (1990) 495 U.S. 1, 4.
[18] See *Miranda* v. *City of Cornelius* (9th Cir. 2005) 429 F.3d 858, 864.
[19] **NOTE**: If a wall stop was prompted by information obtained from a wiretap, California law provides that, at least ten days before a hearing on a motion to suppress evidence, prosecutors must disclose this information to the defense. See Pen. Code § 629.70.

The Changing Times

Alameda County District Attorney's Office

Assistant Deputy DA **Marty Brown** retired after 35 years of service. The following prosecutors were promoted to Senior Deputy/Assistant I: **Allison Danzig**, **Sharmin Bock**, **Ken Mifsud**, **Jeff Rubin**, **Susan Torrence**, and **Tom Burke**. Insp. III **Mark Scarlett** was promoted to lieutenant. Inspectors II **Jon Kennedy**, **Craig Chew**, and **Robert Chenault** were promoted to Inspector III. Newly appointed inspectors: **Tai Nguyen** (San Leandro PD), **Christina Harbison** (Walnut Creek PD), and **Shawn Knight** (Oakland PD).

Former Investigative Assistant **Chris Geeher** died on September 1, 2010.

The following officers were presented with the Alameda County District Attorney's Officer Recognition Award for 2010: **Herb Webber** and **Tony Jones** (Oakland PD), **Todd Sabins** and **Emily Murphy** (Berkeley PD), **Bob Coffey** (Hayward PD), and **Clark Blackmore** (Alameda County Probation Department).

Alameda County Narcotics Task Force

Transferring in: **Dave Greaney** (East Bay Regional Parks PD).

Alameda Police Department

New officers: **Erick Rossi** and **James Fisher**. **Mark Reynolds** transferred from Patrol to the Violent Crimes Unit.

BART Police Department

The following sergeants were named acting lieutenant: **Marlon Dixon**, **Steve Coontz**, and **Gil Lopez**. The following officers were named acting sergeant: **Anisa McNack**, **Rodney Barrera**, **Mike Rawski**, **Cliff Valdehueza**, and **David Salas**. The following officers have retired: Lt. **Gary Cagaanan** (33 years), **Michael Cain** (24 years), and Police Administrative Specialist **Ava U'ren** (11 years).

Transfers: **Janell Willis** and **Lauren LaPlante** to Community Oriented Policing. K9 **"Tibo"** retired; his handler, **Dan Hoover**, returned to Patrol. TSA handler **George Houston** retired his K9 **"Tini"** for medical reasons. His new K9 is named **"Dopi."**

Berkeley Police Department

Berkeley PD underwent a major reorganization. Capt. **Erik Upson** now heads the Operations Division. Capt. **Cynthia Harris** heads the Professional Standards Division, Capt. **Dennis Ahearn** heads the Investigations Division, and Public Safety Business Manager **Lynne Ohlson** heads the Support Services Division. **James Marangoni** retired after 24 years of service. **Linda Clem** retired after 20 years of service. New Public Safety Dispatcher: **Elizabeth Orellana**.

California Highway Patrol

Castro Valley Area: Transferring in: Sgt. **Shawn Morris** (from the Investigative Services Unit) and Sgt. **Robert Rickman** (from the Tracy Area). Recent CHP Academy graduates assigned to the Castro Valley Area: **Drayson McCullough**, **Derek Hatzenbuhler**, **Gary Silvers**, and **Aaron Vargas**. **Mike Valerio** was recently hired into the Senior Volunteer Program.

Hayward Area: Capt. **Mark Mulgrew** was reassigned to the Solano CHP office. The new commander of the Hayward CHP office is Capt. **Jonni Fenner** who was formerly a lieutenant in the Stockton CHP Area. Lt. **Tim Wescott** has assumed command of the Nimitz Commercial Inspection Facility.

Emeryville Police Department

Paul Davidson retired after 20 years with the department. **Robert Alton** was promoted to sergeant and assigned to Patrol. EPD was proud to be a first-time host of an Urban Shield scenario. EPD officers and tactical dispatchers got to witness some of the finest SWAT teams in the nation and the department is looking forward to doing it again next year.

Fremont Police Department

The following sergeants were promoted to lieutenant: **Robert Lanci**, **Anthony Duckworth**, and **Kimberly Petersen**. **Daniel Harvey** was promoted to sergeant. The following officers have retired: Lt. **Gustavo Arroyo** (30 years) and **Timothy Baldocchi** (25 years). **Patrick Brower** was seriously injured when a parolee in a stolen van intentionally accelerated and crashed into his police motorcycle. The parolee was arrested two days later in Los Angeles.

NEWARK POLICE DEPARTMENT

Sgt. **Dave Parks** retired after 31 years in law enforcement and 29 years with NPD. He has been hired back part-time as the department's training manager. Commander **Donna Shearn** was honored as the City of Newark Employee of the Year for her hard work and dedication. Donna has been with the department for 24 years. K9 **"Uras"** retired after seven years of dedicated service. His handler, **Ray Hoppe**, transferred back to Patrol. **Britain Jackman** and K9 **"Eliot"** will take their place in the unit. **Tina Knutson** transferred back to Patrol from her assignment as School Resource Officer.

OAKLAND HOUSING AUTHORITY POLICE DEPT.

Adam Ward completed his narcotic training with his new K9 partner **"Lady"** and is assigned to Patrol. **Jason Zimiga** and **Nathan Mumbower** completed their field training and have been assigned to Patrol. Lateral appointments from Oakland PD: **Victor Li** and **Oscar Vargas**. New officer: **Denise Smith**. New Police Service Aide: **Christopher Hough**. Departures: **Rianne Moland** and **Nequiche Johnson**.

OAKLAND POLICE DEPARTMENT

The following officers have taken disability retirements: **Bruce Vallimont** and Sgt. **Garrett Smit**. Retired lieutenant **Booker Ealy** died on November 10, 2010. Retired lieutenant **John Sterling** died on November 24, 2010. Retired officer **James Jordan** died on October 6, 2010.

OAKLAND SCHOOL POLICE DEPARTMENT

Jonathan Bellusa was promoted to watch commander. **Michael Anderson** was promoted to sergeant. Lateral appointments: **John Keating** and **Alexis Nash** (Oakland PD). **Richard Moore** was hired with prior police experience in the Bay Area. **Gloria Beltran** graduated from the ACSO Academy and is working dog-watch patrol. **Jon Chapman** and **Antonio Fregoso** returned to day-watch patrol following an assignment with the DEA in Oakland.

PIEDMONT POLICE DEPARTMENT

Capt. **John M. Hunt III** was appointed Chief of Police. John had been serving as interim chief since January of 2009.

PLEASANTON POLICE DEPARTMENT

Chief **Michael Fraser** retired after 31 years of service. Captains **Eric Finn** and **David Spiller** will act as interim chiefs until a new chief is appointed. Lt. **Mark Senkle** retired after 27 years of service. Lt. **Thomas Fenner** retired after 26 years of service. **Brandon Young** transferred from patrol to traffic.

SAN LEANDRO POLICE DEPARTMENT

Dan Leja was promoted to acting sergeant and assigned to the Patrol Division. Public Safety Dispatcher **Teresa Loconte** transferred from Support Services to the Criminal Investigation Division.

UNIVERSITY OF CALIFORNIA, BERKELEY POLICE DEPARTMENT

Corporals **Joey Williams** and **Cristina Olivet** were promoted to sergeant and assigned to Patrol. Corporal **Nicole Sanchez** was promoted to acting sergeant. **John Lechmanik** retired after 19 years of service. New officers: **Lawrence Green**, **Marco Ruiz**, **Ethan Katz**, and **David Jackson**. Retired officer **John Teel** passed away on September 15, 2010. John joined the department in 1958 and retired in 1985. POV

War Stories

Living up to his name

One night, a burglar known amongst his friends as "Useless" broke into a house in San Leandro and was looking around a bedroom for things to steal when the owners returned home. So he hid under the bed. As the owners walked into the bedroom they couldn't help but notice the two feet sticking out from under the bed. Curious, they lifted the bed and saw that the feet were connected to a large burglar. So they dropped the bed, ran outside and phoned 911. As it turned out, there was no need to rush. The bed had landed on Useless's head. He was still out cold when SLPD officers arrived.

See you in court

Two Alameda County DA's inspectors had been trying to serve a subpoena on a man named Scott who was a witness in a murder case. But Scott kept giving them the slip so, early one morning, they went to his house and knocked on the door. Eventually, a man wearing only shorts opened the door a few inches and asked, "Whadda you want?" Flashing their badges, they said they were looking for Scott. The man said "Ain't nobody named Scott here. Go away." One of the inspectors then handed the man his card, asking him to call him if somebody named Scott showed up. The man said OK and opened the door a bit wider to take the card. As he did so, his chest came into view. Of particular interest to the inspectors, was a huge tattoo across his midsection: "SCOTT."

Speeding for fun and profit

A candidate for governor of Nevada announced a plan to solve the state's budget crisis: allow people to drive up to 90 m.p.h. on designated highways if they paid a small fee. According to candidate "Gino" DiSimone, the state should install transponders on the cars of people who like to speed, and when they were in a hurry or just wanted an adrenaline rush they would press a button on the transponder which would automatically transfer $25 from their bank accounts to the state treasury, and also somehow notify all officers in the vicinity that, for the next 24 hours, the driver was a fully-accredited highway speedster. The Nevada Highway Patrol said it was a stupid idea. The voters agreed.

Ticket magnets

Speaking of speeders, the car insurance industry decided to conduct a study to determine which cars were most likely to get pulled over for speeding. And the winner is: the 2010 Mercedes SL 550 Roadster! Other cars in the top ten included the Acura Integra, Volkswagen GTI, the H3 Hummer, Pontiac Grand Prix, and the Toyota Scion xB. There were two other interesting findings: First, the least ticketed car was the now-defunct Buick Rainier SUV (this was not a surprise because it was a flop). Second (and also not surprising), young women were 33% less likely to get tickets than men.

We deliver

Police in Brazil arrested a 17-year old boy outside a prison in southern Brazil after he fired several arrows over the prison wall—and strapped to each arrow was a cell phone. The boy was apprehended after one of the flying cell phones struck an officer on the back of his head. The boy later admitted that a drug cartel had hired him for the job, and had even provided him with archery lessons.

Enough said

Approximately 250 fans of the Paris Saint Germain soccer team were arrested during a violent demonstration during a match in Paris. They were protesting the team's new antiviolence rules.

Looking for trouble (and finding it)

Two plainclothes ACRATT investigators were walking into a Burger King in Oakland when they were accosted by an irate citizen who challenged them to fight because he didn't like the way they had looked at him as they walked across the parking lot. To demonstrate that he was a bad dude, he pulled out a Beretta M9 and started waiving it around, strutting, and essentially daring the officers to do something

about it. So they pulled out their guns—which prompted the man to turn around and run. He was arrested for brandishing. It turned out his Beretta (much like his self-confidence) was plastic.

An inside job

During a takeover bank robbery in Arlington, Texas, Tyce Franklin got away with over $183,000. Witnesses reported that the robber was armed with a handgun and was wearing sunglasses and a surgical mask. A few hours later, officers in Fort Worth stopped Franklin for speeding. And in the course of the stop they found the following in his car: a handgun, a surgical mask, and $183,000. Meanwhile, FBI agents were reviewing the bank's surveillance video because they suspected it was an inside job. And they happened to notice one of the tellers sending a text message about a minute before the robber walked inside. So they got a warrant to search the phone and discovered that he had sent the following text message to Franklin: "Just in case u don't remember, just go in the front and walk straight, and don't forget yo sunglasses."

Police work made easy

An Oakland police officer was sitting in his patrol car writing a report on his in-car computer when a young man walked up and asked, "Is that really a computer?" The officer responded, "It sure is. Wanna see how it works?" The man said sure, so the officer asked him his name and DOB and ran him for warrants. Two hits—both felonies.

Bad luck

A 23-year old Oakland man (we'll call him Moe) stole a Mazda 626 in Berkeley, but he was worried that the personalized plates on the car were too distinctive. So, when he spotted another Mazda parked on a dark street, he stole the plates and put them on his 626. A few minutes later, he was driving around Oakland when he noticed an OPD car behind him. He was pretty sure the cop was running his plates, but he wasn't worried because the owner wouldn't have had time to report them stolen yet. Well, he was sure surprised when the officer made a felony stop and arrested him for car theft. En route to jail, the crook asked, "Why'd you stop me? Ain't no way you knew I stole them plates." The officer just laughed, having realized that the unlucky crook had inadvertently stolen the license plates off a car that had been stolen three days earlier.

An x-rated police call

San Jose PD received the following 911 call: "Come quick. My next-door neighbor is videotaping a snuff movie right now! I think she's torturing a man to death!" When officers arrived with guns drawn, a woman answered the door—and she was carrying a big whip. "Drop your whip!" ordered one of the officers, and she complied. She then told them that she wasn't actually shooting a snuff movie. As she explained, she's a semi-professional dominatrix, and she was currently having an "intense" session with a man who had been "very, very bad." The officers checked with the man who confirmed that he did, in fact, deserve all the punishment he was getting. He also promised to be more quiet.

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